UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and Case No. 02-RC-143012

GRADUATE WORKERS OF
COLUMBIA–GWC, UAW,
Petitioner.

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

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INTEREST OF THE *AMICUS CURIAE*

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

Attorneys provided by the Foundation have represented numerous individuals before the National Labor Relations Board ("Board") and in the courts, including representation in such landmark cases as *Harris v. Quinn,* 134 S. Ct. 2618 (2014); *Knox v. SEIU*, 132 S. Ct. 2277 (2012); *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In hundreds of other cases throughout the country, the Foundation is aiding individuals who seek to limit their forced association with, and their financial payments to, unions.

The Foundation, which has a long-standing interest in protecting the rights of teaching assistants to refrain from forced unionism, filed an *amicus curiae* brief in *Brown University*, 342 NLRB 483 (2004), and earlier in *New York University and GSOC/UAW,* 332 NLRB (2000) (*"NYU I"*) and *New York University,* 356 NLRB No. 7 (2010) *("NYU II").*

Amicus Foundation believes that any time individuals are forced to join, be represented

by, or support a labor union, that compulsion impacts upon their constitutional rights. That impingement is especially harmful to teaching assistants because compulsory unionism affects academic freedom. Furthermore, if the Board treats universities as an industry, the impact will undermine the traditional university model and have a negative impact upon those least able to afford to attend a university. In light of the above, the Foundation submits this brief to highlight the adverse impact that certifying labor unions as exclusive bargaining agents of teaching assistants would have upon those students.

ARGUMENT

I. INTRODUCTION

The issue Petitioners Graduate Workers of Columbia – GWC, UAW ("UAW") raise before the Board is whether all "student assistants, terminal masters degree students, and undergraduate students" are statutory employees. The Board held in *Brown University*, 342 NLRB 483 (2004), that graduate students are not statutory employees. The UAW now attempts to overturn that holding which the Board has followed for twelve years.

The Board poses four questions for all *amici* participating in this case to address.[1] The first question is the most significant: should the Board overrule *Brown*? Although the

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[1] (1) Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act?

(2) If the Board modifies or overrules *Brown University*, supra, what should the standard for determining whether graduate student assistants engaged in research are statutory employees, including graduate student assistants engaged in research funded by external grants? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974)).

(3) If the Board concludes that graduate student assistants, terminal masters degree students and undergraduate students are statutory employees, would a unit composed of all these classifications be appropriate?

(4) If the Board concludes that graduate student assistants, terminal masters degree students and undergraduate students are statutory employees, what standard should the Board apply to determine whether they constitute temporary employees?

Foundation will address each question, it will focus in particular on the first question.

The primary reason graduate students, teaching assistants, and research assistants attend universities is to obtain an education. Any monetary compensation they receive while enrolled at a university—whether in the form of stipends, financial aid, grants, or hourly pay—is incidental and secondary to that primary educational purpose. These students are the consumers of the product the university creates. To the extent that the university is training students to become future teachers, the students are also the university's product.

For approximately fifty years, the Board did not recognize graduate student assistants, research assistants, terminal masters degree students or undergraduate students who serve as teaching assistants as being employees under the National Labor Relations Act ("Act" or "NLRA"), (these four groups, unless otherwise specified, will be characterized as "teaching assistants"). *See Cedars-Sinai Med. Ctr.*, 223 NLRB 251 (1976); *St. Clare's Hosp. & Health Ctr.*, 229 NLRB 1000 (1977). Not until the late 1990s, approximately fifty years after enactment of the Act, did the Board, out of the blue, reverse course and "discover" teaching assistants are "employees." *See Boston Med. Ctr. Corp.,* 330 NLRB 152 (1999); *New York Univ.*, 332 NLRB 1205 (2000) (*"NYU I"*). In changing course then, the Board failed to recognize not only that a university is a unique employer, but that it does not fit into an industrial model. The Board also failed to give due consideration and proper weight to the fact that teaching assistants are students who only *incidentally* might be "employees."

