**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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In the Matter of

TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK

Employer

-and- Case No. 02-RC-143012

GRADUATE WORKERS OF COLUMBIA – GWC, UAW
Petitioner

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# BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS


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## INTRODUCTION

This brief addresses the first two questions in the Board's Notice and Invitation to File Briefs dated January 13, 2016. We argue the Board should overrule *Brown University*, 342 NLRB 483 (2004), and hold:

(1) Graduate student assistants who teach or research for their university are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act; and

(2) Graduate student assistants engaged in research, including on externally funded grants, are employees when they perform required service for the employer under the direction and control of a university employee and in exchange for payment.

## INTEREST OF THE *AMICUS CURIAE*

The American Association of University Professors ("AAUP" or "the Association") is a national educational organization with chapters on nearly 400 campuses and over 40,000 members, 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. Out of over 75 local unionized AAUP chapters, more than 20 are at private sector higher education institutions. AAUP develops 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*, *in* AAUP Policy Documents & Reports 3 (11th ed. 2015)("AAUP Policy Documents") (endorsed by more than 200 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 an AAUP statement); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971) (same).

## ARGUMENT

### I. GRADUATE STUDENT ASSISTANTS WHO PERFORM SERVICES AT THEIR UNIVERSITY ARE STATUTORY EMPLOYEES WITHIN THE MEANING OF SECTION 2(3) OF THE NATIONAL LABOR RELATIONS ACT

In *Brown University*, the Board held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the NLRA for three reasons. *First*, the Board insisted that graduate students are "first and foremost students" and the money they are paid to teach, do administrative work, and research "is not consideration for work. It is financial aid." 342 NLRB at 488. As we explain below, that declaration is contrary to terms of Section 2(3) and to the Board's and Supreme Court's approach to the common law definition of "employee." It is also contrary to the facts of this case and the reality of modern universities. *Second*, the *Brown* majority asserted that "collective bargaining would unduly infringe upon traditional academic freedoms." *Id.* at 490. That, too, is wrong; academic freedom exists at public universities where faculty and graduate students bargain collectively and at New York University, a private university that has voluntarily recognized and entered a collective agreement with a union of graduate student assistants. *Third*, the *Brown* majority speculated that "collective bargaining is not particularly well suited to educational decisionmaking" as it would compromise the teacher-student relationship and educational process. *Id.* at 489. That speculation is belied by the evidence of this case and the best available empirical research on higher education practice.

Throughout the American economy, employers and their lawyers are devising methods to manage labor forces performing the company's core services while avoiding the legal

responsibilities inherent in the employment relationship. *See generally* David Weil, *The Fissured Workplace* (2014). Uber and the gig economy and franchise fast food companies may be most in the news for this, but the phenomenon exists in universities as well. The Board, like the Department of Labor, has recognized the phenomenon. Both agencies must and do perform their statutory function by interpreting the deliberately capacious statutory definition of "employee" and "employer" to ensure that the regulatory framework remains relevant in the contemporary economy. *See Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015); Administrator's Interpretation No. 2015-1 (Dep't of Labor July 15, 2015), http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf . Graduate student assistants are paid to teach thousands of courses, class hours, and students, to assist in research, and to perform administrative and other duties at universities across the country. Their labor is integral to the modern research university.

Therefore, the Board should overrule *Brown University* and return to its prior rule that, where "the fulfillment of the duties of a graduate assistant requires performance of work, controlled by the Employer, and in exchange for consideration," "the graduate assistants are statutory employees, notwithstanding that they simultaneously are enrolled as students." *New York University*, 332 NLRB 1205, 1207, 1209 (2000).

