

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

**THE TRUSTEES OF COLUMBIA
UNIVERSITY IN THE CITY
OF NEW YORK,**

Employer

and

Case 02-RC-143012

**GRADUATE WORKERS OF
COLUMBIA – GWC, UAW**

Petitioner

**BRIEF OF *AMICI CURIAE* BROWN UNIVERSITY, CORNELL UNIVERSITY,
DARTMOUTH COLLEGE, HARVARD UNIVERSITY, MASSACHUSETTS
INSTITUTE OF TECHNOLOGY, UNIVERSITY OF PENNSYLVANIA, PRINCETON
UNIVERSITY, STANFORD UNIVERSITY, YALE UNIVERSITY**

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INTRODUCTION AND STATEMENT OF INTEREST

Amici are preeminent research universities in the United States. Their faculty contribute to the expansion and transfer of knowledge in virtually every area of human inquiry. Through their graduate degree programs they prepare the next generation of our nation's scholars, scientists, engineers, educators and leaders. Not a single graduate student in any of the *amici* institutions has ever been required to join a union as a condition of receiving his or her education, nor have the academic or financial arrangements of any of the *amici* graduate programs ever been subject to collective bargaining. The current majority of the Board is reconsidering that paradigm in the present case, and *amici* submit this brief to oppose the reversal or modification of the *Brown University* decision.

Amici all offer doctoral programs that share these common characteristics:

- a) *Amici* believe that preparation for the PhD involves multi-dimensional study and training under the guidance of leading professors, the components of which include intensive coursework, learning to teach in one's field of study, and undertaking original research in fulfillment of the dissertation requirement. Each institution achieves those objectives in various ways, but they all have a common educational focus, and the doctoral candidate's coursework, research and teaching experiences are a fully integrated educational experience.
- b) Most students admitted to a doctoral program are offered several years of financial support by the institution, which typically consists of grants to cover tuition and fees, health insurance coverage and a stipend for living expenses. The amount and duration of the stipend vary from institution to institution. For example, as the record in the *Brown* case reflects, PhD candidates at Brown University are awarded a five-

year financial aid package which begins “typically with a fellowship in the first and fifth years, and TA or RA positions in the intervening years.” *Brown*, 342 NLRB 483, 485 (2004). This financial aid is awarded without regard to the amount of time spent taking courses or performing assistantship duties. Yale provides PhD students with financial aid that supports students fully for a minimum of five years; students on Yale’s financial aid packages receive the same base level of support whether they are taking courses, serving as teaching assistants, or engaged in research. Yale’s Graduate School of Arts and Sciences Catalogue states that “Because the Graduate School considers teaching experience to be an integral part of graduate education, doctoral students receive financial aid packages that include teaching fellowships.” Harvard PhD students in the humanities and social sciences typically receive financial support for five years, which typically includes teaching fellowship support for two years.

- c) The vast majority of programs in the *amici* institutions explicitly require or expect doctoral students to serve as a teaching assistant for some period of time during their years of study. This teaching experience – which may range from grading problem sets to leading a course discussion section to designing and offering a course – is supervised and directed by experienced faculty members. All *amici* institutions believe that teaching experience is an important component of preparing doctoral candidates for careers either as teachers or as professional leaders trained in effective presentation skills. The market value of any teaching services provided by doctoral candidates is not taken into consideration when determining stipends provided to students teaching during their graduate programs.

- d) The selection of students for particular teaching duties varies from institution to institution, but all *amici* institutions endeavor to place doctoral candidates in positions designed to complement and enhance their growth as future members of the academy.
- e) Doctoral candidates pursuing PhD degrees in science and engineering and certain other fields serve as research assistants and complete an original research project in fulfillment of their dissertation requirement. This research is typically conducted under the supervision of a faculty advisor who may or may not be receiving external grants to fund the faculty member's research program.
- f) In addition, *amici* sometimes offer master's degree students and/or undergraduate students the opportunity to serve in various capacities as instructional assistants in their institutions. In each instance these opportunities enhance the educational experience and training of the students.

As is demonstrated herein, there is no compelling reason to reverse the *Brown* decision. The only record evidence of private-sector experience bargaining with graduate assistants since the 2004 *Brown* decision demonstrates the burdensome and disruptive effect such bargaining has on graduate education. The frequent comparisons Petitioner and its supporters make to public-sector collective bargaining with graduate assistants is misguided both because the law in the public sector differs markedly from the NLRA, and the goals and objectives of assistantships in the public sector do not necessarily mirror the educational objectives of such opportunities in the private sector. *Amici* believe that reversal or modification of *Brown* would significantly damage private sector graduate education in this country and will represent an inappropriate intrusion into long protected areas of academic freedom and autonomy.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO REVERSE THE *BROWN* DECISION.