Four years after deciding *NYU I*, the Board again reversed course to recognize graduate students as students, not employees. *Brown Univ.*, 342 NLRB 483 (2004). In overturning *NYU I,* the Board denied certification to the United Auto Workers as the exclusive bargaining agent of

Brown University teaching assistants.

The Board's holding in *Brown* is a correct reading of the NLRA. Teaching assistants are not statutory employees. The Board would commit serious error if it imposed an industrial labor model on what is essentially a student-university relationship.

In addition, the Board should deny certification to the UAW in this case as a matter of public policy. Classifying student teaching assistants as "employees" interferes with their academic freedom, as well as their First Amendment rights of freedom of speech and association.

II. TEACHING ASSISTANTS ARE NOT EMPLOYEES.

In this case, the UAW seeks a bargaining unit comprised entirely of students. The petition specifically seeks a unit of:

> Included: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.
> Excluded: All other employees, guards and supervisors as defined in the Act.

Clearly, any community of interest claimed by the UAW is based not on the students' status as statutory employees, but on their status as students. The language of the petition implicitly concedes that the teaching assistants are primarily students, not primarily statutory employees. Students, whether teaching assistants, research assistants, or hourly workers mainly performing administrative tasks, are principally in college and university programs to receive an education, not to earn a living. The positions of "teaching assistant" and "research assistant" are part of the learning process that will enable many students to better prepare themselves to become

accredited, professional university and college professors, or to pursue research or other positions in colleges, industry or government. As teaching assistants, their principal role, however, is not that of employees, but of students. And, in addition to the training the "jobs" provide them, the jobs provide for monetary compensation used to defray the tuition the students must pay.

Undergraduate students fulfill roles as teaching assistants in a variety of ways, whether as graders, student group leaders, or in some other educational role. They primarily receive their positions as a form of financial aid. They do not work in non-academic positions because they primarily are students who are trying to obtain an education, not employees working to earn a living. Universities aid these students by defraying the cost of education by giving them academic jobs, such as teaching assistants.

In addition to monetary compensation, the primary reward for their efforts as teaching assistants is not money. Indeed, any monetary remuneration pales compared to the intangible remuneration of academic credits, grades, training, and practical experience in their field. It is highly unlikely graduate or undergraduate students become teaching assistants primarily to earn a living. Consequently, they should be treated as the students they are, and not as employees whom labor unions wish to control.

Although the legislative history is silent on the issue, one can safely assume that Congress did not consider teaching assistants who receive money for teaching and research duties to be statutory employees. That assumption is supported by the fact that Congress has accorded teaching assistants a special status: it exempts them from paying social security taxes for money earned as teaching assistants. *See* 26 U.S.C. § 3121(b)(10)(A). The Board should recognize, as Congress already has, the unique educational status teaching assistants hold.

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

III. THE UNIONIZATION OF TEACHING ASSISTANTS MAY CHANGE THE NATURE OF UNIVERSITIES AND COLLEGES AND WILL NEGATIVELY IMPACT THOSE LEAST ABLE TO AFFORD HIGHER EDUCATION.

There is no such thing as a free college education. Colleges and universities incur costs to educate students—whether doctoral, masters degree, or undergraduate students. In most cases, it is the students, or their parents, who pay those costs. Universities and colleges ameliorate that financial impact by providing many students financial aid. Not all students—whether doctoral, master, or undergraduate—receive such aid, but if they do, one form of that financial aid is to pay students to serve as teaching assistants.

The *raison d'etre* of a typical university, such as Columbia University, is to educate students, not to produce a profit. Teaching assistants at a university enroll there for the purpose of obtaining an education, not earning money. They are consumers of the university's services. If they are doctoral students training to be future professors, they are not solely consumers but, if successful, are arguably the university's product.