**A. Graduate Student Assistants Are Employees Within the Meaning of Section 2(3)**

An employee with the right to bargain collectively under the NLRA is defined broadly. As the Supreme Court observed, the Act's definition is consistent with the ordinary dictionary definition of a "person who works for another in return for financial or other compensation." *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 91 (1995). The Supreme Court has repeatedly observed that the Section 2(3) definition of employee is broad. *Id.* at 90 ("The

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'"); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984) ("the breadth of Section 2(3) is striking"). As the Board noted in holding medical residents and interns are employees in *Boston Medical Center*, "students" are not among those workers whom Congress excluded from the coverage of the Act, and "nothing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act." 330 NLRB 152 (1999).

The fact that graduate student assistants have an educational relationship with the university does not mean they are not also employees when performing the work of teaching or research for which they are paid. In *Boston Medical Center* the Board held that residents and interns are employees, even though their work is required to complete the educational requirements for certification in a medical specialty. *Id. at* 160. The *Brown University* majority's characterization of teaching as an academic requirement that precludes employee status undermines the Board's consistently broad interpretation of "employee" under Section 2(3) of the NLRA. The Board carefully examines an employer's characterizations of an individual's employee status on a case-by-case basis, *see NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706 (2001) (nurses as supervisors); *NLRB v.* Y*eshiva University*, 444 U.S. 672 (1980) (faculty as managers), and should therefore reject the assertion that graduate student assistants who otherwise would qualify as employees cease to be employees simply because their work may be 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); *see also Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992) (cautioning

against disenfranchisement of individuals who might be entitled to NLRA protections).

The *Restatement of Employment Law*, while of course not the definitive guidance on the interpretation of the NLRA, specifically recognizes that graduate assistants are employees under the common law definition of employee. It provides: "[w]here an educational institution compensates student assistants for work that benefits the institution, . . . such compensation encourages the students to work for more than educational benefits and thereby establishes an employment as well as an educational relationship." § 1.02, Comment g. Indeed, the *Restatement*'s illustration of this point directly addresses an issue in this case:

> A is a graduate student in biochemistry at university P. In order to complete the degree requirements, A must work in a laboratory under P's auspices, either for pay or as a volunteer. A works in the laboratory of a professor, for which A is paid a yearly stipend and given full tuition remission. The professor has secured grants to support the research that A is assisting. A is an employee of P. P is providing A with significant benefits both in order to further A's education and also to obtain A's services on P's funded research.

§ 1.02, Comment g, Illustration 10.

There is no basis in fact or law for the *Brown* Board's assertion that graduate student stipends cannot be compensation for work because they are financial aid. As a matter of simple logic, an argument based solely on a definition is rarely persuasive. In *Brown,* the Board also noted that stipends are financial aid because "the amounts received by graduate student assistants generally are the same or similar to the amounts received by students who receive funds for a fellowship, which do not require any assistance in teaching and research." 342 NLRB at 32-33. However, not every university caps stipends to equalize compensation between graduate students who teach and those who do not. Between 2009 and New York University's voluntary recognition of the graduate student union in 2013, NYU paid graduate teaching assistants by the

contact hour established in the ACT-UAW 7902 adjunct union contract.[1] This pay structure resulted in some graduate teaching assistants earning more than the stipend. Moreover, if some universities cap stipends regardless of the amount of work graduate students perform, that might be evidence of unequal bargaining power that could be addressed by collective bargaining, but it is not evidence that graduate students are not paid to work.

Furthermore, the Regional Director's findings in this case establish three reasons why the services performed by graduate student assistants are "work[] for another in return for financial or other compensation." *Town & Country*, 516 U.S. at 91. *First*, when graduate students work as teaching and research assistants, their work is indistinguishable from that performed by university faculty. They are, the Regional Director found, the "'Instructors of Record' in some classes … [and] teaching assistants relieve faculty of tasks, such as grading, proctoring, and administrative work, that would otherwise fall within their job duties in their capacity as paid employees." *The Trustees of Columbia University in the City of New York*, Supplemental Decision and Order Dismissing Petition at 29. Students who are the Instructors of Record substitute entirely for permanent or adjunct faculty, such as in teaching a section of a core humanities course, an elementary or intermediate language class, or an undergraduate writing class. *Id.* at 18-19, 21. These graduate student instructors typically "develop a syllabus, select reading texts, and create lesson plans." *Id.* at 21. Students appointed as Preceptors "operate fairly independently, often running their own classes of approximately 20 students," for which

