

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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NEW YORK UNIVERSITY, :
Employer, :
-and- :
GSOC/UAW, : Case No. 2-RC-23481
Petitioner :
: :
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REPLY BRIEF OF NEW YORK UNIVERSITY

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The multiple briefs submitted by Petitioner¹ and its amici pay little attention to the facts of this case. Instead, they offer a familiar parade of arguments against the Board's decision in *Brown University*, 342 NLRB 483 (2004) ("*Brown*"), repeating the various contentions made by the dissent in that case as if frequent repetition somehow would be sufficient to justify a different result. New York University ("NYU") responds briefly to re-focus the Board on the record of this case. That record provides no basis for reconsideration of *Brown*. It also demonstrates that the Acting Regional Director erroneously found that, if *Brown* is overruled: (i) NYU's Research Assistants ("RAs") are employees; and (ii) NYU's graduate students teaching non-credit courses, RAs, and hourly-paid graduate student workers with certain job titles belong in a single bargaining unit based solely on the fact that they are all students.

ARGUMENT

1. *Brown's* Application Depends on the Structure of a School's Graduate Education Programs

Petitioner and its amici misinterpret *Brown* and misunderstand its application to the facts of this case. *Brown* did not hold that there is a universal "inconsistency between student status and employee status" as Petitioner suggests (Pet. Br. at 43).² Rather, *Brown* held that at a school where graduate students have research and teaching responsibilities as "part and parcel" of their

¹ Surprisingly, Petitioner now asserts it is the same entity as Petitioner in the *Polytechnic Institute* case, *i.e.*, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW). (Pet. Br. at 2, Fn. 2) This is contrary to how it identified itself in its petition and in the course of the hearing where counsel for Petitioner adamantly stated that the "petitioning union is GSOC/UAW. The parent organization is International Union, UAW." (Tr. 12) Indeed, Petitioner's representative testified that petitioner's name, "GSOC / UAW", does not refer to the International Union UAW. (Tr. 150) In light of this new position and in the event an election is ordered, Petitioner's full name should appear on any potential ballots. See NLRB Case Handling Manual Section 1198; see also *Polytechnic Institute of New York University*, 29-RC-12054 at fn. 1 (Aug. 30, 2011). Moreover, the changing identity of Petitioner calls into question its showing of interest.

² Transcript references are indicated as "Tr." followed by the page number. Employer Exhibits are referred to herein as "EX". NYU's Brief on Review is cited as "NYU Br. at" followed by the page number. Petitioner's Brief on Review is cited as "Pet. Br. at" followed by the page number. Briefs submitted by the amici are cited as "[Submitting Party's Name] Br. at" followed by the page number. The Acting Regional Director's decision is cited as "Decision at" followed by the page number

academic programs, students cannot be treated as employees under the Act. Where a school structures its graduate programs differently than *Brown*, so that teaching or research appointments have a different relationship to students' academic requirements, *Brown* does not require the same result. This case illustrates the proper understanding of *Brown* in both respects.

Because NYU has restructured its doctoral programs to eliminate any requirement to teach, and instead separately compensates students who choose to teach on a voluntary basis as adjunct faculty, teaching at NYU – unlike *Brown* – is not a fundamental component of the doctoral programs. Graduate students who take on adjunct faculty positions, therefore, can be viewed as employees consistent with *Brown*. At the same time, graduate students who are supported as research assistants are doing the very same research required for their degrees. Their so-called “work” is inseparable from what they do as students, and *Brown*, therefore, properly holds that they are not statutory employees.

The fact that NYU has changed the role of teaching for its graduate students does not affect the continuing validity of the *Brown* decision with respect to Brown University itself and many other schools that still treat teaching as a fundamental and required aspect of doctoral programs, as demonstrated in the amicus briefs submitted by Brown and the American Council on Education together with other leading higher education associations. The choice of a particular school as to how teaching by graduate students will be treated in structuring doctoral educational programs is similar to a school's decision as to how to structure the faculty's role in governance of the institution. A school can choose to give faculty substantial authority in academic and other decision-making, in which case faculty are treated as managers – and not employees under the NLRA.³ Another school can adopt a more centralized model of

³ See *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); *Lemoyne-Owen College*, 345 NLRB 1123 (2005)

governance, in which case faculty will be viewed as employees.⁴ The question of employee status in both situations depends directly on the decisions made by a school as to how best to carry out its academic mission.

