UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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In the Matter of

THE TRUSTEES OF THE
UNIVERSITY OF PENNSYLVANIA

-and- Case No. 4-RC-20353

GRADUATE EMPLOYEES TOGETHER –
UNIVERSITY OF PENNSYLVANIA

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BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF GRADUATE EMPLOYEES TOGETHER – UNIVERSITY OF PENNSYLVANIA

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INTRODUCTION

Former National Labor Relations Board Chair Miller once observed about higher education unionization decisions:

> I personally have felt sometimes as though we were having to make these [higher education] determinations pretty much in the dark, without the aid of information which could have enabled us to make more informed judgments. We must, of course, decide each case presented to us on the basis of information that is developed on that individual record. I hope that we have not decided cases unwisely because of too scanty information, and thus established precedential guidelines that we will later regret.

Miller, *Is the NLRB Still Alive?,* Address before the Texas Bar Association (July 6, 1973), at 10-11, *in* Matthew W. Finkin, "The NLRB in Higher Education," 5 U. TOL. L. REV. 608, 650 (1974). The American Association of University Professors welcomes the opportunity to participate as *amicus curiae* before the Board to address the problem of "too scanty information" about collective bargaining in the academic community.

INTEREST OF THE *AMICUS CURIAE*

The American Association of University Professors ("AAUP" or "the Association") is a national educational organization of approximately 40,000 members, who are primarily faculty members in all academic disciplines. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. Local AAUP chapters exist on close to 400 campuses across the country. Out of a total of 67 local unionized AAUP chapters, 24 are at 23 private sector higher education institutions.

The AAUP plays a unique role in the academic community. Among the organization's central functions is the development of policy standards for the protection

of academic freedom, tenure, due process, shared governance, and other elements central to higher education. *See, e.g.*, American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AAUP POLICY DOCUMENTS & REPORTS 3 (2001 ed.) (*1940 Statement*) (endorsed by more than 180 professional organizations and learned societies). AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1972) (citing AAUP's *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971) (citing the *1940 Statement*). AAUP has served as *amicus* in numerous cases before courts involving faculty members and collective bargaining. *See, e.g.*, *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). The AAUP has also filed *amicus* briefs before the Board, including in a number of graduate assistant cases. *New York University*, 332 N.L.R.B. No. 111 (2000); *Brown University*, 1-RC-21368 (Nov. 16, 2001); and *The Trustees of Columbia University in the City of New York*, 2-RC-22358 (Feb. 11, 2002).

AAUP provides policy assistance to the higher education community at large. As former AAUP President Robert A. Gorman stated:

> The AAUP—by virtue of its history and traditions, its values and its procedures—is different from, and more than, a labor organization. . . . We do not require, and have never required, Association membership as a condition of receiving our aid and good offices. Promoting the academic freedom, or protecting the procedural rights, even of a nonmember is viewed as redounding not only to the benefit of our dues-paying members, and of all of the professoriate, but also to the benefit of all institutions of higher education. Institutions are better, and the quality of higher education improved for what we do, even on behalf of "strangers" to the Association.

Robert A. Gorman, "The AAUP and Collective Bargaining: A Look Backward and Ahead," 68 ACADEME: BULLETIN OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 1a, 2a (Sept./Oct. 1982).

ARGUMENT

Because the administration of the University of Pennsylvania mostly repeats arguments that the Board wisely rejected in *New York University* (*"NYU"*), 332 N.L.R.B. No. 111 (2000), and its only two new arguments are extraordinarily unconvincing, the Board should decline to reconsider *NYU*, and affirm the Regional Director's ruling in *The Trustees of the University of Pennsylvania*, 4-RC-20353 (Nov. 21, 2002) (*"University of Pennsylvania"*).

The university administration mainly reasserts the claim that its academic freedom is violated by allowing graduate assistants to bargain collectively because such unionization will require it to bargain "about issues that directly impact 'who may teach,' 'what may be taught,' 'how it shall be taught,' and 'who may be admitted to study.'" *Request for Review of the University of Pennsylvania to the NLRB* at 15 ("University Request for Review") (quoting *Keyishian v. Board of Regents of State of N.Y.*, 385 U.S. 589, 603 (1967) (Frankfurter, J., concurring)). In *NYU* the Board rejected the speculative claims of colleges and universities that collective bargaining would violate their institutional academic freedom and found no public policy basis for excluding graduate assistants from coverage under the National Labor Relations Act (NLRA). Developments in the past three years provide further support for the Board's decision that collective bargaining is compatible with academic freedom, including the first collective bargaining agreement between the NYU administration and its graduate assistants in

which the parties agreed to an academic freedom provision, and a new research study that finds that collective bargaining does not "compromis[e] the student-faculty relationship." *See* Daniel J. Julius & Patricia J. Gumport, "Graduate Student Unionization: Catalysts and Consequences," THE REVIEW OF HIGHER EDUCATION, Vol. 26, No. 2 (Winter 2002), at 201.

Courts have consistently rejected the argument that the First Amendment shields institutions from federal law such as the NLRA. *See, e.g., Associated Press v. NLRB*, 301 U.S. 103 (1937). Furthermore, national AAUP policies on faculty and graduate assistant collective bargaining indicate that collective bargaining is not only consistent with, but can promote, academic freedom. Local AAUP collective bargaining faculty contracts include provisions to protect individual academic freedom. Just as faculty members have negotiated protections for individual academic freedom in their contracts with administrations, so too can administrations protect their academic freedom through collective bargaining. In addition, no evidence exists that the unionization of graduate assistants interferes with the student-faculty mentoring relationship.