[1] *See*, Graduate School of Arts & Science Henry Mitchell MacCracken Program Policy Guidelines, p. 13, available at, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj0h8Tjv47LAhVQ8GMKHd2-A8MQFggdMAA&url=http%3A%2F%2Fecon.as.nyu.edu%2Fobject%2Fgsas.pdfs.far4guidelines&usg=AFQjCNE_J5tBbRQS7AOmJtzqpOe4Vu61Ww&sig2=hXNprGigFpO9cBrNjWJrRg

they "design and grade all exams and other assignments in their classes, and assign final grades for their students." *Id.* at 11. Elliott Cairns, a doctoral student, testified that he became the sole instructor in a Music Humanities Core course when the professor for whom he worked as a teaching assistant went on medical leave mid-semester, and he was not supervised or evaluated by the department for that teaching. *Id.* at 26. At Columbia, 700 undergraduates take the Core Curriculum Art Humanities Course each semester, which requires that the Department of Art History and Archeology run 40 sections of the course each semester. Two to five regular faculty teach in the section, along with eight to twelve graduate students, twelve or thirteen post-doctoral fellows, and a few adjuncts. *Id.* at 18. It would be impossible for Columbia to teach that many undergraduates in that many sections relying solely on the faculty and adjuncts without dramatically increasing the faculty teaching load.

*Second*, graduate students teach because they are paid, not because it is at the core of Ph.D. training. Graduate student assistants often teach courses far removed from their area of expertise with minimal or no supervision. Mr. Cairns, for example, testified he taught a basic course on music appreciation, unsupervised by the faculty and far removed from his dissertation research on sound recording technology. *Id.* at 27. Common knowledge among university faculty and graduate students, as well as the facts of this case, reveal that the teaching assignments for graduate students are typically quite far afield from their research. A Ph.D. candidate will get little educational benefit from teaching freshman physics or math or elementary German (beyond simply learning how to manage a classroom), or staffing the Physics or Math Help Room, or proctoring or grading homework or exams. Yet these teaching, research, and administrative responsibilities are required in order to receive a stipend or, as in the School of the Arts, "adjunct salary" or hourly pay. *Id.* at 16-17, 19, 21. There is no evidence in

the Regional Director's decision that teaching is the basis on which Columbia graduate students are trained or evaluated by their dissertation committees or departments, and it is not the primary basis on which prospective employers decide to hire.

In all of these positions, graduate student assistants learn something that is professionally useful. They learn how to manage a classroom or lab, or how to be efficient in organizing research or grading homework, or how to explain a complex concept to a bewildered undergraduate. But their success on the job market after receiving the Ph.D. will be based largely on the quality of their dissertation; teaching evaluations are typically secondary. And the time spent in office hours, grading papers, doing administrative tasks, or proctoring exams is not assessed by prospective employers at all. The record indicates that Columbia offers some training in pedagogy. *Id.* at 18 (weekly briefings in the first semester of teaching and then twice a month meetings thereafter). But the relatively slight training in teaching suggests that Columbia aims less at cultivating graduate students as classroom teachers for the benefit of the graduate students and more at ensuring that they teach competently for the sake of Columbia undergraduates whom they serve. And, as all professors and graduate students know, teaching – for all its joys -- comes at the expense of research. Indeed, that is one reason why universities employ so many graduate students to teach. Teaching is the work of universities and it is work for which graduate students must be paid, because if they were not doing it, the university would have to pay the existing faculty to do it or hire new faculty to cover teaching obligations.