Amici submit that there are no facts or changed circumstances that justify revisiting, reversing or modifying *Brown*. As Member Miscamarra stated in his dissents to the granting of the Request for Review in the instant case as well as in *The New School*, 02-RC-143009 (October 21, 2015), there are no compelling reasons for reconsideration of *Brown*. The only known reason for revisiting *Brown* is the change in the Board's majority composition. Modifying or reversing *Brown* without a sound legal basis would undoubtedly foster public and Congressional cynicism about the Board's legitimacy. As former Chief Counsel Datz stated when articulating the arguments against reversal of precedent:

A reversal of precedent results in instability, unpredictability and uncertainty in the law. Employers, employees, and unions cannot act in reliance on the law, for it may change. What is lawful today may be unlawful tomorrow and vice-versa. Further, lawyers run the risk that their best advice will have disastrous consequences based on such reliance. Finally, our society prides itself on being a nation of laws. Where precedent changes simply because a different political group is in power, the public becomes cynical about our ideals and disrespectful of the law. *When One Board Reverses Another: A Chief Counsel's Perspective*, 1 Am. U. Labor & Emp. L.F. 67, 71 (2011).¹

a. Neither the Law Nor the Facts Have Changed Since *Brown* was Decided

There have been no changes in the law relating to the status of students – either Board or court decisions – in the twelve years since issuance of the *Brown* decision. Nor has Congress

¹ See also Member Hurtgen's dissent in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), which overruled *Celanese Corp.*, 95 NLRB 664 (1951): "In my view, there are values that are inherent in the doctrine of *stare decisis*. These values include stability, predictability, and certainty of the law. In the context of labor relations law, these values are outweighed only upon a clear showing that extant law is contrary to statutory principles, disruptive to industrial stability, or confusing. That showing has not been made." Id. at 731.

expressed disapproval of the decision.² In the one case in which an employer sought reconsideration of *Boston Medical Center*, 330 NLRB 152 (1999), involving house officers, the Board majority refused to grant review, stating, “*Boston Medical Center* has been the law for over a decade, and no court of appeals has questioned its validity....” *St. Barnabas Hospital*, 355 NLRB No. 39 (2010). The facts are no different regarding graduate students.

Not only have there been no legal or factual changes since the issuance of *Brown*, but in the Board’s only decision since 2004 on the issue of students, it declined to exercise jurisdiction over Northwestern University football players who received grant-in-aid scholarships because doing so would “not effectuate the policies of the Act.” *Northwestern University*, 362 NLRB No. 167, at 1 (2015).³ *Amici* submit that a determination that graduate student assistants who provide services as part of their educational experience are employees within the meaning of the Act would not only fail to effectuate the purposes of the Act, but it would inappropriately intrude into the fabric of graduate education in private institutions of higher education.

b. There is No Empirical Evidence Suggesting that *Brown* was Wrongly Decided, but There is Clear Evidence that it was Correctly Decided.

The dissent in *Brown*, the Petitioner, and other stakeholders urging the reversal of *Brown* often cite articles which purport to stand for the proposition that collective bargaining by graduate assistants can have a positive effect on faculty-student relationships. One study they point to is *Effects of Unionization on Graduate Student Employees: Faculty-Student Relations*,

² Nor had Congress expressed disapproval in the “25 years of untroubled experience under pre-NYU [332 NLRB 1205 (2000)](*NYUI*) standards....” *Brown*, supra, at 493.

³ Similarly, the United States District Court for the Southern District of Indiana, Indianapolis Division recently ruled that students participating in NCAA athletic teams at the University of Pennsylvania as part of their overall educational program are not employees for FLSA purposes. *Gillian Berger, et.al., v. NCAA, et.al.* Case 1:14-cv-01710-WTL-MJD (2/16/16).

Academic Freedom, and Pay, Rogers, Eaton and Voos, 66 ILR Review 485 (2013).⁴ That study, however, cannot be considered relevant to the present case because it focused exclusively on graduate assistant unions in *public* higher education institutions. Moreover, the authors themselves recognized that there are no empirical studies of the effect of unionization on private-sector graduate assistants, and that “[l]egal arguments made in the absence of empirical evidence are deeply troubling....” *Id.* at 509.⁵

In stark contrast to the absence of scholarly studies investigating the impact of collective bargaining with graduate assistant unions on private universities, there is clear record evidence that such bargaining intrudes on the academic freedom and managerial prerogatives of private institutions. The New York University experience, in particular, revealed that despite its actual contractual commitment to preserve the University’s academic freedom, UAW Local 2110, the union recognized by NYU following the decision in *NYUI*, nonetheless filed grievances which challenged the University’s management rights as well as its academic freedom. Three grievances challenged the university’s right to select the individuals who teach particular courses, i.e. whether an enrolled graduate student in the bargaining unit, or an adjunct or other student not in the bargaining unit will be given the opportunity. All three grievances proceeded to arbitration. Two separate arbitrators ruled in the university’s favor; the union withdrew the

⁴ Record evidence in *NYUII* revealed that the then-sitting chair of the Board, Wilma Liebman, one of the dissenters in *Brown*, suggested to Professor Voos that this research would be helpful to the Board. See University’s Motion for Recusal, filed in *NYUII*.

⁵ The Rogers study pointed to an earlier article (also cited by the dissent in *Brown*) by a Tufts University graduate student in 2000, which involved a survey of faculty at five *public* higher education institutions. Gordon Hewitt, *Graduate Student Employee Collective Bargaining and the Educational Relationship Between Faculty and Graduate Students*, 29 J. Collective Negotiations in the Public Sector 153 (2000). Aside from being irrelevant to concerns at private universities, Hewitt himself suggested that his study could be used as a tool for union organizing: “Labor unions attempting to organize graduate assistants and graduate student organizations seeking collective bargaining rights can use the results of this study to refute claims by university administrators that collective bargaining inhibits the educational relationship between faculty and graduate students....” *Id.* at 164. The study is a polemic; not a work of unbiased scholarship.

third arbitration at the close of its case. *See* Testimony of Terrence J. Nolan before the Regional Director in *New York University (Case 02-RC-023481) (NYUII)*, at pp.688-694, also submitted as testimony in the instant case. Additionally, both NYU's Senate Affairs Committee and its Faculty Advisory Committee on Academic Priorities recommended *against* continued recognition of Local 2110 after its initial contract expired on August 31, 2005. The Faculty Advisory Committee, in recommending against continued recognition of Local 2110, noted that "The readiness of the United Auto Workers to grieve issues of academic decision-making and the nature of the arbitration process leads the Committee to conclude that it is too risky to the future academic progress of NYU for it to have graduate assistants represented by a union that has exhibited little sensitivity to academic values and traditions." *Nolan Testimony, id. Ex. 39*. Likewise, the Senate Academic Affairs Committee and Senate Executive Committee, after identifying eight major grievances filed by the UAW challenging management rights⁶ concluded that "...the realities and risks to maintenance of the University's management rights and academic decision-making from the UAW's vigorous and relentless pursuit of the grievances it has chosen to press tip the scale for the Committee majority [against continued recognition]" *Id. Ex. 38*.