Any reconsideration of *Brown* needs to take account of these differences, and focus on the facts presented in this case.

2. *Brown* Correctly Considered the Policies and Purposes of the Act

Petitioner and its amici do little more than repeat the arguments made by the dissent in *Brown* in their contention that the Board majority incorrectly considered the policies and purposes of the Act in holding that graduate assistants in that case were not statutory employees because their relationship with the university was “primarily an educational one, rather than an economic one.” *Brown* at 489. They similarly offer a strained view of the Board’s prior case law regarding graduate students that is lifted straight from the dissent in *Brown*. There is no need to respond at length to these arguments that were fully considered and firmly rejected in *Brown*.

It bears emphasis, however, that the Supreme Court and the Board have dismissed the contention made by Petitioner and its amici that coverage under the Act can be determined solely by a mechanical application of the common law definition of “employee”. The Supreme Court made this clear in *Allied Chem. & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), in considering whether retired employees were “employees” within the meaning of Section 2(3). The Court explained that “in doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) with meaning”. *Id.* at 68. The Board has

⁴ See *University of Great Falls*, 325 NLRB 83 (1997) (reversed on other grounds by *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (2002)); *St. Thomas University Inc.*, 298 NLRB 280 (1990); *Bradford College*, 261 NLRB 565 (1982).

similarly recognized “the principle that employee status must be determined against the background of the policies and purposes of the Act.” *WBAI Pacifica Found.*, 328 NLRB 1273, 1275 (1999) (emphasis added). As the Board said in *WBAI*, the Act’s “vision of a fundamentally economic relationship between employers and employees is inescapable.” *Id.*

None of the Supreme Court or Board decisions cited by Petitioner and its amici contradict the principle that the Act applies only in the context of a fundamentally economic relationship, nor do they support the proposition that the common law agency test can be applied in determining employee status under the Act in the absence of such a relationship. *See, e.g. NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995) (employee does not lose “employee” status as a result of also being paid by a union); *Nationwide Mutual Insurance Company, et al. v. Darden*, 503 U.S. 318 (1992) (interpreting the Employment Retirement Income Security Act to determine whether an insurance agent with a contract to sell insurance for a company fell within its definition of an employee or was an independent contractor); *Sure-Tan Inc. v. NLRB*, 467 U.S. 883 (1984) (analyzing whether employees who are illegal aliens should be covered under the Act.); *NLRB v. United Insurance Company of America*, 390 U.S. 254 (1968) (applying “general agency principles in distinguish between employees and independent contractors”); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (examining the employee status of strikers); *Seattle Opera Association*, 331 NLRB 1072 (2000) (analyzing the relationship between auxiliary choristers compensated per performance and an opera company); *Sunland Construction Co.*, 309 NLRB 1224 (1992) (analyzing whether individuals lose employee status as a result of obtaining positions to organize the worksite).

Petitioner and its amici place great weight on *Boston Medical Ctr.*, 330 NLRB 152 (1999) arguing that it is inconsistent with the result in *Brown*. But there are numerous significant

differences between the house staff held to be employees in *Boston Medical* and the graduate assistants at issue in *Brown*, as well as the RAs at NYU. The Board's decision in *Boston Medical* was premised on its finding that the "essential elements of the house staff's relationship with the Hospital obviously define an employer-employee relationship." 330 NLRB 152 at 160. In contrast, the essential elements of the RAs' relationship with NYU are entirely academic. Not only are they performing research required for their degrees, but they register for classes, receive grades for their research and have all the attributes of students in a traditional academic setting. Compare 330 NLRB at 160. Furthermore, contrary to Petitioner's incorrect assertion (Pet. Br. at 14), they clearly are unlike interns and residents who have received their advanced academic degrees and are pursuing further training after graduation and, therefore, meet the Act's definition of "professional employees"; RAs, who are enrolled in academic programs to receive their degrees, do not come within that definition.

Reference by Petitioner's amici to the interpretation of "employee" under other statutes similarly fails to support such an absolutist approach.⁵ To the contrary, well-established case law under the closely analogous provisions of the Fair Labor Standards Act ("FLSA") provides strong support for the "primary relationship" test that was adopted in *Brown*.