*Third*, like universities generally, Columbia treats the stipend as payment for teaching or supporting the professor's research, not as general financial support to enable the graduate

student to attend class or conduct his or her own dissertation research.[2] Even when payment is by stipend (rather than by the hour or the job), the funding is contingent on teaching or on doing the professor's research. *Id.* at 6. As Longxi Zhao, a doctoral student, testified, when he was fired for allegedly unsatisfactory performance as a TA, his stipend was eliminated even though his status as a student remained unchanged. *Id.* at 27.

This record establishes that when teaching, conducting the professor's research, or performing other administrative work required to receive a stipend, graduate students are employees. Of course, graduate students learn pedagogy by teaching, as do faculty. Graduate students improve their research skills by working as research assistants to faculty, as do faculty working in research groups. Many professional jobs involve learning by doing, and many such jobs involve formal and informal training in aspects of the job. That there is an educational component to the work does not mean that the relationship between the employee and the university is solely one of student. Rather, graduate student assistants "work[] for another in return for financial or other compensation." *Town & Country Electric, Inc.*, 516 U.S. at 91. For this reason, they are employees and *Brown* should be overruled.

**B. Academic Freedom Is Promoted by Collective Bargaining**

*Brown University* rests on the assertion that allowing graduate assistants to bargain collectively violates institutional academic freedom by requiring the university to bargain about issues that directly impact "who may teach," "what may be taught," "how it shall be taught," and

[2] Although different statutes define "employee" differently, and the tax or immigration law definition of employee is not determinative of the NLRA's definition, it nevertheless bears noting that Columbia treats a portion of some stipends as salary for tax purposes and issues a W2. *Id.* at 7. Columbia also requires graduate students to comply with the I-9 proof of citizenship or work authorization processes that federal law requires of employees (but not students). *Id.* at 7. And Columbia treats other forms of payment to graduate assistants as "adjunct salary." *Id.* at 7, 21.

"who may be admitted to study," thus eroding both institutional academic freedom and faculty-student relationships. *Sweezy v. State of New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), cited in *Brown University,* 342 NLRB at 490 n.26. The *Brown* majority speculated that "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process." 342 NLRB at 493. This fundamentally misunderstands the interplay between academic freedom and the laws that govern employers, including colleges and universities.

The First Amendment, which is the legal basis for claims of academic freedom, is not a basis for excusing universities from compliance with federal law. *See Associated Press v. NLRB,* 301 U.S. 103, 133 (1937). Of course academic freedom is a "special concern of the First Amendment," *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967), and it protects professors, 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). Nevertheless, the First Amendment rights of institutions do not preclude application of the NLRA. In *Associated Press,* the Supreme Court rejected the AP's contention that newspapers and wire services must be free to prevent their editorial employees from unionizing in order that it could fire them at will and control the content of the paper. 301 U.S. at 103. Ruling that the application of the NLRA to editorial employees did not violate the employer's freedom of speech or of the press under the First Amendment, the Court observed that 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. Even an entity with special First Amendment freedoms "has no special immunity from the application of general laws." *Id.* at 132-33.

Institutional academic freedoms provide universities no more "special immunity" from the NLRA than freedom of the press gave the AP. University administrations, like the AP or any other employer, have the right not to hire or retain those graduate assistants who fail to meet the institution's academic needs. *See id.* 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"). Columbia exercises this power, as it does not hire all graduate students who apply to be teaching or research assistants. Supplemental Decision at 24 (graduate students in School of International Public Affairs must apply to be Teaching Assistants, Readers, Research Assistants, and Program Assistants), 20-21 (describing selection of students in School of the Arts for various positions).

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. Yet 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. *Id.* at 200. Like the Equal Employment Opportunity Commission, 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), and if the university retaliates against them for engaging in concerted activities, the Board has the authority to protect

their Section 7 rights. The application of the NLRA to the university, however, does not circumscribe the university's institutional academic freedom to hire and retain those graduate assistants who best meet the needs of the university's academic programs or to require teaching as a part of a degree program. An institution may continue to apply all legitimate academic policies and standards to make personnel decisions. *See University of Pennsylvania v. EEOC*, 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).