If the Board chooses to assert jurisdiction over teaching assistants, it will give rise to a process that may well alter the way in which many students are able to finance their education. If the academic model is replaced with an industrial model, the incentive for universities to hire individuals to fulfill the role of "teaching assistant" will radically change. Rather than treating those positions as learning opportunities and ways to aid the consumer students to finance their

education, universities will be inclined to hire individuals not in need of or looking upon the position as a learning position, but whose primary desire is to earn money. Universities will be incentivized to look off campus for graders, researchers, etc. among unemployed academics, retired academics, and/or high school teachers. Stripping such form of financial aid from many students is unlikely to impact the most wealthy students, but surely will negatively impact those students least able to afford the cost of attending colleges or universities.

Recently, the Board declined to assert jurisdiction over student-athletes, *Northwestern University*, 362 NLRB No. 167 (2015), reasoning that to do so would not effectuate the purposes of the Act. There, the Board recognized that the form of compensation that athletes receive is scholarships, making them different from employees in a traditional industrial model. The Board concluded that asserting jurisdiction would not contribute to industrial stability. Although the Board did not explicitly say so, asserting jurisdiction would have had the effect of radically altering college football. Likewise in this case, the Board should decline to assert jurisdiction over graduate teaching and research assistants, as well as terminal masters and undergraduate teaching assistants.

IV. TEACHING ASSISTANTS ARE SHORT-TERM EMPLOYEES.

Even if, *arguendo*, the Board considers teaching assistants employees, it should treat them as short-term, temporary employees. Because few students, if any, likely will work as teaching or research assistants for more than a brief period of time, any union representing them as their exclusive bargaining agent likely will be representing its own institutional interests over those of the students. As a practical matter, such students are not going to be members of the bargaining unit long enough to truly exercise any democratic control over the union. To exclude them as

employees, as a policy matter, is consistent with Board precedent. *See Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127 (1971); *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992) (temporary employees not included in bargaining units). Treating students as temporary employees is a more appropriate model than that of treating them as if they were identical to long-term employees.

V. NOT ALL TEACHING ASSISTANTS ARE ALIKE.

The question whether teaching assistants are statutory employees should not even be before the Board. The Board should affirm *Brown*. Should it overturn *Brown*, however, it will face a quagmire: which teaching assistants fall into a unit? The one thing all teaching assistants have in common is their student status. Being a student, however, does not make them an employee. Beyond their status as student, each teaching assistant is different. What type of employment and compensation they receive will necessarily vary.

Should the Board overrule *Brown*, it would first have to look at teaching assistants who receive external grants. No legal justification exists to corral students who receive external grants from the government, foundations, or other third-party sources into the same bargaining unit as teaching assistants, whose income is derived from the university itself. Under no conceivable theory can externally funded students properly be classified as statutory employees. Research assistant salaries often are underwritten by independent third parties for specific research projects. Their rates of pay are usually set by the grantor, with whom a union cannot bargain.

It would harm both the students and the university's mission to permit a union to use third-party grants as bargaining chips in university negotiations over other students' rates of pay. Forcing universities to bargain with labor unions over the wages and working conditions of

teaching assistants has the very real possibility of adversely affecting the award of such grants. Labor unions characteristically bargain for equal salaries. Once the exclusive bargaining agent demands that all "wages" either be raised to levels identical to those whose teaching and research is paid for by such grants or, alternatively and more likely, be leveled downward, foundation and corporate incentives to provide those grants will diminish. Furthermore, foundations and corporations present their economic stipends as part of their grants, thus eliminating a union's purported purpose for representation.

In addition to the distinctions among teaching assistants discussed above, numerous other problems not directly raised by the Board would make it difficult to create a bargaining unit composed of teaching assistants. For example, what happens when a professor pays a teaching assistant with university funds to perform a certain discrete task to aid the professor in his research? Each such situation involves unique circumstances, skills, and time-frames, none of which fit within the framework of "collective bargaining." What if some "bargaining unit" students receive non-need based grants and scholarships from a university? A union could charge the university with violating the contract for giving a bargaining unit employee "compensation" outside of the collective-bargaining agreement.

The number of the students whom the Board would have to carve out of a unit of teaching assistants—research assistants, clerical employees with different interests from teaching students, students working for a single professor on a project, students receiving grants or scholarships from third party sources—may be greater than the number of students remaining in the bargaining unit. Clearly, even if the law permitted the Board to label teaching assistants as statutory employees, the Board should exercise its discretion and not do so as it would create insurmountable problems

in fashioning an appropriate unit.

