

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK UNIVERSITY,
Employer

and

Case No. 02-RC-023481

GSOC/UAW,
Petitioner.

POLYTECHNIC INSTITUTE
OF NEW YORK UNIVERSITY,
Employer

and

Case No. 29-RC-012054

INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE,
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW),
Petitioner.

AMICUS CURIAE BRIEF
OF THE NATIONAL RIGHT TO WORK
LEGAL DEFENSE AND EDUCATION FOUNDATION

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INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense and Education Foundation (“Foundation”) is a non-profit, charitable organization that provides free legal assistance to individuals who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

Attorneys provided by the Foundation have represented numerous individuals before the National Labor Relations Board (“NLRB” or “Board”) and in the courts, including representation in such landmark cases as *Knox v. SEIU* ___ U.S. ___, No 10-1121, slip op. (June 21, 2012); *Davenport v. Washington Education Ass’n*, 551 U.S. 177 (2007); *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In hundreds of other cases throughout the country, the Foundation is aiding individuals who seek to limit their forced association with, and their financial payments to, unions.

The Foundation, which has a long-standing interest in protecting the rights of graduate students from forced unionism, filed an *amicus curiae* brief in *Brown University*, 342 NLRB 483 (2004), and earlier in this case, No. 02-RC-023481, *New York University and GSOC/UAW*. *Amicus* Foundation believes that anytime individuals are forced to join, be represented by or support a labor union, that compulsion impacts upon their constitutional rights. That

impingement is especially harmful to teaching assistants and other graduate students since compulsory unionism affects academic freedom. In light of the above, the Foundation submits this brief to highlight the adverse impact that certifying labor unions as exclusive bargaining agents of graduate students will have upon those students.

ARGUMENT

I. INTRODUCTION

The issue Petitioners seek to address before the Board is whether graduate students are statutory employees under *Brown*. Eight years following the Board's decision in *Brown*, the UAW attempts here to overturn *Brown*. The Board posed four questions for all *Amici* to answer.¹ The first question mimics the UAW's two petitions here, by asking whether the Board should overrule *Brown*. *Amicus* National Right to Work Legal Defense Foundation will address each question, but focus in particular on that first question.

The primary reason graduate students attend universities is to receive an education. Any monetary compensation they receive – whether in the form of stipends, financial aid, grants or hourly pay – is incidental and secondary to that primary educational purpose. For approximately

¹ (1) Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which 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 National Labor Relations Act, because they “have a primarily educational, not economic, relationship with their university”? 342 NLRB at 487.

(2) If the Board modifies or overrules *Brown University*, supra, should the Board continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, in part because they do not perform a service for the university? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974).

(3) If the Board were to conclude that graduate student assistants may be statutory employees, in what circumstances, if any, would a separate bargaining unit of graduate student assistants be appropriate under the Act?

(4) If the Board were to conclude that graduate student assistants may be statutory employees, what standard should the Board apply to determine (a) whether such assistants constitute temporary employees and (b) what the appropriate bargaining unit placement of assistants determined to be temporary employees should be?

50 years, the Board did not recognize teaching assistants as employees under the Act. *Cedars-Sinai Med. Ctr.*, 223 NLRB 251 (1976); *St. Clare's Hosp. & Health Ctr.*, 229 NLRB 1000 (1977). Not until the late 1990s, approximately 50 years after enactment of the National Labor Relations Act ("Act" or "NLRA"), did the Board "discover" that graduate students were "employees." Out of the blue, with no change to the law or the nature of a university, the Board reversed course. *Boston Med. Ctr. Corp.*, 330 NLRB 152 (1999); *New York Univ.*, 332 NLRB 1205 (2000) ("*NYU I*"). In changing course, the Board failed to recognize not only that a university is a unique employer, but it does not fit the model of an industrial factory. The Board also failed to give due consideration and proper weight to the fact that teaching assistants are students who only *incidentally* are "employees."

Four years later, in 2004, the Board decided *Brown*, which reversed its holding in *NYU I*, to recognize that graduate students are students, not employees. In overturning *NYU I*, the Board denied certification to the United Auto Workers ("UAW") as the exclusive bargaining agent of Brown University teaching assistants.

The Board's holding in *Brown* is a correct reading of the NLRA. Graduate students are not statutory employees. It would be a serious error for the Board to impose an industrial labor model on what is essentially a student-university relationship. Furthermore, the Board should deny certification to the UAW as matter of public policy. Classifying graduate students as "employees," interferes with their academic freedom, as well as their First Amendment rights of freedom of speech and association.