Moreover, collective bargaining by both faculty and graduate assistants is one of several ways to promote academic freedom on campus, as it allows faculty, students, and administrators to discuss collectively how best to do their shared work of teaching and research. Contractual guarantees to preserve individual academic freedom are an increasingly standard feature of graduate assistant collective bargaining agreements.[3] These contract provisions are in keeping

[3] *See* University of Massachusetts, Amherst (Article XXI) ("Nothing in this Article should be understood to abridge whatever rights of academic freedom the Trustees may allow to graduate student employees."); The City University Of New York (Preamble) ("Whereas, CUNY and the PSC seek to maintain and encourage, in accordance with law, full freedom of inquiry, teaching, research and publication of results, the parties subscribe to Academic Freedom for faculty members. The principles of Academic Freedom are recognized as applicable to other members of the Instructional Staff, to the extent that their duties include teaching, research and publication of results, the selection of library or other educational materials or the formation of academic policy."); Southern Illinois University (Article 7)("Whereas, SIU Carbondale and GA United seek to maintain and encourage, in accordance with law, full freedom of inquiry, teaching, research and publication of results the parties subscribe to Academic Freedom for faculty members."); University of Florida (Article 5, Academic Freedom)("It is the policy of the UBOT and UFF to encourage graduate assistants, in fulfillment of their assigned teaching responsibilities, to give their own interpretation of instructional materials used by them—whether self-chosen or prescribed by the teaching unit—within the bounds of knowledge and methodologies appropriate to the disciplinary field, under the guidance of the employing department or unit."); University of Rhode Island (Article XIII, Academic

with the AAUP *1940 Statement of Principles on Academic Freedom and Tenure*, issued jointly with the Association of American Colleges, which recognizes that faculty and graduate students both 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 13, 14 n.6. AAUP policy specifically recognizes that "graduate students have the right to academic freedom" and are entitled to the same privileges and protections as any other faculty or staff on a number of fronts, including due process in the event of job termination, a voice in institutional governance, and the protection of their intellectual property rights. AAUP *Statement on Graduate Students* (2000), *Id*. at 387. The AAUP's *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." *Id.* at 323. "Collective bargaining is an effective instrument for achieving" and "securing" the objectives of the Association, including "to protect academic freedom." *Id.* AAUP's *Statement on Graduate Students* provides that "graduate student assistants like other employees should have the right to organize to bargain collectively." *Id.* at 387, 388. This *Statement* recognizes that "graduate assistants … carry out many of the functions of faculty members and receive compensation for these duties," which makes collective bargaining appropriate. *Id.* at 387.

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Freedom) ("Institutions of higher education are conducted for the common good and not to further the interests of either the individual or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic Freedom is essential to these purposes and applies to both teaching and research.")

Academic administrations predicted the demise of academic freedom in the 1960s and 1970s, when faculty members began to organize unions. The extensive experience of faculty collective bargaining and graduate assistant bargaining at public universities has refuted these predictions. In fact, faculty and graduate assistant 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 of unionized faculty refer to the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure* and 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] These contracts make promises of academic freedom legally

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[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").

[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* . . ."); 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*."); 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).

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." Robert A. Gorman, *The AAUP and Collective Bargaining: A Look Backward and Ahead*, 68 Academe 1a, 3a (Sept. /Oct. 1982). 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]

Both private and public sector graduate student unions have established collective bargaining agreements that contain legally enforceable contractual protections for individual and institutional academic freedom while honoring the economic interests of graduate student assistants. The first collective bargaining agreement between NYU and its graduate student assistant union contained 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." The second collective bargaining agreement, in effect until 2020, also recognizes NYU as the "sole authority on all decisions involving academic matters."