Moreover, the administration's claim that collective bargaining over mandatory subjects of bargaining will violate its academic freedom is speculative and unconvincing. In any event, the assertion is premature, because parties can resolve many of their differences through collective bargaining. *See, e.g., Regents of the University of California v. PERB*, 715 P.2d 590 (Cal. 1986); *Regents of the University of Michigan v. Employment Relations Commission*, 204 N.W.2d 218 (Mich. 1973). State courts have been able to determine mandatory subjects of bargaining in higher education cases, as has the Board in higher education faculty cases, without jeopardizing academic freedom. The

recent collective bargaining agreement between NYU and its graduate assistants provides the Board with new evidence that parties can resolve their differences through collective bargaining.

Lastly, the new arguments articulated by the University of Pennsylvania administration are unavailing. Any future tension that may develop between the NLRA and the Family Educational Rights and Privacy Act (FERPA) and their application to graduate assistants at the University of Pennsylvania can be resolved without denying the protection of the NLRA to graduate assistants who are employees. The administration also attempts to distinguish its graduate assistants from those in *NYU* by characterizing some of the assigned responsibilities of its graduate assistants as academically required. Such a characterization should not, by itself, preclude the Board from determining that graduate assistants are employees.

I. THE BOARD'S DECISION IN *NYU* WAS WELL REASONED AND SHOULD NOT BE REVISITED.

Providing no new convincing arguments or evidence for the Board, the university administration seeks to have this Board revisit its recent decision in *NYU*. In so doing, the administration simply reasserts the claim that its academic freedom is violated by allowing graduate assistants to bargain collectively, because it will be required to bargain "about issues that directly impact 'who may teach,' 'what may be taught,' 'how it shall be taught,' and 'who may be admitted to study.'" *Request for Review of the University of Pennsylvania to the NLRB* at 15 ("University Request for Review") (quoting *Keyishian v. Board of Regents of State of NY*, 385 U.S. 589, 603 (1967) (Frankfurter, J., concurring)).

Ample support exists for the *NYU* Board's conclusion that unionization of graduate assistants will not violate a higher education institution's First Amendment

academic freedom. The administration's "doomsday cry" is at best speculative, and at worst misleading. *See Regents of the University of California*, 715 P.2d at 605 (rejecting as "doomsday cry" university's contention that the unionization of medical school residents would lead to violation of the institution's academic freedom). The administration's assertions fundamentally misunderstand the interplay between academic freedom and the laws that govern employers, including colleges and universities. In *NYU* the Board reasoned,

> While mindful and respectful of the academic prerogatives of our Nation's great colleges and universities, we cannot say as a matter of law or policy that permitting graduate assistants to be considered employees entitled to the benefit of the Act will result in improper interference with the academic freedom of the institution they serve.

NYU, slip op. at 4; *see also Boston Medical Center*, 330 N.L.R.B. No. 30 (1999), slip op. at 13-14 (rejecting employer's academic freedom argument because it puts "the proverbial cart before the horse"). The administration of the University of Pennsylvania gives this Board no new information that should lead it to reconsider, let alone overturn, the *NYU* decision.

A. The First Amendment Does Not Immunize Universities from the National Labor Relations Act.

Despite the administration's protestations to the contrary, institutional First Amendment academic freedom has never been a basis for "immunizing" higher education institutions from the application of federal law, including the NLRA. *University Request for Review* at 12; *see Associated Press v. NLRB*, 301 U.S. 103, 133 (1937).

Courts have long recognized academic freedom as a "special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Such academic

freedom typically protects professors, and sometimes institutions and students as well. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Regents of the University of California v. Bakke*, 438 U.S 265, 312-13 (1978) (Powell, J., concurring); *see also Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n. 12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, somewhat inconsistently, on autonomous decisionmaking by the academy itself."); *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1983) ("Academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment."), *aff'd*, 482 U.S. 578 (1987).

Nevertheless, courts have ruled that the First Amendment rights of institutions, like those asserted by the administration of University of Pennsylvania, do not preclude application of the NLRA. In *Associated Press*, 301 U.S. at 103, the United States Supreme Court ruled that the application of the NLRA to an editorial employee did not violate the employer's freedom of speech or of the press under the First Amendment. The Associated Press (AP) argued that, "whatever may be the case with respect to employees in its mechanical departments it must have absolute and unrestricted freedom to employ and discharge those who . . . edit the news," because its "function" was to report news "without bias," and so it could not "be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees." *Id.* at 131.

The Court rejected the AP's assertion that "any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily

an invalid invasion of the freedom of the press." *Id.* In so ruling, the majority roundly criticized the publisher for relying on a hypothetical and counterfactual claim of bias to assert a total prohibition against the application of the NLRA to editorial employees: "It seeks to bar all regulation by contending that regulation in a situation not presented would be invalid." *Id.* at 132. The Court observed that coverage under the NLRA in no way "circumscribes the full freedom and liberty [of the AP] to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the [AP] is free at any time to discharge . . . any editorial employee who fails to comply with the policies it may adopt." *Id.* at 133. Accordingly, the Court found the employer's argument "an unsound generalization," reasoning that

> [t]he business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.

Id. at 132-33. Therefore, the NLRA applied to the AP, and journalists had the right to bargain under the Act.