II. TEACHING ASSISTANTS AND OTHER GRADUATE STUDENTS ARE NOT EMPLOYEES.

The GSOC/UAW, in the New York University case here, seeks a unit of “all graduate student employees of New York University who are receiving stipends from the University.” Clearly, any community of interest claimed by the UAW is not based on the students’ status as statutory employees, but rather on their status as students. The language of the petition implicitly concedes that the graduate students primarily are students, not primarily statutory employees.

Graduate students, whether teaching assistants, research assistants or hourly workers mainly performing administrative tasks, are principally in college and university programs to receive an education, not to earn a living. The positions of “teaching assistant” and “research assistant” are part of the learning process that will enable many of those graduate students to better prepare themselves to become accredited, professional university and college professors, or to pursue research or other positions in colleges, industry or the government. As graduate students, however, their principal role is not that of employee. Furthermore, teaching assistants and research assistants, by the very nature of their jobs, hold short-term positions. While the job requirements of their positions may be intense, the primary reward for their efforts is not money. Indeed, any monetary remuneration pales compared to the intangible remuneration of academic credits, grades, training, and perhaps most importantly, practical experience in their field. It is highly unlikely that graduate students become teaching assistants primarily to earn a living. Consequently, they should be treated as the students they are and not as employees who labor unions wish to control.

Although the legislative history is silent on the issue, it is safe to assume that Congress

did not consider graduate students who receive money for teaching and research duties to be statutory employees. Indeed, that assumption is supported by the fact that Congress has accorded teaching assistants a special status by exempting them from paying social security taxes for money earned as teaching assistants. *See* 26 U.S.C. § 3121(b)(10)(A). The Board should recognize, as Congress already has, the unique status graduate students have.

Recognition that teaching assistants do not work at universities principally for monetary remuneration is consistent with the Board's holding in *Goodwill Industries*, 304 NLRB 767 (1991). There, the Board ruled that employees of Goodwill are not employees for purposes of the Act when the primary purpose of their work is rehabilitative rather than to earn a living.

In addition, even if, *arguendo*, the Board considers graduate students employees, it should treat them as short-term, temporary employees (Board Question 4). Because few, if any, are likely to work as teaching or research assistants for more than a brief period of time, it is likely that any union that represents them as their exclusive bargaining agent represents, first and foremost, its own institutional interests over that of the students'. As a practical matter, the students are not going to be members of the bargaining unit long enough to truly exercise any democratic control over the union. Excluding them as employees, as a policy matter, is consistent with Board precedent. *See Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127 (1971); *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992) (temporary employees not included in bargaining units). The Board's approach to temporary employees is a more appropriate model for graduate students than to treat them as being the same as long-term employees.

Lastly, the industrial model upon which the NLRA is based is an inappropriate model to impose on a university, as regards its compensated students. The Supreme Court limited the

Board's power to force university professors into labor unions because "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680-81 (1980). So also, the industrial model is not appropriate for the university-graduate student relationship.

One of the worst abuses of exclusive representation is the leveling down of the best in favor of the group. In the industrial model labor unions use in collective bargaining, employees are fungible, receiving the same wages adjusted for seniority. The result is that the most productive workers receive the same wages as those least productive. This has a particularly egregious impact on graduate students for both non-economic as well as economic reasons.

Non-economically, it is inappropriate to treat teaching assistants and other graduate students as employees, because some part of their "compensation" is typically in the form of academic credit, which is an intangible. Grading is associated with such credit. If monetary compensation for teaching assistants is treated as employee wages under the Act, it is a short and natural step for grades received as part of the academic credit to be treated as a form of compensation subject to collective bargaining. In that case, it is likely that bargaining over grades would become a mandatory subject of bargaining. It would be consistent with labor union philosophy to demand that all graduate students receive grades within a narrow range – or even the same grades – for credits received as teaching assistants. The negative impact this would have upon the academic community is inconceivable.

While the UAW may have Marxist dreams that students are "workers" (as opposed to students), who will be in the vanguard of an economic revolution when the workers of the world unite, the fact remains that graduate students *are* principally students who have little

commonality of interest with most employees. Imposing an employee-employer model upon students' education does not make them "workers."

If the NLRB assigns the NLRA's moniker "employee" to teaching assistants and other graduate students, it unnecessarily and, as discussed below, unfairly burdens students who wish to pursue their education without a labor union interfering with their academic and First Amendment freedoms.