The basis for the claim that graduate student unionization would harm academic freedom is the possibility that mandatory subjects of bargaining would include the subjects of study or

[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.").

requirements to obtain a degree. Such concerns involve the scope of bargaining, however, rather than the scope of representation, which is the issue now before the Board. The Board retains the power to define the subjects of bargaining to exclude subjects that would infringe the academic freedom of faculty and universities, but those questions are not presented in this case. To consider topics for negotiation when determining whether graduate student assistants are employees puts the "cart before the horse." *See Boston Medical Center*, 330 NLRB at 164. As the Board recognized in finding medical residents and interns to be employees under Section 2(3), "[t]he 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…. We will address these issues later, if they arise.* [T]he parties can identify and confront any issues of academic freedom as they would any other issue in collective bargaining." *Id.* at 164 (emphasis added). The process of contract negotiation and further development in the law can accommodate the special concerns of parties. *See Regents of the University of California v. PERB*, 715 P.2d 590, 605 (Cal. 1986); *University of Pennsylvania v. EEOC*, 493 U.S. at 200.

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

> The University asserts that … 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 v. Employment Relations Commission*, 204 N.W.2d 218 (Mich.1973), 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. 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 Michigan court reasoned that students "clearly can bargain with the Regents on the salary that their members receive since it is not within the educational sphere." But, the court continued, "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." Thus, the court concluded, other issues that might fall somewhere between the bargainable and nonbargainable issues "will have to be decided on a case by case basis." *Id.*

The *Brown University* majority dismissed the evidence of successful graduate student assistant unionization at public universities by saying that the relevant state labor laws "limit bargaining subjects for public academic employees." 342 NLRB at 492. The majority cited as an example the California statute "excluding, from collective bargaining, admission requirements

for students, conditions for awarding degrees, and content and supervision of courses, curricula, and research programs." *Id*. at 492 n. 31. Although Section 8(d) of the NLRA does not contain the specific exemptions that are contained in some state higher education labor laws, the Board if necessary can interpret Section 8(d) "to exclude various kinds of management decisions from the scope of the duty to bargain" in order to preserve "the principle of control by the owner of property over basic decisions concerning his enterprise." *Philadelphia Newspaper Guild v. NLRB*, 636 F.2d 550, 559 (D.C. Cir. 1980). The Board has not hesitated to find, and the Supreme Court has not hesitated to agree, that Section 8(d) excludes certain management decisions. For example, "choice of advertising and promotion, product type and design, and financing arrangements" are not mandatory subjects in the private sector. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981). *See also Kiro, Inc.*, 317 NLRB 1325, 1327 (1995). The Board has been particularly protective of management prerogatives where the enterprise involves the exercise of First Amendment rights. *Peerless Publications, Inc.*, 283 NLRB 334, 335 (1987). Section 8(d) could be construed to "limit bargaining subjects for . . . academic employees," by "excluding, from collective bargaining, admission requirements for students, conditions for awarding degrees, and content and supervision of courses, curricula, and research programs." *Brown University*, 342 NLRB at 492 & n. 31.

Moreover, the Board may seldom need to construe Section 8(d) in the context of graduate students because many collective bargaining agreements covering graduate student assistants expressly recognize the University's right to control academic matters. Of course, having to bargain, arbitrate, or litigate over management rights is more burdensome to universities than being able to unilaterally proclaim them. But that is part of developing a stable bargaining relationship and a body of law governing collective bargaining in a particular sector. The

concern about the proper scope of management rights in the university setting does not warrant categorical exclusion of graduate student assistants from the protection of the NLRA any more than it justified categorical exclusion of medical residents and interns or newspaper reporters or any other category of worker in an industry with particular management rights issues.

For more than four 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.[8] The concerns raised by the *Brown University* majority 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 determine the appropriate scope of bargaining for graduate student assistants to preserve an institution's academic freedom.

[8] 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 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).