Both collective bargaining and arbitration are, by their very nature, adversarial. They clearly have the potential to transform the collaborative model of graduate education to one of conflict and tension. Local 2110's decision to challenge contractual language it had agreed upon to protect academic freedom illustrates concretely the real-life experience of graduate assistant bargaining in the private sector, and the real-life reaction of private-sector faculty leaders to the

⁶ Despite the contract's clear management rights clause, among other things, the UAW challenged the right of departments to choose whom to hire and the right of the graduate school to fashion policies governing who is eligible for financial aid.

effect such bargaining and litigation had on the university. This evidence of private sector experience with graduate assistant bargaining cannot be ignored.⁷ Indeed, the NYU experience provided a real-time workshop about the realities of bargaining with graduate assistants whose teaching experience was embedded in their education and financial aid package – precisely the paradigm that exists at the *amici* institutions.⁸

c. The Board and the Courts Do Not Impose The Section 2(3) Definition of “Employee” Blindly; Context Always Matters.

Petitioners contend that there is a “false dichotomy” between working and learning. Petitioner’s Request for Review at 9. They, along with the dissent in *Brown*, argue that the Board must give effect to the “plain meaning” of section 2 (3) of the Act’s broad definition of “employee,” without regard to the context in which graduate assistants provide service to their universities. Petitioner’s assertion ignores the reality of graduate education in institutions such as *amici*, where graduate assistants perform teaching and research as an integral part of their degree program.

The majority in *Brown* correctly concluded that, when examined in light of the underlying purposes of the Act, the graduate assistants are students whose relationship with the

⁷ *Amici* do not suggest that Local 2110’s motivation in pursuing its grievances was improper. Its action was perfectly legal and consistent with standard operating procedures in private-sector collective bargaining. It is the fact of the litigation’s genuinely disruptive impact on the university that must be acknowledged. Those who contend *Brown* should be reversed cannot simultaneously promote academic studies in the public sector as evidence of the positive effects of graduate assistant bargaining while turning a blind eye to the actual evidence of the consequences of bargaining in the private sector.

⁸ Note that at the time of *NYUI*, graduate assistant funding at NYU was tied, in part, to performing service as a teaching assistant. Subsequently, in 2009, as a result of financial aid reforms, NYU de-coupled teaching assistant stipends from the financial aid package offered to its graduate students. The University eliminated the requirement that students supported by fellowships provide service to the University in connection with their financial aid, and it eliminated the positions of TA and GA. Instead, graduate students who chose to teach after 2009 did so as adjunct instructors who were included in the adjunct bargaining unit represented by UAW Local 7902. See New York University’s Conditional Request for Review in *NYUIII* (6/30/11), at 4. In other words, teaching became decoupled from their academic program; they were compensated at the same rate as adjunct faculty; and they were considered employees when they taught. Subsequently, as part of the resolution of *NYUIII*, the university recognized Local 2110 as representative of a separate bargaining unit of teaching and research assistants, excluding research assistants in the hard sciences.

university is primarily academic, not economic. This has not changed. The determination of employee status cannot be made by the mere mechanical application of statutory language taken out of context. The case law makes clear that the “employer-employee” relationship should be viewed in its entirety, not carved up into discrete spheres. *See, e.g., Allied Chem. & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971) (“In doubtful cases resort must still be had to economic and policy considerations to infuse § 2 (3) with meaning.”); *WBAI Pacifica Found.*, 328 N.L.R.B. 1273, 1275 (1999) (“At the heart of each of the Court’s decisions is the principle that employee status must be determined against the background and purposes of the Act.”). It is easy to make the glib statement that Section 2(3) permits no exceptions, yet the Courts and the Board have made exceptions in circumstances where the definition of “employee” is inconsistent with the reality of the situation. This is particularly true in the world of higher education, with respect to which the Supreme Court stated that “the principles developed for use in the industrial setting cannot be ‘imposed blindly on the academic world.’” *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1980).⁹ A mechanical application of Section 2(3) in order to achieve a desired end result serves no legitimate purpose.

d. Because the *Amici* Institutions Do Not Measure Teaching and Research by Graduate Assistants in Commercial or Economic Terms, the Model of Traditional Collective Bargaining Cannot Apply to Them.

Amici and institutions like them, including Columbia,¹⁰ do not establish stipends for

⁹ The Supreme Court’s exclusions of certain classifications of individuals from the Section 2(3) definition of employee are well known. *See, e.g. NLRB. v. Bell Aerospace Co.* 416 US 267 (1974) (managerial employees); *Allied Chem. & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (retirees). In similar fashion, the Board has determined that certain categories of individuals providing “service” should not be considered employees because their relationship to the employer is not fundamentally an economic one. *See, e.g. WBAI Pacifica Foundation*, 328 NLRB No. 179 (1999) (unpaid staff); *Goodwill Indus. of Tidewater*, 304 NLRB 767 (1991) (disabled workers).