Like the NLRA, the FLSA broadly defines "employee" as "an individual employed by an employer." 29 U.S.C. § 203(e). Nonetheless, in determining whether students or trainees are employees under that statute, courts developed a "primary benefit" test similar to the analysis in *Brown*. Courts have found that the dispositive question under the FLSA is whether the student/trainee or the putative employer is the primary beneficiary of the relationship. The most recent such case, *Solis v. Laurelbrook Sanitarium & School Inc.*, 642 F.3d 518 (6th Cir. 2011),

⁵ See AFL-CIO Br. at 3-6; UNITE-HERE Br. at 9-12.

exemplifies the approach. The *Solis* court held “that the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship.” *Id.* at 529. It applied this analysis to affirm a ruling that students who worked caring for patients at a sanitarium in connection with religious instruction provided by a Seventh Day Adventist school were not employees for purposes of the FLSA, even though they engaged in “practical” work including kitchen duty, housekeeping, and work that generated revenue for the sanitarium. *Id.* at 530-31.

The *Solis* court gave considerable weight to the “intangible benefits” students received through their work, including: lessons about responsibility, the dignity of manual labor, the importance of working hard and seeing a task through to completion, leadership, sensitivity and respect. *Id.* at 531. The court found that these intangible benefits were significant and cited other cases in which such amorphous benefits had “tip[ped] the scale” of primary benefit against “employment” even where schools received tangible benefits from the students’ activities. *Id.* at 531-32 (citing cases). *Solis* cites numerous courts that have expressly or implicitly followed this “primary benefit” approach. *Id.* at 528

Nor do the Title VII cases cited by Petitioner and its amici support a strict application of the common law test for determining whether graduate students are employees under that statute. The only circuit court decision on the issue, *Cuddeback v. Florida Board of Education*, 381 F.3d 1230 (11th Cir. 2004), weighed multiple factors in applying the “economic realities test” of employee status. Thus, the Court found that a number of factors weighed in favor of treating plaintiff as a student, including the fact that much of her work was done for the purpose of satisfying the lab-work, publication and dissertation requirements of her graduate program. The Court found that these factors were outweighed by other facts demonstrating that the university

treated her as an employee. Most significantly, plaintiff was considered an employee under applicable state law and covered under a collective bargaining agreement that governed her employment relationship with the state university, and provided for a stipend and benefits for her work and for sick leave and other employee benefits.⁶ *Cuddeback*, 381 F.3d at 1234. The significance of *Cuddeback*, however, is not the result of the court’s weighing of the particular facts in that case, but the recognition that determining the employee status of students requires such an overall balancing for the purposes of Title VII.⁷

3. The Policy Considerations Relied On By the Board in *Brown* Remain Valid

Petitioner dismisses as “speculation” and “unfounded” the concerns expressed by the Board in *Brown* that collective bargaining would impair academic freedom and interfere with the student-faculty relationship. There simply is no basis in the record, however, for its claim that “the evidence is uncontroverted that collective bargaining does not impair academic freedom and does not interfere with student-faculty relationships.” (Pet. Br. at 20) (emphasis in original)

NYU has demonstrated in its Brief on Review that three separate University committees concluded that NYU should withdraw recognition from the UAW as representative of the University’s graduate assistants, based on the unanimous conclusion that the UAW’s actions

⁶ *Ivan v. Kent State University*, 863 F. Supp. 581, 585 (N.D. Ohio 1994), *aff’d* 92 F.3d 1185 (6th Cir. 1999), similarly analyzed whether a graduate student assistant was covered by Title VII by use of the “economic realities test” that “allows a case-by-case determination of employment status based on the totality of circumstances of employment.”

⁷ The amicus brief of the AFL-CIO points to an example in the draft Reinstatement of Employment Law in support of its position that graduate student assistants should be treated as employees under the NLRA. (See AFL-CIO Brief at 3-6) But that example is based directly on the *Cuddeback* case, and thus does not address the much different facts presented in *Brown*, or by the research assistants at NYU. Restatement (Third) of Employment law, American Law Institute, p. 39 (Tentative Draft – 2009). In addition, the comment at p. 38 that the NLRB has vacillated on the employee status of graduate students ignores the Board’s consistent treatment of research assistants as not employees under the Act for almost 40 years under *Leland Stanford* and *NYU I*.

presented a clear and present threat to NYU's academic autonomy. This was true notwithstanding language in the Graduate Assistant CBA that NYU genuinely believed at the outset of the relationship provided the best possible way to protect its right to make academic decisions. Petitioner's easy assertion that "the experience of NYU was that the collective bargaining process does not impair the University's academic freedom" (Pet. Br. at 22) rings especially hollow in light of the UAW's repeated attempts to do just that. Furthermore, there is no guarantee – or even likelihood – that Petitioner would readily agree in a future negotiation to the same contractual language that led arbitrators to deny its repeated grievances over core academic decisions.