Claims of institutional academic freedom provide higher education institutions no more "special immunity" from the NLRA than claims of freedom of the press gave the AP. *See Associated Press*, 301 U.S. at 132-33.[1] The University of Pennsylvania

[1] Since the early 1970s the Board has applied the NLRA to colleges and universities. *Cornell University*, 183 NLRB 329, 334 (1971) ("[W]e are convinced that assertion of jurisdiction is required over those private colleges and universities whose operations have a substantial effect on commerce to insure the orderly, effective, and uniform application of national labor policy."); *C.W. Post Center of Long Island University*, 189 NLRB 904 (1971) (recognizing unit of faculty members). In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the U.S. Supreme Court ruled that some faculty members may be managers and, therefore, excluded from coverage under the NLRA. While recognizing that the "pyramidal hierarchies of private industry . . . . in the

administration's recitation of a parade of horribles does not transform its speculations about potential violations of institutional academic freedom into a bar against the application of the NLRA to graduate assistants. Just as the publisher in *Associated Press* had the employer prerogative not to hire or retain an editor who "fails faithfully to edit the news to reflect the facts without bias and prejudice," so, too, does the university administration, as an employer, have the right not to hire and retain those graduate assistants who fail to meet the institution's academic needs. *See id.* at 132. The administration's fears and "unsound generalization[s]" about the consequences of collective bargaining by graduate students, like the AP's concerns after passage of the Wagner Act, do not "immunize" the administration from federal labor law. *See Associated Press*, 301 U.S. at 132; *see also NLRB v. Wentworth Institute*, 515 F.2d 550, 556 (1st Cir. 1975) (rejecting institute's argument that finding faculty to be employees and allowing them to engage in collective bargaining "will supposedly result in erosion of academic freedom").

Similarly, just as academic freedom does not "embrace" the right of a university to discriminate, it does not "embrace" the right of a university to prohibit students who are paid to teach from unionizing. A university, like any other employing institution, has to organize its affairs consistently with the fundamental principles of federal law, such as Title VII of the Civil Rights Act. *See Powell v. Syracuse University*, 580 F.2d 1150,

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industrial setting cannot be 'imposed blindly on the academic world,'" the Court (and the Board) in no way embraced the notion that universities are immune from application of the Act. *See id.* at 680-81 (citations omitted). Accordingly, the Board has applied in post-*Yeshiva* cases the protections of the NLRA to faculty members who are deemed employees, not managers. *See, e.g.*, *Manhattan College*, 2-RC-21735 (Nov. 9, 1999); *NLRB v. Cooper Union*, 783 F.2d 29 (2d Cir.), *cert. denied*, 479 U.S. 815 (1986); *Marymount College of Virginia*, 280 NLRB 486 (1986).

1154 (2nd Cir), *cert. denied*, 439 U.S. 984 (1978) (Judicial precedent does not "indicate that academic freedom embraces the freedom to discriminate.").[2] In *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990), the university administration had genuine concerns about the disclosure of materials gathered in the tenure process to parties outside the university. The Court rejected the administration's First Amendment claims of injury to institutional academic freedom in applying Title VII to the tenure review process at the private university. In the case presently before the Board, the academic freedom concerns articulated by the administration are significantly more threadbare than those that the Court rejected as too "speculative" and "attenuated" in the Title VII case. *Id.* at 200.

Like the Equal Employment Opportunity Commission (EEOC), which has the authority to investigate whether colleges and universities discriminate against their staff and faculty, the Board has the authority to determine whether graduate students are "employees" under Section 2(3) of the Act. 29 U.S.C. § 152(3). The application of the NLRA to the university, however, does not circumscribe the university's academic freedom to hire and retain those graduate assistants who best meet the needs of the university's academic programs. An institution may continue to apply all legitimate academic policies and standards to make personnel decisions. *See University of*

[2] In *Powell*, 580 F.2d at 1150, the Second Circuit emphasized that a university's First Amendment right to academic freedom did not allow it to violate Title VII. In that case, a female professor sued the university for race and gender discrimination in the nonrenewal of her employment contract. The Second Circuit, in affirming the trial court decision, ruled that the then-current judicial "anti-interventionist policy" afforded to higher education institutions, which made them "virtually immune to charges of employment bias," had "been pressed beyond all reasonable limits." *Id.* at 1153. The court concluded that judicial precedent did not, and "was never intended to, indicate that academic freedom embraces the freedom to discriminate." *Id.* at 1154.

Pennsylvania v. Equal Employment Opportunity Commission, 493 U.S. at 198-99 (noting that the university was not prevented "from using any criteria it may wish to use, except those . . . that are proscribed under Title VII" in making "legitimate" academic tenure decisions). The AAUP believes that concerns of the administration about asserted infringements of institutional academic freedom remain altogether unsubstantiated.

B. National AAUP Policies on Faculty and Graduate Assistant Unionization Recognize That Unionization Is Not Only Consistent With, But Enhances, Academic Freedom.

AAUP has issued policies that embrace collective bargaining by both faculty and graduate assistants as one of several ways to promote academic freedom on campus. These policies demonstrate that the leading association of faculty members in the United States does not view collective bargaining between unions of graduate assistants and university administrations as inconsistent with the academic freedom of institutions or of faculty, or with other fundamental values in higher education.

The Association's 1973 *Statement on Collective Bargaining* provides that, "[a]s a national organization which has historically played a major role in formulating and implementing the principles that govern relationships in academic life, the Association promotes collective bargaining to reinforce the best features of higher education." AAUP, *Statement on Collective Bargaining*, AAUP POLICY DOCUMENTS & REPORTS 217 (2001 ed.) ("AAUP POLICY DOCUMENTS"). It states that "[c]ollective bargaining is an effective instrument for achieving" and "securing" the objectives of the Association, including "to protect academic freedom." To promote "the best features of higher education," the *Statement on Collective Bargaining* encourages Association chapters that engage in collective bargaining to strive to "obtain explicit guarantees of academic

freedom and tenure in accordance with the principles and stated policies of the Association." *Id.*

The AAUP has also adopted policies supporting the right of graduate students who are deemed employees by the Board to bargain collectively. AAUP's *Statement on Graduate Students* provides that "graduate student assistants should have the right to organize to bargain collectively . . . [and that] [a]dministrations should honor a majority request for union representation." AAUP, *Statement on Graduate Students*, AAUP POLICY DOCUMENTS 268, 270. The *Statement* recognizes that "[g]raduate students not only engage in more advanced studies than their undergraduate counterparts, they often hold teaching or research assistantships. As graduate assistants, they carry out many of the functions of faculty members and receive compensation for these duties." *Id.*

In the joint *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP and the Association of American Colleges explain that academic freedom gives teachers "full freedom in research and in the publication of the results" as well as freedom "in the classroom [to] discuss[] their subject." AAUP POLICY DOCUMENTS at 3.[3]

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[3] The entire academic freedom provision of the *1940 Statement* reads:

> (a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
>
> (b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
>
> (c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their

The *1940 Statement* recognizes that not only faculty, but also graduate students are entitled to the protections of academic freedom: "Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time tenured and probationary faculty teacher, but also to all others, such as part-time faculty and teaching assistants, who exercise teaching responsibilities." AAUP POLICY DOCUMENTS at 6.