¹⁰ “The market value of teaching services which students will provide is not considered in calculating what the stipend amount will be.” RD Decision in Case 02-RC-143012 (*Columbia University*) at 6.

graduate assistants based on the market value of teaching and/or research services. The “value proposition” in these institutions is “what is the educational value of the experience?” not, “what is the lowest cost to teach each undergraduate?” Collective bargaining is not suited to negotiations about the value of the educational experience at any particular institution. And given that stipends, tuition, and tuition remission are entwined within the financial support package provided to students (separate and distinct from any teaching that they do), then bargaining over the amount of stipends would involve bargaining about tuition – surely not a subject that can properly be within the jurisdiction of the Board. Because the graduate student/university relationship at institutions like *amici* is not driven by economics, the rough and tumble of collective bargaining cannot be imposed on that relationship without doing irreparable damage. That is why for decades – except for the brief existence of *NYUI* – the Board has recognized that students who perform teaching and research services for their institutions as part of their educational experience are not considered Section 2(3) employees.¹¹

II. IMPOSING COLLECTIVE BARGAINING WITH GRADUATE ASSISTANTS ON PRIVATE SECTOR INSTITUTIONS WOULD IMPERMISSIBLY INTRUDE INTO THEIR ACADEMIC FREEDOM.

It is undisputed that even if graduate assistants at private institutions were considered employees under the Act, they would have dual status: as students and as employees. Petitioner and those who advocate reversal of *Brown* argue that student issues can easily be separated from employment issues. *Amici* and those who believe that *Brown* was correctly decided maintain that because the services performed by graduate student assistants are embedded in the very

¹¹ Nor is it appropriate to characterize graduate assistants as “apprentices” whom the Board has found to be employees under the Act. Graduate student assistants are not individuals training to become journeymen in a particular field, especially at the same employer. Graduate students are training to become members of the academy, which involves mastery of knowledge (coursework), teaching and original research. No reported Board cases hold such individuals to be apprentices. Moreover, the Board does not find all apprentices to be employees. *See, e.g. Firmat Manufacturing Corp.*, 255 NLRB 1213 (1981)(student apprentice hired as part of a cooperative education program at a local high school held not an employee under the Act).

fabric of their educational experience, it is impossible to isolate one from the other, except perhaps by taking the path of NYU, which completely divorced student status from teaching status in 2009. Bargaining, therefore, as in the NYU pre-2009 experience, will inevitably produce disputes, litigation, and perhaps strikes such as those which have frequently occurred at public universities, thereby inserting the bargaining process directly into academic judgments and experiences.¹²

This divide between those who maintain that a surgical precision between the roles of student and employee can be defined, and those who recognize the reality that the roles are inseparable parts of the educational experience, takes on enormous importance because the stakes for our private higher education system are so high. If Petitioner and its supporters – relying solely on public-sector data and their rigid construction of Section 2(3) of the Act - are correct that bargaining will not adversely affect the academy’s educational mission, all will be well. But if Petitioners and the dissent in *Brown* are wrong – as NYU’s pre-2009 experience demonstrated - the damage done to private sector graduate education in this country will be significant.

a. An Example of Collective Bargaining’s Intrusion into Academic Freedom

It is easy to talk in generalities about the difficulties inherent when applying the economic model of collective bargaining to students providing services as part of their education.

¹² For example, graduate assistants have struck at the University of California (Menendez, Sarah S. and Phuc Pham, “UC Graduate Student Workers Strike Over Unfair Labor Practices” (April 3, 2014), *New University*, available at <http://www.newuniversity.org/2014/04/news/uc-graduate-student-workers-strike-over-unfair-labor-practices/>); the University of Oregon (Mulhere, Kaitlin, “Strike for Better Benefits” (December 3, 2014), *Inside Higher Ed*, available at <https://www.insidehighered.com/news/2014/12/03/u-oregon-grad-students-strike-better-benefits>), and the University of Illinois (Campbell, Peter, “University of Illinois Caves After Two Day Grad Strike” (November 18, 2009), *Labor Notes*, available at <http://www.labornotes.org/2009/11/university-illinois-caves-after-two-day-grad-strike>).

Amici suggest that a concrete example will better illustrate the dimensions of the problem that a reversal of *Brown* would foist on private graduate institutions.

Consider this situation: In a post-*Brown* world, a union representing graduate teaching assistants negotiates a collective bargaining agreement with a private university which contains a clause preserving the institution's academic freedom: the university reserves the right to decide who may teach, what may be taught, how it shall be taught, and who may be admitted to study.¹³ Several graduate assistants are assigned to teach and grade 15-student sections of a major survey course in American history. The past practice reveals that the final exam has always been a multiple-choice test. The professor leading the course decides to change the final exam to essay questions. The teaching assistants' union files a grievance under the contract claiming that the requirement to grade essay questions impermissibly expands the assistants' workload and violates past practice. The union simultaneously files an unfair labor practice charge claiming an unlawful unilateral change in workload. The union also demands to bargain about the *impact* of the increased workload, should the Board or an arbitrator determine that the decision to switch to essay questions is a management right. Finally, the union makes an information request to the university seeking final exam information for every history course offered within the past five years which had utilized teaching assistants.