### C. Unionization of Graduate Student Assistants Does Not Harm Faculty-Student Mentoring Relationships In Any Academic Discipline.

The third premise of the *Brown University* decision was that collective bargaining would compromise the cooperative relationships between faculty mentors and their graduate student mentees. Both the Regional Director's findings and fifteen years' worth of large empirical studies of unionized campuses refute the *Brown* Board's speculation.

The Regional Director's exhaustive description of the nature of graduate student assistant teaching and research work at Columbia makes clear what an ALJ found twenty years ago in upholding the rights of graduate student assistants at the University of California to unionize: the graduate students' teaching work, and even much research lab work, has little to do with the mentoring relationship between faculty and students. In *Regents of the University of California*, 20 PERC ¶ 27129 (1996), the ALJ explained: "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.* Moreover, the most current research on the issue finds that graduate student unionization poses no adverse effect on faculty-student relations.

A 2002 study by researchers at Stanford University analyzed interview data and collective bargaining contracts of graduate teaching and research assistants and found "no conclusive evidence 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"; indeed, "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*, 26 Review of Higher Education 187, 201 (Winter 2003). 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 study covered all academic disciplines, including the sciences, social sciences, and humanities. 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 liberal arts and sciences faculty members at five universities where graduate assistant unions had existed for at least four years (the State University of New York at Buffalo and the Universities of Florida, Massachusetts, Michigan, and Oregon). 29 J. Collective Negotiations Pub. Sector 153 (2000). The study revealed that professors generally do not believe that their relationships with graduate students have suffered because of collective bargaining. *Id.* at 157.[9] Close to 90 percent of the survey participants asserted that bargaining had not kept them from forming close mentoring relationships with their graduate students, and over 90 percent said that collective bargaining had not inhibited their ability to advise or instruct graduate students. *Id.* at 161. And 95 percent of those surveyed believed that collective bargaining had not stifled the free

[9] Like Columbia University, 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 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

exchange of ideas between faculty members and students. *Id.* 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.* The study concluded that data showed that faculty "believe collective bargaining is appropriate for graduate students," do not consider it an "educational hindrance," and bargaining "does not inhibit [professors'] ability to advise, instruct, or mentor their graduate students." *Id.* at 164.

Most recently, a 2013 study comparing student-faculty relationships, academic freedom, and economic well-being across unionized and non-unionized campuses confirmed the findings of prior surveys: unionization does not interfere with faculty-student relationships or harm the education or training of graduate students. *See* Sean E. Rodgers, Adrienne E. Eaton, & Paula B. Voos, *Effects of Unionization on Graduate Student Employees: Student Relations, Academic Freedom, and Pay*, 66 ILR Review 487-501 (2013). The authors used survey data collected from Ph.D. students at eight major public U.S. universities classified as research universities with very high research activity "RU/VH,"; commonly referred to as "R1". The departments surveyed (English, computer science, business, psychology, and history) were specifically selected for their disciplinary variety (humanities, social science, professional school, and STEM [science, technology, engineering, math]). *Id.* at 497.

Comparing unionized and non-unionized graduate student employees in terms of faculty-student relations, academic freedom, and pay, the study found that union represented graduate student employees reported higher levels of personal and professional support and unionized graduate student employees fared better on pay. Additionally, unionized and nonunionized students reported similar perceptions of academic freedom. Unionized graduate students "had higher mean ratings on their advisors accepting them as competent professionals, serving as a

role model to them, being someone they wanted to become like, and being effective in his or her role." *Id.* at 505. Accordingly, the authors concluded that "potential harm to faculty-student relationships and academic freedom should not continue to serve as bases for the denial of collective bargaining rights to graduate student employees." *Id.* at 487. Significantly, the authors also noted that unionization does not impermissibly intrude into the general academic climate as the *Brown University* majority feared. Instead, "the main impact of unionization is on *employees,* rather than the overall climate for *graduate students*." *Id*. at 500. In summary, no evidence shows or even suggests that graduate student assistant unionization interferes with the mentor-mentee relationship in the humanities, social sciences, or STEM fields.