C. Local AAUP Faculty Union Experience Indicates That Academic Freedom Is Compatible With Academic Freedom.

Academic administrations predicted the demise of academic freedom in the 1960s and 1970s, when faculty members initially began to organize unions. Administrators at that time predicted that unions of faculty members would interfere with academic freedom. The actual experience of local AAUP chapters in faculty collective bargaining has refuted these predictions. In fact, faculty collective bargaining has yielded contractual protections for a variety of professional values, including individual academic freedom.[4]

Local AAUP chapters have successfully established explicit guarantees of academic freedom in their collective bargaining contracts. Some chapters for which a local AAUP bargaining representative exists for faculty refer to the *1940 Statement* and

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> utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

Id. at 3-4.

[4] *See* David M. Rabban, "Is Unionization Compatible with Professionalism?," 45 INDUS. & L.R. REV. 97, 110 (Oct. 1991) (reviewing provisions affecting professional standards in collective bargaining agreements in a number of professions, including higher education faculty, and finding "substantial, unambiguous support for professional values in many agreements," which suggests "at a minimum, that unionization and professionalism are not inherently incompatible").

quote it extensively in their collective bargaining contracts.[5] Other faculty collective bargaining agreements to which an AAUP chapter is a party incorporate the language of the *1940 Statement* to define academic freedom.[6]

Such local AAUP faculty collective bargaining agreements do not simply promote academic freedom, but make such protections legally enforceable. As former AAUP President Robert A. Gorman wrote in evaluating the initial ten-year effort by local AAUP chapters in collective bargaining: "[C]ollective bargaining agreements leave no doubt that essential AAUP principles of academic freedom, tenure, due process, peer review, nondiscrimination, and the like, can be rendered fully enforceable as part of the contract rules prevailing in court cases and arbitration proceedings." Gorman, *supra*, at 3a.

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[5] Numerous collective bargaining agreements include academic freedom provisions. Such contracts recognize the nearly universal mutual understanding that academic freedom is consistent with collective bargaining. For examples of local AAUP chapter contracts, *see* Bard College (New York) (Art. VIII) ("All teachers (whether Faculty or not) will enjoy academic freedom as set forth in the Association of American Colleges-American Association of University Professors' *1940 Statement of Principles on Academic Freedom and Tenure* . . ."); Bloomfield College (New Jersey) (Art. 3) ("The College and the Chapter accept the principles of academic freedom as defined in the *1940 Statement of Principles on Academic Freedom and Tenure* . . . formulated by the Association of American Colleges and the American Association of University Professors."); Curry College (Massachusetts) (Art. III) ("The College and the AAUP endorse the specific section on Academic Freedom from the document entitled *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*."); Indian River Community College (Florida) (Art. XIX) ("The Chapter subscribes to the AAUP *1940 Statement of Principles and the Interpretive Comments of 1940 and 1970*."); Kalamazoo Valley Community College (Michigan) (Art. 3.54) ("The following excerpt is taken from the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure*. . . ."); Kent State University (nontenured) (Art. III. § 2) (tenured) (Art. IV, § 2) ("As stated in the American Association of University Professors' *1940 Statement of Principles on Academic Freedom and Tenure*. . . ."); Regis University (Colorado) (Art. 11.1) ("Regis University affirms and is guided by the ideal that all members of the faculty, whether tenured or not, are entitled to academic freedom as set forth in the *1940 Statement of Principles on Academic Freedom and Tenure* of the American Association of University Professors. . . ."); University of Rhode Island (Art. 7.2) ("The Board and the University of Rhode Island unconditionally endorse the *1940 Statement*.").

[6] *See, e.g.*, Central State University (Ohio) (Art. 5.1); University of Cincinnati (Art. 2); Eastern Michigan University (Art. II).

The collective bargaining process is capable of accommodating and adapting to the concerns of any industry or profession, and the academy is no exception.[7] Collective bargaining has accommodated faculty unionization, and it will continue to adapt to graduate assistant unionization. By demonstrating that parties can negotiate a contract that does not infringe upon academic freedom, but indeed generally enhances and protects it, AAUP policy and local chapter practice support the Board's ruling in *NYU* and the Regional Director's decision in the *University of Pennsylvania*.

D. Unionization of Graduate Students Does Not Harm Faculty-Student Mentoring Relationships.

Not only does the university administration fail to provide the Board with any new material about why the Board should revisit its recent *NYU* decision, but it ignores a recent post-*NYU* study that provides further evidence that unionization will *not* "compromise" the cooperative relationships between faculty mentors and their graduate student mentees.[8] Two recent studies make clear that graduate assistant unions do not inhibit professor-graduate student relations.

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[7] *See* William M. Weinberg, *Patterns of State-Institutional Relations Under Collective Bargaining, Faculty Bargaining, State Government and Campus Autonomy: The Experience in Eight States*, *in* PENNSYLVANIA STATE UNIVERSITY AND THE EDUCATION COMMISSION OF THE STATES REPORT 103 (Apr. 1976) ("The higher education 'industry' has adapted collective bargaining, as has every other industry, to match its own administrative structure, product and institutional needs, and relationships with unions.").