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

Three hallmarks of universities are respect for: academic freedom; freedom of speech; and freedom of association. Compulsory exclusive representation will negatively impact each of these freedoms.

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

Academic freedom took root in the Middle Ages, when universities gained some freedom from state control. The protections afforded scholars by academic freedom expanded during the Enlightenment. By the 20th century, academic freedom was recognized in most Western countries, although government control of universities and infringements of academic freedom were commonplace in totalitarian regimes such as Nazi Germany and the Soviet Union. That long tradition of academic freedom is at risk in this case.

In the United States, academic freedom is generally respected, and the courts have accorded it special legal protections. The U.S. Supreme Court has held that academic freedom is a "special concern of the First Amendment." *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603 (1967). Out of respect for academic freedom, the Court has urged judicial restraint when dealing

with universities. *Bd. of Curators v. Horowitz,* 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring); *see id.* at 90-92, (opinion of the Court). Just as courts show deference and a reluctance to interfere in university settings when the risk exists of treading on academic freedom, so too should the Board. To use state power to impose an exclusive bargaining agent on teaching assistants is an unwarranted intrusion into academia. As a matter of public policy and out of respect for academic freedom, the Board should refrain from such impositions.

In addition to the consideration the Board must give to academic freedom, it must also weigh the negative impact exclusive bargaining would have on students' rights of free speech and free association. The imposition of exclusivity will impact students' First Amendment rights in a manner that may well not withstand constitutional scrutiny. The NLRA's "exclusive representation" regime is rooted in state action. Absent a governmental grant of monopoly bargaining power to a union as an exclusive bargaining agent, students are free to work out their own contracts with universities. Only the power of the government takes that liberty from teaching assistants. Moreover, compelled negotiation and enforcement of any agreement between a union and a university is administered by the Board. That governmental involvement is "state action," to which the Constitution applies. *Railway Clerks v. Hanson*, 351 U.S. 225, 232 & n.4 (1956). *Beck v. Commc'ns Workers*, 776 F.2d 1187, 1205-09 (1985) (2-1 decision), *aff'd en banc on other grounds*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988);[2] *Seay v. McDonnell-Douglas Corp.*, 427 F.2d 996, 1002-04 (9th Cir. 1970); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16-18 (1st Cir. 1971) ("'The federal statute is the source of the power and authority by which any private rights are lost or sacrificed,'" citing *Hanson*, 351 U.S. at 232, *(id.* at 16)); *see Miller v. Air*

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

Line Pilots Ass'n, 108 F.3d 1415, 1420 (D.C. Cir. 1997) ("it is not apparent why it is any less 'state action'" under the NLRA than under the RLA), *criticizing Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983); *Wegscheid v. Local Union 2991, UAW*, 117 F.3d 986, 987-98 (7th Cir. 1997); *but see Price v. Int'l Union, UAW*, 927 F.2d 88, 91-92 (2d Cir. 1991); *Kolinske,* 712 F.2d at 474. Because state action is involved in the grant of exclusivity and the administration of relations between the employees, union, and employer, the imposition of a union as an exclusive collective bargaining agent alone implicates First Amendment considerations as the Supreme Court found in *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

In addition to the impact exclusive representation has on the interests of students, such "exclusivity" further opens the door to compulsory unionism under Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), which would further invade the students' speech interests. *See generally, Commc'ns Workers v. Beck*, 487 U.S. 735 (1988). Once the Board mandates exclusive representation, compulsory union dues and fees will likely closely follow. Laws and regulations that compel speech and association are subject to a high standard of scrutiny. "[A] significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Recently, the Supreme Court made it clear that exacting scrutiny is required when compulsory unionism is imposed. *See Knox v. SEIU*, 132 S. Ct. 2277 (2012); *Harris v. Quinn,* 134 S. Ct. 2618 (2014).