In a similar fashion, amici American Federation of Labor and Congress of Industrial Organizations, The American Federation of Teachers, AFL-CIO, The American Association of University Professors, and The National Education Association (collectively "AFL-CIO") state that in their view it is "virtually certain... that Section 8(d) would be construed to 'limit bargaining 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.'" (AFL-CIO Br. at 7)⁸ Notwithstanding their confidence in how a future Board would rule on these issues, they fail to explain how collective bargaining would even be possible as to RAs when their supposed work is synonymous with their "courses, curricula, and research programs." (See NYU Br. 44-45)

⁸ The suggestion by the AFL-CIO that NYU has itself to blame for permitting the UAW to pursue grievances over academic decisions is absurd. (AFL-CIO Br. at 8) The AFL-CIO inexplicably cites to *Int'l Bhd. of Fireman & Oilers Local 288*, 302 NLRB 1008 (1991) for the astounding proposition that NYU should have filed a breach of contract grievance or bad faith bargaining charge against the Union for infringing on its right to make academic decisions. Apart from the upside-down notion that NYU had the burden to stop the UAW from filing such grievances, that case stands only for the rather mundane principle that a union must furnish requested information that is relevant to the Employer's processing of a grievance.

Petitioner also relies, as expected, on the incomplete and inconclusive study by Dr. Paula Voos. (Pet. Br. at 23-24) There is no need to add to the discussion in NYU’s Brief on Review as to why that study provides no support for Petitioner’s claims. Indeed, Dr. Adrienne Eaton, the co-author of the study, confirmed in her July 25, 2012 letter to the Board that the study is still not published but is “currently under a revise and resubmit” letter from a prospective publisher.⁹

4. Research Assistants Are Not “Employees” Under the Act

Petitioner pays little attention to the actual evidence about NYU’s research assistants. Instead, it simply relies on the conclusion of the Acting Regional Director that NYU’s current research assistants “have an economic relationship with a university involving the performance of services in exchange for pay” (Pet. Br. at 28), but points to no new or different facts warranting that conclusion since the opposite holding in *New York University*, 332 NLRB 1205 (2000) (“*NYU I*”) – and there are none.

Indeed, the Acting Regional Director expressly found that there was *no change* since the decision in *NYU I* with respect to the same list of facts regarding research that Petitioner now relies on in arguing that RAs perform services for NYU. (See Pet. Br. at 27; Decision at 20-21) Those same facts were found irrelevant to the question of whether research assistants performed services for the university in *NYU I*. 332 NLRB at 1220-21. Petitioner completely fails to address the most fundamental fact that research assistants are performing the research required for their degrees and for which they receive academic credit – just as in *Leland Stanford Junior University*, 214 NLRB 621 (1974)(“*Leland Stanford*”) and *NYU I*. It ignores the testimony of its

⁹ NYU objects to the Board’s consideration of Dr. Eaton’s letter which improperly seeks to supplement the evidence regarding the study offered at the hearing. NYU also objects to any effort by Drs. Eaton or Voos to submit a revised version of the study to the Board if and when it is published, as Dr. Eaton suggests she plans to do in her letter.

own witness, John Freudenthal, that there is absolutely no distinction between what he does as a research assistant and the work he does for academic credit. It similarly ignores evidence that the role and responsibility of research assistants at NYU in the sciences has not changed from 1999 and that other research assistants are indistinguishable from those in the sciences -- as the Acting Regional Director found. (Decision at 20, 27) Simply putting a new label on the same academic responsibilities of research assistants does not change them into employees.¹⁰