Here is what would likely happen: If the parties could not resolve the grievance, it would proceed to arbitration. Arbitration typically takes months and costs both parties a considerable amount of money and time. The university would have to impose on dozens of professors to obtain information about final exams or risk an unfair labor practice charge by the union asserting that it did not provide information relevant to the union's representation of its

¹³ See *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

members. The Board would also investigate the unfair labor practice charge, and it might or might not defer the case to the arbitration under the General Counsel's current standards.

Assuming the Board did not defer to arbitration and issued a complaint which was not settled, the trial before an Administrative Law Judge, review by the Board, and potential appeal to a Court of Appeals in the event the university did not prevail would likely take several years, at a minimum. Meanwhile, throughout this process, the graduate students continue to be mentored by the faculty members, their scholarly work is evaluated and eventually completed, and the original teaching assistants who were involved in the grievance would likely have completed their degrees and left the university.

But that is only part of the picture. Assume that the university won the arbitration and the Board did not issue a complaint on the unfair labor practice charge. The union still wants to bargain over the *impact* of the university's non-bargainable management decision to change the course from multiple-choice to essay questions. If the union believes the university did not bargain in good faith over the impact, then the union can file another unfair labor practice charge. If a complaint issues, the litigation process could continue for another several years.

Suppose the arbitrator rules that the university violated the contract when the professor decided to change to essay questions? The university could certainly consider appealing under applicable federal law, but the costs would be high, it would be time-consuming, and the grounds for appealing private-sector arbitration decisions are very narrow.

While all of this is going on, the university is faced with some difficult decisions. What is the meaning of its academic freedom clause if the union can insist on arbitration over a course content decision? Should the university advise other professors that changes in course exams might lead to grievances? To avoid potential and costly litigation, should the university advise

its professors not to make changes that could arguably increase assistants' teaching responsibilities? Should the university anticipate that it will have to bargain the *impact* of its academic decisions, even if the decisions themselves are reserved to management? Will the university be faced with ongoing information requests relating to any academic decisions which might impact teaching assistants in the bargaining unit?

And finally, consider the effect this entire controversy may have on the graduate assistants teaching in the American history course. Their relationship with the supervising professor is a mentoring one. He or she may even be a dissertation advisor for some teaching assistants – an intense relationship built on trust and collaboration. What impact will the grievance have on that critical relationship? What if some or all of the other teaching assistants in the course did not want to file a grievance in the first place? It is well known that under virtually all collective bargaining agreements, the *union*, not individual bargaining unit members, has the right to file grievances, and the sole discretion whether to file for arbitration. The union might grieve in order to protect what it considers its institutional interest, notwithstanding the particular interests of the affected teaching assistants. In real-life terms, the impact on the student-faculty relationship would not merely be “collateral damage.” It could be enormous and psychologically destructive to both teaching assistants and faculty.

The above scenario, while hypothetical, is emblematic of typical collective bargaining disputes both in the public and private sector.¹⁴ It is by no means a “doomsday” scenario. It

¹⁴ See, for example, the consolidated complaint in *Columbia College Chicago*, 13-CA-073486, et. seq. (ALJ decision, JD-13-13 (3/15/13), in which the General Counsel alleged that the College refused to bargain collectively with its faculty union about the impact and effects of the College's decision to reduce the number of credit hours (and corresponding pay) awarded for certain courses. If graduate assistants were considered employees, this identical scenario could easily arise. The difference, of course, is that faculty are true employees who teach not in order to learn, but in order to make a living; theirs is a truly economic relationship with the institution. See also the University of Connecticut's Graduate Employee Union's report on a dispute regarding grading a final exam: “A TA was assigned grading responsibilities that required working beyond the maximum workload for their appointment

illustrates only one issue that is very likely to arise in the event the Board concludes that graduate students who assist by teaching in a course as part of their educational experience are “employees” within the meaning of the Act. The fact that this hypothetical is realistic is evidenced by NYU’s experience with Local 2110 described above, in which the union insisted on arbitrating issues which were clearly reserved to the university as part of its contractual managerial and academic rights.

Among additional issues that could, and likely would, arise in bargaining with graduate assistants who teach as part of their educational experience, are the following, which are listed by way of illustration only:

- a) The relationship between teaching stipends and tuition: what would happen if a university decided to charge tuition to graduate assistants who had tuition waived prior that time? Since the effect of an increase in tuition would be to lower total compensation, would the university have to bargain about the decision itself, or, if not, would it have to bargain the effect of the change?¹⁵
- b) Would a university have to bargain about a decision, or the impact of a decision, to eliminate teaching assistant positions that had historically been made available to graduate students?¹⁶

level. Due to the protections in our contract language, the TA raised the issue to the department and was relieved of having to grade the final exams.” <http://www.uconngradunion.org/>, last viewed 2/15/16.

¹⁵ This situation occurred at the University of Illinois at Urbana-Champaign when the graduate assistants union went on strike in November 2009 seeking to protect tuition waivers. Conflict over tuition waivers continued until 2012, involving an arbitration, an unfair labor practice charge by the union and the threat of a second strike over the issue. See <http://www.uigeo.org/2012/11/>, last viewed February 15, 2016.

¹⁶ At the University of Washington, UAW Local 4121 reported to its members on April 30, 2010 that “On the positive side the University has agreed to remove the proposed cuts to TA positions in the College of Arts and Sciences and the Odegaard Writing Center. This is a significant victory, which was made possible through months of mobilization by members.” <http://www.uaw4121.org/update.php>, last viewed 2/15/16.

- c) Must a university bargain about which of its programs provide tuition remission and which do not?¹⁷
- d) Must a university bargain about the minimum credits a student must take in order to qualify for a teaching assistant position?¹⁸

Under current Board law, if private sector graduate assistants were considered employees and they became represented for collective bargaining, any and all of these potential disputes might be subject to the full panoply of Board procedures, as well as arbitration. There is no statutory shortcut in the event parties cannot amicably resolve their differences.