## II. GRADUATE STUDENT ASSISTANTS ENGAGED IN RESEARCH, INCLUDING ON EXTERNALLY FUNDED GRANTS, ARE EMPLOYEES WHEN THEY PERFORM REQUIRED SERVICE UNDER THE DIRECTION AND CONTROL OF A UNIVERSITY EMPLOYEE

Graduate student assistants engaged in research, including on externally funded grants, are employees when they perform required service for the employer under the direction and control of a university employee and in exchange for payment. Under the judicial interpretation of the broad scope of Section 2(3), the source of funding and the nature of the research should be irrelevant to whether the graduate student is an employee. An employee is simply a "person who works for another in return for financial or other compensation." *Town & Country*, 516 U.S. at 91. When a graduate student works under the direction or control of a member of the university faculty "in return for financial or other compensation," the graduate student is an employee. This is true when the student teaches or does administrative work. It is equally true when the student works on research, including grant-funded projects, even when the work will result in the student being named as a co-author and when the student will use some aspects of that work in his or her own dissertation. The grant is paid to the university to enable the faculty to conduct

research, and the faculty principal investigators under the grant supervise graduate students conducting the research necessary to fulfill the mission of the university. If the work is required as a condition of receiving financial compensation, the graduate student is an employee. Any claims to the contrary should be resolved on a case-by-case basis rather than by a categorical determination.

This approach is consistent with numerous existing public and private university collective bargaining agreements, which cover graduate student research assistants without differentiating among them based on funding sources. Collective bargaining agreements at the Universities of Massachusetts, Washington, Connecticut, and Oregon, at the California State University system, Oregon State University, the SUNY Research Foundation, and New York University all include externally funded graduate research assistants.[10] Further, collective bargaining agreements for postdoctoral researchers—many of whom are externally funded—cover the entirety of the University of California system, as well as the University of Massachusetts, Amherst. What these collective bargaining agreements demonstrate is the broadly recognized centrality of graduate student research—regardless of funding source—to the successful fulfillment of the research mission of the university.

[10] http://www.geouaw.org/wp-content/uploads/2012/11/GEO-Contract-9-1-12-to-8-31-14.pdf (UMass); http://www.uaw4121.org/know-your-rights/contract/#article14 (UWash); http://www.uconngradunion.org/geu-uaw-collective-bargaining-agreement/ (UConn); http://www.calstate.edu/hr/employee-relations/bargaining-agreements/contracts/uaw/index.shtml (Cal State system); http://cge6069.org/wp-content/uploads/2015/11/CBA-2015-2016_FINAL.pdf (Oregon State U); http://cwaraunion.org/sites/default/files/collective-bargaining-agreement.pdf (SUNY Research Foundation); http://www.makingabetternyu.org/gsocuaw/wp-content/uploads/GSOCNYU_2015contract_searchable.pdf (NYU).

These examples above also prove that the source of funding has, in practice, been no bar to employee status. On the contrary, grant-funded research has been fully integrated into the regular work of the university and fully embedded in the university's administrative and employment structure. At NYU, in fact, the collective bargaining agreement covers all graduate student research assistants in the departments included in the bargaining unit, regardless of the sources of their funding. Although NYU and the Union may negotiate for terms of employment that may be specific to graduate research assistants, whether internally or externally funded, these are scope of bargaining issues under Section 8(d), not issues of Section 2(3) employee status.

## CONCLUSION

For the reasons above, the Board should overrule the test of employee status applied in *Brown University* and return to its well-reasoned *NYU* decision, which found collective bargaining by graduate assistants compatible with academic freedom.

Sincerely,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of February, 2016 a copy of the foregoing brief *Brief of Amicus Curiae American Association of University Professors* was served via email on the following:

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