In the same way, Petitioner relies on the conclusory statement by the Acting Regional Director that research assistants “are performing services for pay” (Pet. Br. at 29) without attempting to explain how the same financial aid provided to all doctoral students can be considered “pay” for the research assistants. It defies common sense to consider the stipend and tuition remission provided to research assistants as compensation for service, when all students receive the same amounts whether they are appointed as research assistants or supported on a fellowship. Illustrating this point are doctoral students in computer science, who are supported in different semesters on research grants and fellowships with no difference in their responsibilities. (Tr. 531-32) As in *Leland Stanford*, the payments to NYU’s research assistants are not wages but “are in the nature of stipends or grants to permit them to pursue their advanced degrees and are not based on the skill or functions of the particular individual or the nature of the research performed.” 214 NLRB at 621-22. Similarly, the Regional Director in *NYU I* found that the research performed by RAs in the science departments and Sackler Institute GAs “is the same research they would perform as part of their studies in order to complete their dissertation, regardless of whether they received funding. The funding for the Sackler GAs and the science

¹⁰ *Research Foundation of the State University of New York Office of Sponsored Programs*, 350 NLRB 197 (2007), is not relevant to the issue presented here of graduate students appointed as RAs who are performing dissertation research at their university. As stated by the Board in that case, “the Employer is not a university or college and does not confer degrees or admit students” and it is “not an academic institution.” 350 NLRB at 198. Accordingly the board found that there was not an educational relationship between the individuals and the employer. *Id.*

research assistants, therefore, is similar to a scholarship.” *NYU I*, 332 NLRB at 1220. The same is true today.

Other arguments by Petitioner and its amici regarding RAs are similarly without merit:

i. Tax Treatment Does Not Support Treating RAs as Employees

Contrary to the argument by amici UNITE HERE and Graduate Employees & Students Organization (UNITE HERE Br. at 12-13) the tax treatment of stipends and tuition remission does not support viewing these amounts as compensation for services instead of financial aid. To begin with, the tax treatment has not changed since *NYU I*. (Tr. 323, 844) The stipends that NYU provides to its graduate students are treated as taxable income under the Internal Revenue Code, regardless of whether students are being funded through an external grant or a fellowship. *See* 26 CFR § 1.117-2. The only issue, which is determined by reference to the Internal Revenue Code, is what amounts must be withheld by NYU and what amounts the students are independently responsible for paying taxes on. Tuition remission provided to research assistants, like tuition remission provided to students on fellowships, is not subject to income tax under IRS guidelines. *See* 26 CFR § 1.117-1(a). In comparison, tuition remission provided to university employees is subject to taxation. Internal Revenue Code § 127. *Finally – and most significantly – stipends and tuition remission provided to research assistants are not treated as wages under the tax law.* These amounts are not subject to FICA (social security) tax, which is normally required to be withheld from all “wages . . . received . . . with respect to employment.” *See* Internal Revenue Code §§ 3101, 3121(b)(10).

ii. RAs Are Not Equivalent to Apprentice Employees

Petitioner’s argument that RAs are equivalent to apprentices relies on cases distinguished or deemed not relevant in *Brown*. (*See* Pet. Br. at 15, *citing*, *Newport News Shipbuilding & Dry*

Dock Co., 57 NLRB 1053 (1944); *Chinatown Planning Council, Inc.*, 290 NLRB 1091 (1988); *General Motors Corp.*, 133 NLRB 1063 (1961)) These cases involve apprentices who receive on-the-job training performing the same work in the same workplace as regular employees, with the goal of being promoted to “journeyman” or a similar senior position, as soon as they gain the necessary technical competence. In contrast to apprentices, RAs are working on their own educational programs within the setting of a large educational institution and are almost always seeking employment after graduation with outside employers, whether in the private sector or academia. There is no expectation of future employment at the same school where they are studying.

Moreover, contrary to Petitioner’s assertions, even in apprenticeship cases, the Board examines whether the relationship is predominantly educational or economic, and has found apprentices not to be employees under the Act where the relationship was predominantly educational. *See Towne Chevrolet*, 230 NLRB 479 (1977) (student working for a company as part of a vocational-training program has more of an educational rather than an employment relationship with the employer); *Firmat Mfg. Corp.*, 255 NLRB 1213 (1981) (student working pursuant to his high school’s cooperative education apprenticeship program was found to have an educational rather than employment relationship with the employer due to the educational focus of the position).

iii. The Experience at Public Universities Does Not Support Treating RAs as Employees

Petitioner again relies on the dissenting opinion in *Brown* in arguing that the experience of graduate students at public universities supports treating graduate assistants as employees under the Act. (Pet. Br. at 24-26) The majority in *Brown* correctly explained why this public sector experience is not relevant. 342 NLRB at 493. But even if the Board could properly look

to the public sector for guidance, it would not support treating RAs as employees. Many states that allow public sector bargaining by graduate students at public universities *exclude* RAs from bargaining either entirely or where (as here) research assistants are performing research that is primarily related to their education.