III. AS A MATTER OF PUBLIC POLICY, THE BOARD SHOULD REFRAIN FROM TREATING GRADUATE STUDENTS AS EMPLOYEES BECAUSE OF THE ADVERSE IMPACT IT WILL HAVE UPON THE STUDENTS' ACADEMIC FREEDOM AND FIRST AMENDMENT RIGHTS.

Three hallmarks of a university are respect for academic freedom, and freedom of speech and association. Each of these freedoms will be negatively impacted by compulsory exclusive representation.

One aspect of academic freedom is the right to pursue research and to teach without state control. The Board's imposition of an exclusive bargaining agent upon a bargaining unit composed of students necessarily adversely impacts the academic freedom of teaching assistants and graduate students. For the reasons stated below, the Board should, as a matter of public policy, exercise its discretion and decline to force graduate students to be represented by an exclusive bargaining agent.

Academic freedom took root during the Middle Ages when universities gained some freedom from state control. The protections to scholars afforded by academic freedom expanded during the Enlightenment. By the 20th century, academic freedom was recognized in most Western countries, although governmental control of universities and infringements of academic

freedom were commonplace in totalitarian regimes such as Nazi Germany and the Soviet Union.

In the United States, academic freedom is generally respected, and the courts have accorded it special legal protections. The U.S. Supreme Court has held that academic freedom is a “special concern of the First Amendment.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Out of respect for academic freedom, the Court has urged judicial restraint when dealing with universities. *Board of Curators v. Horowitz*, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring); *see id.* at 90-92, (opinion of the Court). Just as the courts show deference and a reluctance to interfere in university settings when there is a risk of treading on academic freedom, so too should the Board show similar deference and restraint. Using state power to impose an exclusive bargaining agent on teaching assistants and other graduate students is an unwarranted intrusion into academia. As a matter of public policy and out of respect for academic freedom, the Board should refrain from such impositions.

In addition to the consideration the Board must give to academic freedom, it must also weigh the negative impact exclusive bargaining will have on students’ rights of free speech and free association. The imposition of exclusivity will impact their First Amendment rights in a manner that may well not withstand constitutional scrutiny. The NLRA’s “exclusive representation” regime is rooted in state action. Absent a governmental grant of monopoly bargaining power to a union as an exclusive bargaining agent, students are free to work out their own contracts with universities. It is only the power of the government that takes that liberty from teaching assistants and other graduate students. Moreover, compelled negotiation and enforcement of any agreement between a union and a university is administered by the NLRB. This governmental involvement is “state action,” to which the Constitution applies. *Railway*

Clerks v. Hanson, 351 U.S. 225, 232 & n.4 (1956). *Beck v. Commc'ns Workers*, 776 F.2d 1187, 1205-09 (1985) (2-1 decision), *aff'd en banc on other grounds*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988);² *Seay v. McDonnell-Douglas Corp.*, 427 F.2d 996, 1002-04 (9th Cir. 1970); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16-18 (1st Cir. 1971) (“the federal statute is the source of the power and authority by which any private rights are lost or sacrificed,” citing *Hanson*, 351 U.S. at 232, (*id.* at 16.)); *see Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1420 (D.C. Cir. 1997) (“it is not apparent why it is any less ‘state action’” under the NLRA than under the RLA), *criticizing Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983); *Wegscheid v. Local Union 2991, UAW*, 117 F.3d 986, 987-98 (7th Cir. 1997); *but see Price v. Int'l Union, UAW*, 927 F.2d 88, 91-92 (2d Cir. 1991); *Kolinske*, 712 F.2d at 474.

Because there is state action involved in the grant of exclusivity and the administration of relations between the employees, union and employer, the First Amendment rights of graduate students are implicated. *See Thomas v. Collins*, 323 U.S. 516, 532 (1945).

The imposition of a union as an exclusive collective bargaining agent alone implicates these First Amendment considerations. As the Supreme Court found in *Abood* :

An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied.

²The Supreme Court did not rule on the “state action” issue in *Beck*, 487 U.S. at 761.

431 U.S. at 222.

While the *Abood* Court found that in that instance the state had a sufficient countervailing interest that justified infringement on First Amendment rights, the government may not, as discussed below, have a sufficient interest that justifies infringement in this case. Furthermore, in addition to the impact that exclusive representation has on the interests of students, such “exclusivity” further opens the door to compulsory unionism under § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), which would further invade the students’ speech interests. *See generally, Communications Workers v. Beck*, 487 U.S. 735 (1988).