[8] One administrative law judge (ALJ), upon hearing the claims of graduate students within the University of California system, ordered that the state's student employees attending public institutions be allowed to unionize. *Regents of the University of California*, 20 PERC ¶ 27129 (1996). The ALJ explained that

> [t]he mentor relationship . . . is limited primarily to the relationship between a graduate student and a dissertation committee chair, or sometimes a committee member. Any impact upon that relationship . . . is virtually non-existent [because it is] . . . extremely rare for the same individuals to have been in both an employee-supervisor relationship and a student-faculty mentor relationship.

A 2002 study by Daniel J. Julius and Patricia J. Gumport of Stanford University found in their analysis of interview data and collective bargaining contracts that

> no conclusive evidence [suggests] that collective bargaining in and of itself is compromising the student-faculty relationship in general, or the willingness of faculty to serve in a mentoring capacity. Moreover, our data suggest that the clarification of roles and employment policies can enhance mentoring relationships.

Daniel J. Julius & Patricia J. Gumport, "Graduate Student Unionization: Catalysts and Consequences," THE REVIEW OF HIGHER EDUCATION, Vol. 26, No. 2 (Winter 2002), at 201. Furthermore, the authors "conferred with labor relations practitioners who could not identify any sustained trends that suggested the student-faculty relationship could evolve into an employee-supervisor relationship, where faculty may be reluctant to speak candidly with students–for fear of grievances being filed." *Id.* The authors conclude that "fears concerning the undermining of mentoring relationships (just as those concerning peer review, professionalism, and the like when full time faculty organized) appear to be without foundation or premature to say the least." *Id.* at 209.

Similarly, in "Graduate Student Employee Collective Bargaining and the Educational Relationship Between Faculty and Graduate Students," Gordon J. Hewitt surveyed a random sample of faculty members at five universities where graduate assistant unions had existed for at least four years. 29 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 153 (2000). The study reveals that professors generally do not believe that their relationships with graduate students have suffered because of collective bargaining. The

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Id. at 386. The ALJ continued: "Even if evidence indicated that a large number of mentor relationships overlapped with employment relationships, extending coverage would not damage those relationships. There is nothing inherent in collective bargaining that precludes a supervisor from being a mentor." *Id.*

five universities are the State University of New York at Buffalo and the Universities of Florida, Massachusetts, Michigan, and Oregon. *Id.* at 157.[9] There is no reason to believe that relationships between faculty and students at private institutions would be any different.

Close to 90 percent of the Hewitt survey participants asserted that bargaining had not kept them from forming close mentoring relationships with their graduate students. *Id.* at 161. Perhaps even more significantly, over 90 percent indicated that collective bargaining had not inhibited their ability to advise or instruct graduate students. *Id.* And 95 percent of those surveyed believed that collective bargaining had not inhibited the free exchange of ideas between faculty members and students. *Id.* "[T]he results show [that] faculty . . . support the right of graduate students to bargain collectively, and believe collective bargaining is appropriate for graduate students. . . . [B]ased on their experiences, collective bargaining does not inhibit [professors'] ability to advise, instruct, or mentor their graduate students." *Id.* at 164. Hewitt observed that in their open-ended comments, faculty members never characterized the effect of bargaining on their "educational relationships" with students as "negative." *Id.* Nor did they consider bargaining to be an "educational hindrance." *Id.* And so, "[t]he faculty consider their

[9] Like the University of Pennsylvania, these five institutions are included in the Carnegie classification "Doctoral/Research Universities/Extensive." The category is defined as "[i]nstitutions [that] typically offer a wide range of baccalaureate programs, and . . . are committed to graduate education through the doctorate. They award 50 or more doctoral degrees per year across at least 15 disciplines." HIGHER EDUCATION DIRECTORY (Higher Education Publications, Inc. 2002). In addition, all of these institutions, except the University of Massachusetts, are members of the prestigious Association of American Universities, which is an "association of 62 leading research universities in the United States and Canada." *See* www.aau.edu/aau/members.html.

relationships with graduate students a sacred trust and do not allow bureaucratic or political encumbrances to interfere with that trust." *Id.*

In summary, no evidence shows or even suggests that graduate assistant unionization interferes with the mentor-mentee relationship.

E. Institutional Academic Freedom Concerns Are Best Addressed Through Collective Bargaining, Not In Determining Whether Graduate Assistants are Employees.

The university administration recites a litany of evils pertaining to negotiating over mandatory subjects of bargaining that, it asserts, will violate the institution's academic freedom and, therefore, the Board should overturn *NYU*. *University Request for Review* at 13-14. The administration's concerns involve the scope of bargaining, however, rather than the scope of representation, which is the issue before the Board. To consider topics for negotiation when determining whether graduate assistants are employees puts the "cart before the horse." *See Boston Medical Center*, 330 N.L.R.B. No. 30 (1990), slip op at 13.[10] The administration's concerns over academic freedom

[10] Providing no new information to the Board, the administration of the University of Pennsylvania simply resurrects an argument clearly rejected by the Board in *Boston Medical Center*, where the employer asserted that negotiating over mandatory subjects of bargaining violated the medical center's institutional academic freedom. The Board opined:

> The contour of collective bargaining is dynamic with new issues frequently arising out of new factual contexts: what can be bargained about or concentrated on, and what the parties are free to bargain about, may change. But such problems have not proven to be insurmountable in the administration of the Act. *We need not define here the boundaries between permissive and mandatory subjects of bargaining concerning [house staff], and between what can be bargained over and what cannot. We will address these issues later, if they arise. . . .* An employer is always free to persuade a union that it cannot bargain over matters in the manner suggested by the union. . . . But that is part of the bargaining process: the parties can identify and confront any issues of academic freedom as they would any other issue in collective bargaining. . . . If the parties cannot resolve their differences through bargaining, they are free to seek

violations are "speculative" and "premature," because the process of contract negotiations can accommodate the special concerns of parties. *See Regents of the University of California*, 715 P.2d at 605; *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. at 200 (institutional academic freedom argument too "speculative"). As the U.S. Supreme Court opined in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937):

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

Example after example—from state court rulings to the recent collective bargaining contract between graduate assistants and the administration at NYU—provides further support for the Board's decision in *NYU* that collective bargaining enables graduate assistants and university administrations to resolve any conflicts that arise about institutional academic freedom. The Board should leave untouched its *NYU* decision, and affirm the Regional Director's ruling in *University of Pennsylvania*.