In Michigan, for example, state law explicitly excludes “individual[s] serving as a graduate student research assistant or in an equivalent position” from participating in collective bargaining. *See* Michigan Consolidated Laws § 423.201(1)(e)(iii) (2012). A similar exclusion was made by state administrative agencies in Illinois and California. *See Graduate Employees Org. v. Illinois Educ. Labor Rel. Bd.*, 315 Ill. App. 3d 278, 285 (1st Dist. 2000) (holding that the proper test is a “significant connection test,” whose proper application “will exclude from organizing those graduate students whose work is so related to their academic roles that collective bargaining would be detrimental to the educational process.”); *In re Board of Trustees of the University of Illinois Chicago & Graduate Employees’ Organization GEO Local 6297, IFT-AFT, AFL-CIO*, Case No. 2004-RC-0012-C (August 27, 2004); *In re Board of Trustees of the University of Illinois at Urbana-Champaign & Graduate Employees-Organization, IFT/AFT, AFL-CIO*, Case No. 96-RC-0013-S (Nov. 1, 2002); and Cal. Gov. Code § 3562(e); *Association of Graduate Student Employees v. Regents of the University of California*, Case No. SF-Ce-17-9-H, PERB Dec. No. 730-H at 48 (April 26, 1989)(concluding research assistants were not employees under California’s Higher Education Employer-Employee Relations Act and that the educational objectives of Graduate Student Researchers are not subordinate to the services they provide to the university).

Similarly, in Iowa, the Public Employment Relations Board excluded “Research Assistants ... whose appointments are (a) primarily a means of financial aid which do not require

the individuals to provide services to the University, or (b) which are primarily intended as learning experiences which contribute to the students' progress toward their graduate or professional program of study or (c) for which the students receive academic credit.” *University of Iowa / State Board of Regents v. United Electrical, Radio & Machine Workers of America, Local 896 (COGS)*, Case No. 5463, (May 6, 1996).¹¹

iv. The Source of Funds For RA's Is Not Significant

Petitioner and its amici mistakenly focus on the external source of funding for research assistants as a significant factor (*see, e.g.*, Pet. Br. at 30; AFL-CIO Br. at 10-11), but the Board's decision in *Leland Stanford* was based on the nature of the research assistants' responsibilities, rather than the source of their funding. Indeed, the Board noted in *Leland Stanford* that an RA could have support from a combination of sources including contracts or grants from the government or a third party or endowment income or other money used to fund research appointments. 214 NLRB at 622. Thus, the concerns expressed in these briefs over the hypothetical consequences of a decision that excludes RAs because they are supported by external funds are completely misplaced.

5. The Acting Regional Director Erroneously Included Student Adjuncts, RAs and Certain Hourly-Paid Student Workers in a Single Bargaining Unit

Echoing the decision of the Acting Regional Director, Petitioner argues that graduate assistants share a community of interest “by virtue of their status of students.” (Pet. Br. at 32) It is indeed ironic that Petitioner relies entirely on student status in defining a unit for bargaining over terms and conditions of *employment*, while at the same time maintaining that student status is irrelevant in determining whether graduate assistants are statutory “*employees*”. By focusing

¹¹ The lengthy amicus brief filed by the union certified to represent graduate students at the University of Iowa never mentions that the unit it represents under that state's law expressly excludes research assistants under a rationale similar to that articulated in *Brown*. (*See* United Electrical, Radio and Machine Workers of America (UE) and UE Local 896/Campaign to Organize Graduate Students (COGS) Brief)

exclusively on their identity as students, moreover, neither Petitioner nor the Acting Regional Director discusses the evidence demonstrating that NYU graduate student adjuncts have an overwhelming employment-related community of interest with non-student adjuncts, and that there is no community of interest among the student adjuncts, RAs and hourly-paid student workers included by the Regional Director in a single bargaining unit.