Once the Board mandates exclusive representation, compulsory union dues and fees will likely closely follow. The Supreme Court has held that requiring employees to pay *any* union dues or agency fees as a condition of employment is “a significant impingement on First Amendment rights.” *Ellis*, 466 U.S. at 455. The principle underlying the Supreme Court’s decisions in compelled speech cases is that, just as the First Amendment protects the right of freedom of speech and association, it also protects the right to refrain from compelled speech and association. *Keller v. State Bar*, 496 U.S. 1 (1990) (state cannot require payment of bar dues used for political and ideological purposes); *Abood*, 431 U.S. at 234-35 (state cannot require payment of agency fees for purposes other than collective bargaining, contract administration and grievance adjustment); *Wooley v. Maynard*, 430 U.S. 705, 713-15 (1977) (state cannot require citizens to have a state motto on automobile license plate); and *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (state cannot require salute to the flag).

The Supreme Court has found that “the agency shop itself impinges on the nonunion employees’ First Amendment interests.” *Hudson*, 475 U.S. at 309. Not only political and

ideological speech is impacted by compulsory unionism. The Court has made it clear that:

our cases have never suggested that expression about philosophical social, artistic, economic, literary, or ethical matters to take a nonexhaustive list of labels is not entitled to full First Amendment protection. Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. . . . Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective “political” can properly be attached to those beliefs the critical constitutional inquiry.

Abood, 431 U.S. at 231-32 (note omitted).

Since *Abood*, the courts have not limited the protections afforded by the First Amendment to the right to refrain from political and ideological speech. They have narrowly limited the types of compelled speech that can withstand constitutional scrutiny. The First Amendment does not protect only employees’ right to refrain from compelled political and ideological expenditures. As interpreted by the courts, neither can employees be compelled to pay for a host of other activities, including organizing, *Ellis*, 466 U.S. at 451-53; extra-unit litigation, *id.* at 453, *Lehnert*, 500 U.S. at 528; death benefits, *Ellis*, 466 U.S. at 455 n.15; charitable contributions, *Lehnert*, 500 U.S. at 524; and public relations, *id.* at 528-29 (Blackmun, J.); *accord id.* at 559 (Scalia, J., concurring).

Laws and regulations that compel speech and association are subject to a high standard of scrutiny. “[A] significant impairment of First Amendment rights must survive exacting scrutiny.” *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Recently, the Supreme Court made it clear that exacting scrutiny is required when compulsory unionism is imposed, *Knox v. SEIU* ___ U.S. ___, No. 10-1121, slip op. at 9 (June 21, 2012).

Therefore, the infringement on the First Amendment rights of graduate students must be subject to a high level of scrutiny. Because teaching assistants and graduate students are

protected by the First Amendment right to refrain from speech and association, a classic First Amendment analysis must apply. To withstand constitutional scrutiny, there must be a compelling state interest that justifies the infringement on the First Amendment right of non-association. *Abood*, 431 U.S. at 220-24; *Buckley v. Valeo*, 424 U.S. 1, 65 (1976); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958). Compelled speech can only be justified if the state has a compelling interest that justifies infringement on the First Amendment. *Abood*, 431 U.S. at 220-24. Despite the burden placed on non-union employees by agency fees, the *Abood* Court held that fees limited to bargaining costs could withstand constitutional scrutiny, because of the states' important interest in "labor peace." Although the Court found that such infringements justified in *Abood*, the case for such justification is measurably weaker in the context of teaching assistants and graduate students, who essentially are students whose primary remuneration is educational not economic.

The government bears the burden to show that it has a compelling interest that justifies the burden on graduate students' First Amendment rights. Such an infringement can only be justified when the record shows governmental interest. *DeGregory v. Attorney Gen.*, 383 U.S. 825, 829 (1966). The NLRB's own historical record of not treating graduate students as employees shows that they fall outside the industrial-labor model that government uses to justify exclusivity and compulsory unionism. The government may claim that its interests in this academic setting are identical to that which permits compelled speech for collective bargaining in industrial settings. Given the countervailing interests of academic freedom in a university setting and the limited economic interests involved in graduate students receiving compensation, no compelling interest justifies an infringement on the students' First Amendment rights.

IV. NOT ALL GRADUATE STUDENTS ARE ALIKE

Whether graduate students are statutory employees should not be an issue before the Board. The Board should affirm *Brown*. However, should the Board overturn *Brown*, it will face the conundrum of which graduate students fall into a unit. The one thing that all graduate students have in common is that they are students, but being a student does not make them an employee. Beyond their status as a student, each graduate student is different. What type of employment and compensation they might receive varies.