State courts have found not only that collective bargaining for student-employees is compatible with institutional academic freedom, but also that such academic freedom concerns as may arise are best dealt with through collective bargaining. In *Regents of the University of California*, 715 P.2d at 590, the California Supreme Court ruled that interns and residents were employees under state law. In so ruling, the court rejected the

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> resolution of the issues by resort to our processes, and we will address them at the appropriate time.

Slip op. at 13 (emphasis added).

institution's academic freedom argument, which is similar to that raised by the administration in *University of Pennsylvania*. The California court observed:

> The University asserts that if collective bargaining rights were given to house staff the University's educational mission would be undermined by requiring bargaining on subjects which are intrinsically tied to the educational aspects of the residency programs. . . . [T]he University's argument is premature. The argument basically concerns the appropriate scope of representation under the Act. . . . Such issues will undoubtedly arise in specific factual contexts in which one side wishes to bargain over a certain subject and the other side does not. These scope-of-representation issues may be resolved by the Board when they arise. . . .

Id. at 605.

Similarly, in *Regents of the University of Michigan*, 204 N.W.2d at 218, the Michigan Supreme Court considered the scope of bargaining between the administration and a group of interns, residents, and post-doctoral fellows at the University of Michigan Hospital under Michigan's labor law and its state constitution, which provides for the Board of Regents' autonomy. The court held that "[b]ecause of the unique nature of the University of Michigan . . . the scope of bargaining by the Association may be limited if the subject matter falls clearly within the educational sphere." *Id.* at 224. The court continued:

> For example, the Association clearly can bargain with the Regents on the salary that their members receive since it is not within the educational sphere. While normally employees can bargain to discontinue a certain aspect of a particular job, the Association does not have the same latitude as other public employees. For example, interns could not negotiate working in the pathology department because they found such work distasteful. If the administrators of medical schools felt that a certain number of hours devoted to pathology was necessary to the education of the intern, our Court would not interfere since this does fall within the autonomy of the Regents [under the state constitution.] Numerous other issues may arise which fall between these two extremes and they will have to be decided on a case by case basis.

Id. While the decisions of these state courts were necessarily circumscribed by specific statutes and binding judicial precedent, the cases provide further support for the Board's decision in *NYU* that through collective bargaining, parties can often resolve their differences, and that collective bargaining does not violate institutional academic freedom.

The recent NYU collective bargaining agreement between the university administration and its graduate assistants provides further evidence that parties can resolve their differences through collective bargaining. *Statement by NYU Vice President Robert Berne on Reaching an Agreement with the UAW Enabling the University to Proceed to the Bargaining Table*, NYU Press Release (Mar. 1, 2001) (www.nyu.edu/publicaffairs/newsreleases/b_BERNE_UAW.shtml) (NYU administration's statement that the final contract with its graduate assistants protects NYU's academic freedom). The final contract includes the following "academic freedom" clause: "Decisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University." *Complete Proposal of NYU to International Union, UAW and Its Local 2110* (Jan. 28, 2002) (www.nyu.edu/publicaffairs/gradissues/agreement/uawnyuproposal.pdf). The NYU contract includes a no-strike provision. The contract also makes clear that many issues of concern to graduate assistants, such as salaries, fringe benefits, and hours, which are "manifestly amenable to collective negotiations," fall far outside the

ambit of an institution's educational decisionmaking. *See Regents of the University of California*, 715 P.2d at 604.[11]

For more than three decades faculty members have engaged in collective bargaining, and during that period the Board, the courts, and state agencies have been able to "draw the line" in determining the scope of mandatory bargaining consistent with the concerns of institutional academic freedom.[12] The concerns raised by the University

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[11] *See also* Julius & Gumport, *supra*, REVIEW OF HIGHER EDUCATION at 199 ("[O]ur review of graduate student labor agreements suggests that they [graduate assistant unions] focused on higher salaries, job security, and grievance mechanisms."); Martin H. Malin, "Student Employees and Collective Bargaining," 69 KY. L.J. 1, 27-28 (1980) (noting that "[w]ages and fringe benefits do not involve questions of academic policy and clearly would be matters of mandatory collective bargaining," and reviewing early collective bargaining agreements of student employees at state institutions to find that they emphasize "traditional economic issues," not academic ones); Douglas Sorrelle Streltz & Jennifer Allyson Hunkler, "Teaching or Learning: Are Teaching Assistants Students or Employees?," 24 J.C. & U.L. 349, 375 (1997) ("Students' objectives are to bargain collectively over economic and employment conditions such as wages, health benefits, and hours, not over academic matters."); "Recent Case: Labor Law--NLRB Holds That Graduate Assistants Enrolled at Private Universities Are 'Employees' Under the National Labor Relations Act," 114 HARV. L. REV. 2557, 2559-60 (2001) ("[T]he number of student sections that a teaching assistant must lead and the amount of compensation per hour or per course are clearly 'terms and conditions of employment' that will become subjects of bargaining. Just as clearly, degree requirements and student evaluation are issues that should be left fully under faculty control."); William Vaughn, "Apprentice or Employee? Graduate Students and Their Unions," ACADEME 43, 48 (Nov./Dec. 1998) ("[A]cademic issues are mostly ancillary to the subject of graduate-employee unions. Unions bargain over terms and conditions of employment; they don't mediate academic matters.").