Instead, Petitioner says that the Acting Regional Director was trying to “recreate” the graduate assistant bargaining unit that it represented from 2001-2005 “as nearly as possible.” (Pet. Br. at 36-37) As NYU has explained, however, the facts and circumstances have changed significantly since that bargaining unit ended seven years ago, and it cannot be “recreated” as if nothing had changed. Indeed, Petitioner implicitly acknowledges that the Regional Director erroneously concluded that only graduate students who teach non-credit courses should be included in the bargaining unit, in a misguided effort to reconstruct that defunct bargaining unit. It now contends that the Board should instead include “all graduate students who teach in the bargaining unit” (Pet. Br. at 37) – effectively abandoning its amended petition which was limited to graduate students receiving stipends, and which also proved to be an unworkable distinction.

In seeking to sweep all graduate student adjuncts into the proposed unit, however, Petitioner fails to explain how the Board can sever all graduate student adjuncts from the adjunct faculty bargaining unit, when graduate students have been an integral part of that bargaining unit since its inception, and the adjunct faculty CBA is applied equally to students and non-students in all respects.¹² Petitioner also fails to discuss the evidence demonstrating an overwhelming community of interest among student and non-student adjuncts based on the terms and

¹² As the adjunct faculty bargaining unit is described functionally (*see* EX 43 at 1) and student adjuncts clearly perform the described work, they should be included in the unit unless Petitioner can demonstrate that the nature and structure of the student adjunct’s work is so dissimilar from those of other adjuncts as to warrant exclusion. *See John P. Scripps Newspaper Corp.*, 329 NLRB 854 (1999). Petitioner can make no such showing.

conditions of their employment. It relies only on the Regional Director's clearly erroneous findings that student adjuncts differ from non-student adjuncts based on the nature of their duties and the reasons for their selection (*See* Pet. Br. at 35-36; NYU Br. at 49-50).

Furthermore, Petitioner ignores the cases holding that the Board applies a traditional community of interest analysis in determining whether student employees should be included in the same unit with non-students. *See Boston Medical Center*, 330 NLRB 152 (1999); *University of West Los Angeles*, 321 NLRB 61 (1996); NYU Br. at 55-57.¹³ Instead, Petitioner relies largely on the Board's decision in *Adelphi University*, 195 NLRB 639 (1972) as establishing that graduate student assistants do not belong in the same unit as faculty. To the extent that case involved an appropriate bargaining unit, however, the Board looked to community of interest factors related to the different terms and conditions of employment between students and faculty members, and not simply to student status. Significantly, while Petitioner analogizes graduate student assistants to apprentices, it ignores the holdings in the very cases that it cites which include apprentices in the same bargaining unit as regular employees. (*See* Pet. Br. at 15)

Petitioner also fails to provide any basis for including graduate student adjuncts, RAs, and certain hourly paid student workers in the same bargaining unit other than the fact they are all students. It completely ignores the disparities in their duties, compensation and other terms and conditions of employment. (*See* NYU Br. at 66-71)

Indeed, Petitioner says nothing at all about the hourly-paid student workers whom the Acting Regional Director included in bargaining unit, except for the suggestion that they perform functions similar to those that had been performed by Graduate Assistants ("GAs"), before the

¹³ Significantly, the amicus brief of AFL-CIO agrees that the Board should apply its ordinary community of interest test in determining a bargaining unit for graduate students considered to be employees. (AFL-CIO Br. 12-13)

GA position was eliminated. (Pet. Br. at 8-9) But there is no evidence in the record as to the duties of GAs in any specific job title; rather, the undisputed evidence was that it was not possible to determine whether specific hourly-paid jobs corresponded to previous GA positions. (NYU Br. at 63-64) There is no basis on the record to find that the hourly-paid student workers in the specific titles identified by the Acting Regional Director have a community of interest with student adjuncts and RAs – or that they can be differentiated from the rest of the approximately 1,560 graduate students in such hourly-paid jobs throughout the university.