Given the experience of NYU, it is a near certainty that the advent of bargaining with graduate assistants will irrevocably damage graduate education in the private sector, and potentially undergraduate education as well.

b. Conflict and the Use of Economic Weapons are Built into the NLRA

The prospect that private sector universities “employing” graduate assistants to teach or assist in courses as part of their educational experience will be confronted with similar situations is virtually guaranteed by the nature of the NLRA. The very premise of the Act is conflict-driven; it is not based on the civility of academic discourse. As the Supreme Court stated:

It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one.

¹⁷ This exact situation is currently in litigation between the University of California and UAW Local 2865, which filed a charge alleging an unfair labor practice when the University failed to waive tuition for a Master’s of Law candidate who became a course reader in the history department. The charge also alleged that the student was “maliciously” denied a thesis advisor change because of her multiple fee remission requests. *See* <http://www.dailycal.org/2014/12/01/student-workers-union-alleges-unfair-treatment-graduate-student-law-school-program/>, last viewed 2/15/16.

¹⁸ Recently, over 100 graduate students and others attempted to enter a grievance hearing at the University of Michigan on behalf of a graduate assistant who was dually-enrolled in the Taubman College of Architecture and Urban Planning and the School of Engineering and had been removed from a TA position at Taubman College because she did not have sufficient credits in architecture to serve as a TA in that program. <https://www.michigandaily.com/section/news/standwithalex>, last viewed 2/15/16.

The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. *NLRB v. Insurance Agents*, 361 U.S. 477, 488-489 (1960).

Moreover, unlike many state laws regulating collective bargaining in public institutions, which impose explicit restrictions on the duty to bargain,¹⁹ Section 8(d) of the Act broadly requires bargaining over “wages, hours, and other terms and conditions of employment ...” The Supreme Court first recognized the distinction between “mandatory” and “non-mandatory” subjects of bargaining in *N.L.R. B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Other pronouncements of the Court further defined mandatory subjects, *see, e.g. Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and the Board itself has defined certain subjects as mandatory or permissive.

The identification of mandatory versus non-mandatory subjects, however, has occurred on a case-by-case basis over decades, and because the Board has never before purported to intrude into the details of graduate education, the potential subjects of bargaining remain uncharted territory. There is simply no list or manual to which a university can turn in the private sector to identify whether a particular subject is a mandatory subject of bargaining with graduate assistants whose activities are occurring as part of their education, nor is there even a mechanism for obtaining an advisory opinion from the NLRB about whether a particular subject is a mandatory bargaining subject.²⁰ If a university were to guess wrong, the consequences could

¹⁹ The contrast with state collective bargaining laws is discussed in Part III, *infra*.

²⁰ By contrast, some state labor relations agencies provide for advisory opinions. *See, e.g. Massachusetts Department of Labor Relations*, 456 CMR 16.06, “Advisory Rulings.”

be costly, both in money and in damage to the institution's academic freedom. If a university declined to guess at all, paralysis could result.

The Board's confidence, expressed in *NYU I*, that "the parties can 'confront any issues of academic freedom as they would any other issue in collective bargaining,'" *NYUI at 1208*, quoting *Boston Medical Center*, 330 NLRB 152, 164 (1999), is belied by the actual experience of NYU and by the very nature of the exercise. A reversal of *Brown* would be predicated on the assumption that a single relationship – that between the university and its student – can somehow be clearly broken into two distinct spheres, academic and employment. It cannot be, and the inevitable result would be consequential to private higher education. The concerns expressed by *amici* are not speculative; they are real and cannot be glossed over with empty assurances.²¹

III. THE PROPOSITION THAT BARGAINING BY TEACHING ASSISTANTS IN THE PUBLIC SECTOR DEMONSTRATES THAT IMPOSING THE SAME REQUIREMENT IN THE PRIVATE SECTOR WILL BE HARMLESS IS FALSE.

The dissent in *Brown* asserted in a conclusory way that "...there is nothing fundamentally different between collective bargaining in public-sector and private-sector universities." *Id.* at 499. That is a false proposition.

There is a world of difference between public and private-sector labor law. Each state makes its own decision about representation of public employees. Almost all states prohibit strikes by public employees. Some states explicitly define the scope of bargaining for educational employers²²; others do not. In states where collective bargaining statutes do not

²¹ Petitioners and their supporters, in order to illustrate their reasonable approach to bargaining, can no doubt point to collective bargaining agreements with graduate assistant unions (such as at NYU) in which the institution is explicitly granted broad management rights and academic freedom protections. The real issue is not *whether* a particular union or university will concede certain issues in bargaining; the issue is *whether they have to, what are the consequences if they do not, and whether, as at NYU, a union will challenge language it agreed to.*

²² See, e.g. RCW41.56.203: (2)(a) The scope of bargaining for employees at the University of Washington under this section excludes:(i) The ability to terminate the employment of any individual if the individual is not meeting

expressly identify mandatory and non-mandatory subjects of bargaining, state labor relations agencies have stepped in to identify “core” or “non-delegable” managerial rights which may not be bargained.²³ Similarly, state courts have set limits on bargainable subjects.²⁴ In addition, unlike suits to vacate arbitration awards under Section 301 of the LMRA, many states permit appeals of arbitration awards which are contrary to state or federal laws.²⁵ These appeals are broader than the limited scope of review of arbitration awards issued under private-sector collective bargaining agreements.