First, the Board must address the problem of graduate students who receive external grants (Board question # 2). No legal justification exists to corral into a bargaining unit students who receive external grants from the government, foundations or other third party sources into the same unit as graduate students whose income is derived from University sources. Under no conceivable theory can externally funded students properly be classified as statutory employees. Research assistant salaries generally are underwritten by independent third parties for specific research projects. Their rates of pay are usually set by the grantor, with whom a union cannot bargain. It would be harmful to both the students and the mission of the university to permit a union to use the those grants as bargaining chips in university negotiations over other students' rates of pay. Universities and graduate students typically receive foundation and corporation grants that are earmarked for the hiring of teaching assistants and other graduate students to perform specific duties. Forcing universities to bargain with labor unions over the wages and working conditions of graduate students has the potential to adversely affect the award of such grants. As discussed above, the typical behavior of labor unions is to bargain for equal salaries. Once the exclusive bargaining agent demands all "wages" either be raised to the same level as

those whose teaching and research is paid for by such grants or, alternatively and more likely, be leveled downward, foundation and corporation incentives to provide those grants diminishes. Furthermore, most grant money already has the economic stipend set as part of the grant, thus eliminating the union's purported purpose for representation

Regarding students who hold temporary university jobs (Board Question 4), they work on an hourly basis often doing administrative work. Clearly they are not statutory employees who share the same community of interest as student teaching assistants or students who receive federal grants. In fact, they may fall into in a different bargaining unit – such as a clerical employees' unit.

A separate unit of graduate students is never appropriate (Board Question 3). The situation that exists at New York University illustrates this. There, graduate students who are paid to teach currently are commingled with adjunct professors. The best scenario is that the students not be treated as statutory employees. However, if they are, as is the case at NYU, where graduate student teaching is *voluntary* and done for the income, placing the compensated teaching graduate students into a unit with adjunct professors appears to be the more appropriate unit than a unit that includes non-teaching but paid graduate students. If the students formed a separate unit, the only basis for their commonality would be their standing as students, not employees.

In addition to the distinctions between graduate students discussed above, many other problems not directly raised by the Board's questions make it difficult to create a bargaining unit composed of graduate students. For example, what happens when a graduate student is paid by a professor with university funds to perform a certain discrete task to aid the professor in his

research? Each such situation would involve unique circumstances, skills, and time-frames, none of which fits within the framework of “collective bargaining.” Another problem arises if some “bargaining unit” students receive non-need based grants from a university. A union could charge that the university was violating the contract by giving a bargaining unit employee “compensation” outside of the collective bargaining agreement.

If one adds up all of the exceptions that the Board would have to carve-out of a unit of graduate students – third-party funded students, teaching students already in another unit, clerical employees with different interests from teaching students, students working for one professor on a project, students who receive grants or scholarships – it is clear that even if the law permitted the Board to label graduate students as statutory employees, the Board should exercise its discretion and not do so because of all the problems it would create.

CONCLUSION

The Board’s reversal of 50 years of policy and practice in its *Boston Medical* and *NYU I* decisions, was not justified by any change in the law or the facts. In 2004, the Board wisely overturned those decisions in *Brown*. Graduate students and teaching assistants who wish to voluntarily join together to discuss their teaching duties and obligations are free to do so. However, students who do not wish to do so should not be forced to. Students should not be considered employees under the Act. If, *arguendo*, they are considered employees by the Board, they should be treated as temporary employees. Moreover, even if, *arguendo*, students can be considered employees under the Act, the Board should consider whether there is sufficient state interest to justify this interference with academic freedom and the freedom of speech and association, and the other inherent problems in creating a unit of graduate students. Finally, the

Board should consider whether, as a matter of public policy, forcing students to be represented by an exclusive bargaining agent serves the Act's purposes and the larger societal interests implicated by such an intrusion into academia. For the above-stated reasons, the Board should deny the UAW's petition, and not reverse its holding in *Brown*.

Respectfully submitted,

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Dated: July 23, 2012

CERTIFICATE OF SERVICE

This is to certify that on July 23, 2012, a copy of the *Amicus Curiae* Brief of the National Right to Work Legal Defense and Education Foundation in Cases 02-RC-023481 and 29-RC-012054, was filed electronically with the National Labor Relations Board, and copies were deposited in the U.S. mail with the proper postage affixed thereto to the parties below:

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