The government bears the burden to show it has a compelling interest that justifies the burden on teaching assistants' First Amendment rights. Such an infringement can only be justified when the record shows such a governmental interest. *DeGregory v. Attorney Gen.,* 383 U.S. 825, 829 (1966). The NLRB's own historical record of not treating teaching assistants as

employees shows that they fall outside the industrial-labor model government uses to justify exclusivity and compulsory unionism. The General Counsel may claim that the government's interests in this academic setting are identical to that which permits compelled speech for collective bargaining in industrial settings. Given the countervailing interests of academic freedom in a university setting, however, and the limited economic interests involved in teaching assistants receiving compensation, no compelling interest justifies an infringement on the students' First Amendment rights.

VII. A UNIVERSITY IS NOT AN INDUSTRY AND THAT MODEL SHOULD NOT BE IMPOSED ON TEACHING ASSISTANTS.

The industrial model upon which the NLRA is based is an inappropriate model to impose on a university's relationship with any of its students. In *NLRB v. Yeshiva University*, 444 U.S. 672, 680-81 (1980), the Supreme Court limited the Board's power to force university professors into labor unions because "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" So also, the industrial model is not appropriate for the university-student teaching assistant relationship.

One of the worst abuses of exclusive representation is the leveling down of the best in favor of the group. In the industrial model labor unions use in collective bargaining, employees are fungible, receiving identical wages, adjusted for seniority. The result is that the most productive workers receive the same wages as the least productive. That adverse economic effect is not the only egregious impact on teaching assistants.

Non-economically, it is inappropriate to treat graduate students as employees, because some part of their "compensation" typically is in the form of academic credit, which is an

intangible. Grading is associated with such credit. If monetary compensation for teaching assistants is treated as employee wages under the Act, it is a short and natural step for grades received as part of the academic credit to be treated as a form of compensation subject to collective bargaining. In such a case, bargaining over grades likely would become a mandatory subject of bargaining. It would be consistent with labor union philosophy to demand that all teaching assistants receive grades within a narrow range—or even the same grades—for credits received as teaching assistants. The negative impact that would have upon the academic community is immeasurable.

CONCLUSION

Although the UAW may have Marxist dreams that students are "workers" (as opposed to students), who will be in the vanguard of an economic revolution when the workers of the world unite, the fact remains that teaching assistants principally *are* students, with little commonality of interest with most employees. To impose an employee-employer model upon students' education does not make them "workers."

If the Board assigns the NLRA's moniker "employees" to teaching assistants, it will unnecessarily and unfairly burden students who wish to pursue their education without a labor union's interference with their academic and First Amendment freedoms.

The Board's reversal of fifty years of policy and practice in its *Boston Medical* and *NYU I* decisions was not justified by any change in the law or facts. In its 2004 decision in *Brown*, the Board wisely overturned those decisions. Teaching assistants who wish to voluntarily join together to discuss their teaching duties and obligations are free to do so. Students who do not wish to do so, however, should not be forced into such association. Students should not be

considered employees under the Act. If, *arguendo*, the Board considers them as such, they should be treated as temporary employees and jurisdiction declined for that reason.

Moreover, even if, *arguendo*, students can be considered employees under the Act, the Board should consider whether sufficient state interest exists to justify this interference with academic freedom and the freedom of speech and association, and the other inherent problems that would result in creating a bargaining unit of teaching assistants. Finally, the Board should consider whether, as a matter of public policy, forcing students to be represented by an exclusive bargaining agent serves the Act's purposes and the larger societal interests implicated by such an intrusion into academia.

For the above-stated reasons, the Board should deny the UAW's petition, and it should neither reverse nor modify its holding in *Brown*.

Respectfully submitted,

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Dated: February 26, 2016

CERTIFICATE OF SERVICE

This is to certify that on February 26, 2016, a copy of the *Amicus Curiae* Brief of the National Right to Work Legal Defense and Education Foundation in Case No. 02-RC-143012 was filed electronically with the National Labor Relations Board, and was sent by electronic transmission, and copies were deposited in the U.S. mail with the proper postage affixed thereto to the parties below:

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Dated: February 26, 2016