academic requirements as determined by the University of Washington;(ii) The amount of tuition or fees at the University of Washington. However, tuition and fee remission and waiver is within the scope of bargaining;(iii) The academic calendar of the University of Washington; and(iv) The number of students to be admitted to a particular class or class section at the University of Washington; Cal. Gov’t Code Sec. 3562q, stating that for the University of California, “The scope of representation shall not include any of the following: (A) Consideration of the merits, necessity, or organization of any service, activity, or program established by law or resolution of the regents or the directors, except for the terms and conditions of employment of employees who may be affected thereby; (B) The amount of any fees that are not a term or condition of employment;(C) Admission requirements for students, conditions for the award of certificates and degrees to students, and the content and supervision of courses, curricula, and research programs, as those terms are intended by the standing orders of the regents or the Directors;” 115 ILCS5/4 (Illinois Labor Relations Act): Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives.” The statute further states, with regard to impact bargaining: “During this bargaining, the educational employer shall not be precluded from implementing its decision.” *Id.* at 4.5(b).

²³ See, e.g. *Town of Danvers*, 3 MLC 1559, 1571 (1977) (Massachusetts Labor Relations Commission) (“The public employer, like the private employer, must have the flexibility to manage its enterprise. Efficiency of governmental operations cannot be sacrificed by compelling the public employer to submit to the negotiating process those core governmental decisions which have only a marginal impact on employees’ terms and conditions of employment.... Therefore, those management decisions which do not have direct impact on terms and conditions of employment must not be compelled to be shared with the representatives of employees through the collective bargaining process. Those decisions must remain within the prerogative of the public employer. To compel the sharing of core governmental decisions grants to certain citizens (i.e. organized public employees) an unfair advantage in their attempt to influence public policy.”

²⁴ See, e.g., *Brown* fn. 31, citing *University Education Association v. Regents of the University of Minnesota*, 353 N.W. 2d 534 (Minn. 1984) and *Regents of the University of Michigan v. Michigan Employment Relations Commission*, 389 Mich. 96, 204 N.W. 2d 218 (1973).

²⁵ See, e.g. M.G.L. c. 150C: The superior court shall vacate an arbitration award if: “(3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law.” *Compare* Federal Arbitration Act, 9 U.S. Code § 10, vacating award only permitted (4) “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

The huge distinction between the NLRA and the laws governing bargaining by graduate students at public universities is a gap that cannot be bridged by saying it does not exist. Public sector labor law has checks and balances that simply do not exist in the private sector. The risks and rewards of pursuing a bargaining subject, acceding to a demand, demanding arbitration or engaging in an unlawful strike are much clearer because public sector labor law addresses these issues.

There is an even more fundamental reason why public sector bargaining by graduate assistants differs from bargaining in the private sector. In the public sector, as the dissent suggested in *Brown*, much of the focus on setting compensation for teaching is about its cost: “The reason for the widespread shift from tenured faculty to graduate teaching assistants and adjunct instructors is simple: cost savings. Graduate student teachers earn a fraction of the earnings of faculty members.” *Brown* at 498, fn. omitted. The economic model of graduate assistant service may well be true in the public sector, where teaching assistantships may not necessarily be tied to graduate programs, where restricted public funding forces institutions to value the per capita cost of educating undergraduates, and where doctoral candidates are not granted the level of support characteristic of *amici* and other preeminent private sector research universities.

The situation is entirely different at *amici*, where the level of stipends provided to graduate students is totally divorced from the institutions’ actual costs of hiring non-student teaching personnel. Indeed, the record in *Brown* and in the instant case demonstrates that it would cost the institutions much *less* to hire adjunct faculty than to provide stipends and experience to graduate students. Contrary to the *Brown* dissent, the statement of the reality at *amici* is that “Adjunct faculty receive a fraction of the support of doctoral students.” Thus, because

institutions such as *amici* treat student assistantships as *educational*, not *economic* opportunities, there is no legitimate comparison between bargaining with public sector teaching assistants and those in schools similar to *amici*.

IV. RECONSIDERATION OF THE STATUS OF PRIVATE SECTOR GRADUATE ASSISTANTS MUST BE UNDERTAKEN ON A CASE-BY-CASE BASIS

Amici submit that, in the event the Board reconsiders *Brown*, it should avoid broad characterizations that are incompatible with the various configurations that exist in graduate education at private universities. As indicated at the outset of this brief, all of the *amici* share common educational and financial support objectives with regard to their graduate students, but the details vary substantially from campus to campus and between degree programs at a single university. This is widely true of other private universities. A reversal of *Brown* by holding that any and all students – whether graduates or undergraduates – who serve as assistants are considered employees would be destructive to our entire system of private graduate education for the reasons set forth above. The distinctions within and among programs at *amici* and other institutions necessitate a case-by-case examination of the precise role graduate assistantships have for particular students. For example, teaching is a curricular requirement in many programs; in others it may be optional but expected; and in still others teaching opportunities may provide support in addition to standard financial aid packages. In some programs teaching pedagogy is a required course and is coupled with assistantships; in other programs teacher training is available but elective. Although *amici* believe that it makes no sense to set *Brown* aside, they also believe that there is not sufficient factual convergence to paint with a broad brush, without regard to the nuances of private sector graduate education.