[12] S*ee* Bernhard Wolfgang Rohrbacher, "After *Boston Medical Center*: Why Teaching Assistants Should Have the Right to Bargain Collectively," 33 LOY. L.A. L. REV. 1849, 1911 (2000) (noting that different state courts "all have been able to 'draw the line' somewhere" in determining mandatory bargaining issues in education, such as class size, and so, "[b]y the same token, there is no reason to believe that the NLRB will not equally be able to 'draw the line'") (internal citations omitted)). The Board has defined what is within the scope of bargaining for higher education faculty under the NLRA. *See, e.g., Kendall College*, 228 NLRB 1083 (1977) (holding faculty schedules to be a mandatory subject of bargaining), *enf'd*, 570 F.2d 216 (7th Cir. 1978); *Kendall College*, 288 NLRB 1205, 1211 (1988) (finding outside employment to be a mandatory subject of bargaining). So, too, have state courts. *See, e.g.,* V*ermont State Colleges Faculty Federation v. Vermont State Colleges*, 141 Vt. 138 (S. Ct. 1982) (tenure is a mandatory subject of bargaining); *Burlington County College Faculty Ass'n v. Board of Trustees*, 311 A.2d 733 (N.J. 1973) (academic calendar not a mandatory subject of bargaining). *See also* David M. Rabban, "Can American Labor Law Accommodate Collective

of Pennsylvania administration can be addressed by the parties through collective bargaining and, if need be, by the Board's giving content to the statutory terms "rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). If and when the Board is presented with an actual dispute, it will "draw the line" in determining the appropriate scope of bargaining for graduate assistants without violating an institution's academic freedom.

II. NOTHING IN THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT DICTATES DENYING GRADUATE ASSISTANTS THE PROTECTION OF THE NLRA.

One of the novel assertions raised by the administration in this case is that graduate assistants must be excluded from the protections of the NLRA because to do otherwise would create conflict between the NLRA and the Family Educational Rights and Privacy Act (FERPA), which was enacted to protect the educational records of students. 20 U.S.C. § 1232; *see University of Pennsylvania Request for Review* at 15-17. The administration contends that under the NLRA "the Union would be entitled to significant amounts of FERPA-protected information" in confidential educational records, and thus "conflicting [statutory] requirements" exist. *Id*. at 16. This new argument is unconvincing at best.

Just because a potential tension *may* exist between the NLRA and a particular federal statute does not lead to the draconian conclusion that graduate assistants must be excluded from NLRA coverage. The Board and courts accommodate tensions between the NLRA and other federal laws, such as antitrust, bankruptcy and immigration statutes,

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Bargaining by Professional Employees?," 99 YALE L.J. 689, 706 (Jan. 1990) (reviewing scope-of-bargaining decisions of state courts and boards in cases primarily involving public school teachers).

without denying employees the protection of the NLRA. Similarly, the Board can balance any tensions that may exist between the NLRA and FERPA and, thereby, uphold the Regional Director's decision in *University of Pennsylvania*.

"The cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Courts strive "'to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section." *United States v. Menaschle*, 348 U.S. 528, 538 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882)); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *Ruckelshaus v. Monsanto Co.* 467 U.S. 986, 1018 (1984). And so, repeals by implication are found only when such repeal is "clear and manifest." *TVA v. Hill*, 437 U.S. 153, 189 (1978).

In *Southern Steamship v. NLRB*, 316 U.S. 31 (1942), the U.S. Supreme Court held that when the Board's authority trenches on policies contained in other federal laws, in this case federal maritime law, the Board must balance its interests with those of the other laws. In so ruling, the Court opined that the Board cannot seek to enforce its policies under the NLRA "so single-mindedly that it may wholly ignore other and equally important congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another. . . ." *Id.* at 147.

Accordingly, "[i]n their interpretation and application of the National Labor Relations Act . . . the National Labor Relations Board . . . and courts have been required . . . to work out the boundaries of regulation under the Act and under other federal regulatory schemes that, frequently, overlap and conflict with the Act." Patrick Hardin & John E. Higgins, Jr., THE DEVELOPING LABOR LAW 2272 (Fourth Ed., 2001). For example, "there are times and circumstances when federal antitrust statutes and the law and policies of the NLRA and the Norris-LaGuardia Anti-Injunction Act must be accommodated to each other." *Id.* at 2273; 29 U.S.C. § 101-110, 113-115; *see, e.g., Boys Market v. Retail Clerks Local*, 398 U.S. 235 (1970) (terms of Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of NLRA when the collective bargaining agreement contained provisions for binding arbitration of a grievance dispute). Similarly, "[s]ubstantial aspects of bankruptcy law often touch upon matters regulated, either directly or indirectly, by the NLRA." Hardin & Higgins, *supra*, at 2298; *see, e.g., Direct Press Modern Litho*, 328 NLRB 860, 861 (1999) (engaging in "the requisite accommodation . . . between the competing statutory schemes set forth in the Bankruptcy Code and the National Labor Relations Act"). Courts and the Board have also sought to accommodate the NLRA and federal immigration laws. Hardin & Higgins, *supra*, at 390 (2002 Supp.); *see, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984) ("[E]nforcement of the NLRA . . . is compatible with the policies" of the Immigration and Nationality Act). Accordingly, the Board and courts work to "reconcile" potential conflicts between federal laws. Hardin & Higgins, *supra*, at 2298.