6. NYU's Hourly-Paid Student Workers Should Be Excluded as Temporary Workers

Petitioner argues that appointment for an academic term is sufficient to include graduate assistants in a bargaining unit, because “their jobs as TAs, RAs and GAs are related to their professional development and their long-term careers so that they have an ongoing interest in their conditions of employment.” (Pet. Br. at 42) That argument has no relevance to the hourly-paid student workers included in the bargaining unit simply because they have the job title “Research Assistant” or a title that indicates that they are providing assistance to a specific faculty member. There is no evidence that the students in these hourly-paid positions are performing work “related to their professional development and their long-term careers;” to the contrary, as the Acting Regional director found, these positions involve a low level of research that is much different from that done by RAs. (Decision at 18-19) Petitioner fails to discuss the hourly-paid positions at all except by oblique reference to “GAs”. But as discussed above, students in these hourly-paid positions cannot be equated to former GAs.

The Board’s determination as to which employees are eligible to participate in an election under the Act is intended “to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of

employment offered by the employer.” *Trump Taj Mahal Assocs*, 306 NLRB 294, 296 (1992).

Accordingly,

It is established Board policy that a temporary employee is ineligible to be included in the bargaining unit.... The critical inquiry on this date is whether the “temporary” employee’s tenure of employment remains uncertain. . . . [The] “date certain” eligibility test for temporary employees . . . does not require a party contesting an employee’s eligibility to prove that the employee’s tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.

St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992), *citing Pen Mar Packaging Corp.*, 261 NLRB 874 (1982).

Consistent with this established framework and contrary to the Petitioner’s assertion, the Board has frequently found that temporary or casual employees with sufficiently finite termination dates – like the hourly-paid student workers – do not have a sufficient interest in the outcome of collective bargaining to participate in the process. For example, in *Goddard College*, 216 NLRB 457 (1975), the Board held that that visiting faculty members hired for a definite term of one semester or year were temporary employees. Even though visiting faculty members occasionally continued their employment beyond a year, and up to 10 per cent had been offered permanent positions, the Board excluded all visiting faculty from the bargaining unit. As the hourly-paid student workers are employed for a set duration (typically limited to one semester or year) and have no expectancy of continued employment, they similarly should be excluded as temporary employees. *See also Trustees of Stevens Institute of Technology*, 222 NLRB 16 (1976) (faculty member with a one-year contract is a temporary employee, notwithstanding being offered another temporary appointment); *American Federation of State, County &*

Municipal Employees, AFL-CIO, 224 NLRB 1057, 1058 (1976) (employee with a ninety-day contract which could be extended for an additional ninety-days by the employer held to be a temporary employee).

Petitioner erroneously states that “the Board has long recognized that employees hired for a limited period of time with a defined endpoint have the right to organize.” (Pet. Br. at 39) None of the cases cited in its brief actually support this proposition. Similar to the employees in *Kansas City Repertory Theater Inc.*, 356 NLRB No. 28 (2010), all the employees in these cases had a reasonable expectation of continuing or repeated employment in the future. For example, *Berlitz Sch. Of Languages*, 231 NLRB 766 (1977), involved on-call language teachers. The frequency with which the teachers were assigned depended on the demand for the language they taught and their availability. These teachers, however, remained on the school’s on call list for years and expected that the school would continue to give them assignments as long they were interested. Similarly in *Avis Rent-a-Car Sys., Inc.*, 173 NLB 1366 (1968), there was no fixed endpoint to the assignments of auto-shuttlers who transported cars between the company’s various rental facilities in Philadelphia. They would continuously show up and whenever work was available they would be assigned.¹⁴ These cases are completely unlike the hourly-paid student workers at NYU who have assignments for one or two semesters, with no expectation of future employment in these positions.

Finally, Petitioner does not distinguish the hourly-paid workers from the graders and tutors who were excluded from the bargaining unit in *NYU I* because they likewise had no substantial expectation of continued employment in their jobs. *NYU I*, 332 NLRB at 1221.

¹⁴ The same is true of the “temporary” employees in *Pulitzer Publishing Co.*, 101 NLRB 1005 (1952); *Hondo Drilling Co.*, 164 NLRB 416 (1967); *Daniel Construction Co.*, 133 NLRB 264 (1961).

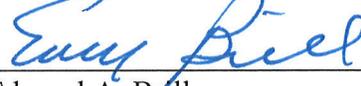
CONCLUSION

The Petition should be dismissed in its entirety.

New York, New York
August 6, 2012

Respectfully Submitted,

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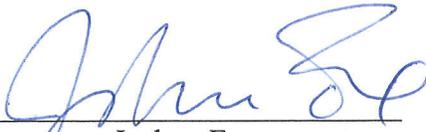
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