Characterizing all students who serve in assistantships as employees would lead to absurd results. For example, if a graduate student receives a financial support package which includes,

in part, an assistantship, and the assistantship is a required part of the curriculum, the institution would be forced to bargain over strictly academic matters, including tuition, course credits and the like. That would clearly intrude into the institution's academic freedom. What if the same student obtained an assistantship in another department, which included a stipend which augmented that student's overall support? Would that student be treated as an employee in those circumstances? The myriad of circumstances in which graduate students are awarded assistantships compels a case-by-case analysis. Failure to do so would not only result in rulemaking under the guise of adjudication, but it would result in intractable conflicts between graduate assistants' student and "employee" status.

V. RESEARCH ASSISTANTS PURSUING RESEARCH LEADING TO A DISSERTATION ARE NOT EMPLOYEES, REGARDLESS OF THEIR SOURCE OF FUNDING.

The law has been clear since *Leland Stanford*, 214 NLRB 621 (1974) that research assistants who perform research leading to the dissertation, and who receive academic credit (i.e. the PhD) for performing the research, are considered "primarily students" not entitled to employee status under Section 2(3) of the Act. In *Leland Stanford*, the Board pointed out that the relationship of the RA's and the university "was not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer. Rather, it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary, as determined by the project's needs." *Id.* at 623.

The *Leland Stanford* description of RA's is characteristic of research assistants at *amici* institutions. No Board decision – not even *NYUI* – has ever found research assistants to be

employees.²⁶ And the source of research assistant funding is not controlling. For example, in *Leland Stanford*, the Board noted that the RA's were funded by government grants, third party grants, and "endowment income or other moneys used to fund certain research appointments." *Id.* at 622. The source of funding was not relevant, since Stanford equalized support among students regardless of the source. *Id.* at 622.

Accordingly, research assistants who are performing the research as part of their pursuit of the PhD are unquestionably students, not employees within the meaning of the Act.

VI. THE BOARD SHOULD APPLY THE SAME STANDARDS TO MASTER'S AND UNDERGRADUATE STUDENTS AS IT DOES TO GRADUATE STUDENTS AND FIND THAT THEY ARE PRIMARILY STUDENTS, NOT EMPLOYEES.

Amici believe that *Brown* was correctly decided and that the principle that where a student's relationship with the institution is primarily academic rather than economic, the student is not an employee within the meaning of the Act. This principle applies even more so to master's and undergraduate students. At the *amici* institutions, master's students and undergraduates are occasionally given various opportunities to enhance their educational experience by serving in either teaching or research roles. The opportunities are very limited. The teaching opportunities range from teaching assistantships to tutors, graders and similar roles, typically for short periods of time. These students receive stipends for such activity as part of the financial aid offered by each institution. In each instance, an educational purpose – whether to reinforce and enhance existing skills, learn pedagogical and/or research skills and/or experience a mentoring relationship with a faculty member – is a reason for providing the opportunity to the students in the first place.²⁷ In many instances, these students undertake these responsibilities for

²⁶ NYU's current contract with Local 2210 likewise excludes research assistants in the hard sciences.

²⁷ By contrast, it is not unusual for undergraduates, for example, to earn money by serving in a variety of roles whose purpose is clearly economic from both the perspective of the student and the university. Examples include

academic and/or programmatic credit, as well as to receive financial support. These positions are often seen as honors, awarded to students precisely because of their academic accomplishments. Characterizing the students as employees in these circumstances would subject private sector institutions to the exact same bargaining complications identified earlier. Few private sector institutions would be inclined to make these opportunities available if they were accompanied by an obligation to bargain about such things as workload or financial aid, or the impact of decisions relating to subjects such as these.

If the Board were to reverse *Brown* and conclude that master's and undergraduate students who provide teaching and research-related services as part of their education are employees, they should not be placed in the same bargaining unit as doctoral students if the opportunities and obligations inherent in those positions are not comparable to those afforded to doctoral students. Just as in the case of a review of *Brown* itself, *amici* submit that there is no "one size fits all" ruling that can apply to unit placement. Like the status of students who perform teaching and research-related functions as part of their education, the analysis must be undertaken on a case-by-case basis.

VII. STUDENT ASSISTANTS WHO DO NOT HAVE AN EXPECTATION OF CONTINUED EMPLOYMENT MUST BE CONSIDERED CASUALS.

Amici recognize that the current Board majority, despite dissent, is inclined to permit casual employees who work intermittently and have no expectation of continued employment to organize. *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28 (2010). This approach would be completely unworkable in a university, particularly where student assistants may serve in limited capacities with a clear expectation that they will *not* continue in their roles, either

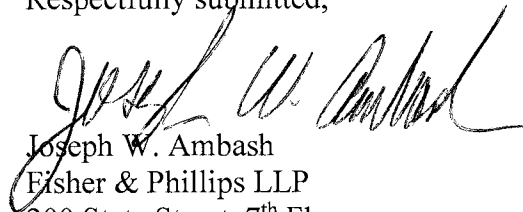
administrative/office jobs and dining hall jobs, among others. Assuming the students meet the requirement of regularity of employment, there is no policy reason for excluding them from being represented for bargaining.

because they will graduate, a course will end, or for any of a myriad of other reasons. For example, in *NYUI*, the graduate assistants who served as “graders” and “tutors” were excluded from the unit because their employment – even lasting a semester – was “sporadic and irregular.” *NYUI* at 1221. “Where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment, such employees are excluded as temporary.” *Id.* *Amici* submit that there is no legitimate reason to depart from that precedent.

CONCLUSION

For all of the reasons set forth herein, *amici* urge the Board not to reverse or modify the *Brown* decision.

Respectfully submitted,



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February 29, 2016

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 29th of February 2016 I served the foregoing *amicus* brief, via the Board's electronic filing system and via e-mail, upon the following:

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