At this time, no clear conflict appears to exist between FERPA and the NLRA in *University of Pennsylvania*. For example, FERPA provides that a university may

disclose a student's educational record to a third party if the "eligible student" has provided written consent. 20 U.S.C. § 1232g(b)(1) & (b)(2)(A); 34 C.F.R. § 99.30. FERPA also permits the nonconsensual disclosure of educational records to third parties under certain conditions, including when disclosure is made pursuant to a lawfully issued subpoena or court order. 34 C.F.R. § 99.31(a)(9). So, for example, NYU obtained a subpoena from the NLRB to release personal information about its graduate assistants to the UAW. <www.nyu.edu/nlrbsubpoena>.

Moreover, in an August 21, 2000 letter to the American Federation of Teachers, LeRoy Rooker, Director of the Family Policy Compliance Office of the Federal Department of Education, indicated that educational institutions could designate the names and addresses of teaching assistants as "directory information." *See* 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.31 (a)(ii). He reasoned that such a policy would be permissible because the information is "similar to those types of information that are specified by the statute under the definition of directory information and are of a nature of being common knowledge to those who are in the individual's class or who pass by the class." <www.ed.gov/offices/OM/fpco/ferpa/library /aft.html>; *see also Board of Trustees of the University of Massachusetts*, Case No. SCR-01-2246 (Commonwealth of Massachusetts Labor Relations Commission, Jan.18, 2002), at 36-38 (rejecting administrator's assertion that the privacy of the institution's student's records under FERPA was "incompatible with effective collective bargaining": "[U]ltimately, the entire FERPA [issue] is premature and not appropriately raised in a representation proceeding.").

The Board's obligation is to reconcile any tension that may exist between the NLRA and FERPA. *See* August 21, 2000 letter from Rooker to AFT, *supra* ("[W]e are not convinced that an irreconcilable conflict exists . . . [b]etween FERPA and other Federal statutes. . . ."). Such an "accommodation," if and when it becomes necessary, is appropriate, but the university's radical proposal for the wholesale exclusion of graduate assistants from NLRA protections is not.

III. THE GRANTING OF ACADEMIC CREDIT FOR THE TEACHING RESPONSIBILITIES CARRIED OUT BY GRADUATE ASSISTANTS SHOULD NOT AUTOMATICALLY PRECLUDE A FINDING THAT THEY ARE EMPLOYEES.

Neither the Act nor Board precedent supports the denial of statutory rights to employees simply because the services they perform, in this case teaching, are required as part of an educational program. The administration asserts that *NYU* is distinguishable from this case because the University of Pennsylvania requires its graduate assistants "to teach as part of an academic program and as training to further their education." *University Request for Review* at 20. Accordingly, the administration reasons, the university's graduate students are not employees. But a graduate assistant can be both a student and an employee, since the Board broadly interprets the statutory term "employee." 29 U.S.C. § 152(3); *see WBAI Pacifica*, 328 N.L.R.B. No. 179, at *3 (1999).

In *NYU* the Board found that graduate assistants were "employees" under the Act and, therefore, could unionize: "[T]he fulfillment of duties of a graduate assistant requires performance of work, controlled by the Employer, and in exchange for consideration." *NYU*, slip op. at 2. The Board found that even if their work is "primarily educational," graduate assistants may be employees if they perform services for the administration in

exchange for compensation: "[N]otwithstanding any educational benefit derived from graduate assistants' employment, we reject the premise of the Employer's argument that graduate assistants should be denied collective bargaining rights because their work is primarily educational." *Id.* at 3. The work of faculty is also "primarily educational," and the Board has asserted jurisdiction over them as employees, even though they are paid to learn through teaching, research and service. Under *NLRB v. Yeshiva*, 444 U.S. 672 (1980), some faculty are excluded from NLRA coverage because they are managers, not because they learn as part of their employment.

In *Boston Medical Center* the Board rejected the argument that residents and interns were not employees, even though their work was required to complete the educational requirements for certification in a medical specialty. That the house staff obtain "educational benefits" from their employment, the Board ruled, "is not inconsistent with their employee status": "Their status as students is not mutually exclusive of a finding that they are employees." 330 N.L.R.B. No. 30, slip op. at 45 (emphasis added). The Board noted that "[i]t has never been doubted that apprentices are statutory employees. . . ." *Id.* (citations omitted). As the Board accurately observed, "[m]embers of all professions continue learning throughout their careers" and, therefore, a learning component should not preclude the Board from determining that a student may be an employee. *Id.* at 45-46.

The Board's acceptance of the administration's characterization of teaching as an academic requirement to preclude employee status would undermine the Board's consistently broad interpretation of "employee" under Section 2(3) of the NLRA.[13] The

[13] *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984) (ruling that "the breadth

Board carefully examines an employer's characterizations of an individual's employee status on a case-by-case basis. *See, e.g., NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706 (2001) (nurses as supervisors); *Yeshiva University*, 444 U.S. at 672 (faculty as managers). The Board should similarly examine the assertion that graduate assistants who otherwise would qualify as employees cease to be employees simply because their work is declared by administrators to be academically required. *See Shephard's Uniform and Linen Supply*, 274 NLRB 1423 (1985) (ruling, in part, that students performing maintenance work for academic credit as part of a high school vocational educational program are employees under the Act).

CONCLUSION

The administration of the University of Pennsylvania provides the Board with no new convincing arguments or evidence to reconsider, let alone overturn, *NYU*. For the reasons above, the Board should leave undisturbed its well-reasoned *NYU* decision, which found collective bargaining of graduate assistants compatible with academic freedom, and should affirm the Regional Director's ruling in *University of Pennsylvania*.

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of Section 2(3) is striking" and, therefore, undocumented aliens "plainly come within the broad statutory definition of 'employee'"); *NLRB v. Town & Country*, 516 U.S. 85, 90 (1995) (concluding that "[t]he phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition for it says, '[t]he term "employee" shall include any employee'"); *see also Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992) (cautioning against disenfranchisement of individuals who might be entitled to NLRA protections).

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May 27, 2003

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