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

AMICUS BRIEF OF THE GENERAL COUNSEL

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On December 23, 2015, the Board granted the Petitioner's Request for Review and the Employer's Conditional Request for Review. Thereafter, on January 13, 2016, the Board issued a Notice and Invitation to File Briefs, which invited the parties and interested *amici* to address the following questions:

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 be 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?

We address Question 1 in Section B of our argument and Question 2 in Section C. For the reasons given in Section A of our argument, we do not address Questions 3 and 4.

I. SUMMARY OF ARGUMENT

The Board should overrule *Brown University* and return to recognizing graduate student assistants as employees under Section 2(3) of the Act. As the Board had previously held in its well-reasoned decision in *New York University* ("*NYU*"), the Act's plain language and purpose clearly support finding graduate assistants to be statutory employees. In overturning *NYU*, the Board majority in *Brown* imposed a distinction between students and employees that is inconsistent with precedent, contrary to the text and policies of the Act, and at odds with underlying common-law principles. Furthermore, developments in the years since *Brown* was decided have refuted the speculative assertions upon which it was based and rendered it an aberration in Board law.

In overruling *Brown*, the Board should make no distinction between graduate student assistants who perform research duties and those who do other types of work in connection with their studies. Rather, the Board should adhere to the general standard articulated in *NYU*, which considers graduate assistants to be statutory employees if they perform services for their university, subject to its control, and in return for compensation. Graduate assistants can meet that standard regardless of whether they are engaged in research funded by external grants, and the Board should clarify that point in order to avoid unnecessarily narrow application of the Act.

II. ARGUMENT

A. The General Counsel Maintains an Interest in This Proceeding but Expresses No View on the Ultimate Merits or on Questions 3 and 4.

While not formally a party to representation proceedings, the General Counsel maintains an interest in this matter for three reasons. First, he shares the Board's goal of ensuring that "questions preliminary to the establishment of the bargaining relationship be expeditiously resolved," *NLRB v. O.K. Van Storage*, 297 F.2d 74, 76 (5th Cir. 1961), and that questions of representation be settled accurately and fairly, *see NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330-31 (1946). Second, the General Counsel has a role in the processing of representation cases because he supervises the Regional Directors and their staffs, to whom the Board has delegated authority over representation proceedings. *See UC Health v. NLRB*, 803 F.3d 669, 671 (D.C. Cir. 2015) (citing 26 Fed. Reg. 3911 (May 4, 1961)). Third, the General Counsel is responsible for prosecuting unfair labor practices, such as when an employer interferes with the right of employees to engage in protected concerted activity or refuses to bargain collectively with their representative. Such cases may arise after the Board has conducted a representation proceeding; however, many do not and may require the General Counsel to determine, prior to issuing complaint, whether the workers involved are statutory employees. *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87-88 (1995) (Board found individuals were employees under the Act; no prior representation proceeding had occurred). The General Counsel therefore has a substantial interest in this proceeding, both because it may ultimately give rise to unfair labor practice charges concerning the Employer and/or Petitioner, and because the Board's decision will guide his actions in other cases involving graduate student assistants.

The General Counsel believes that his views on Questions 1 and 2, set forth below, will be of use to the Board. Because the General Counsel is not a party to representation

proceedings, he expresses no view on the ultimate merits of this particular case. Moreover, he expresses no view on the proper resolution of Questions 3 and 4 because they concern representational issues related to unit composition and thus are unlikely to be of more than incidental importance to the resolution of unfair labor practice cases.

B. Question 1: The Board Should Overrule *Brown University*.

In answering the Board's first question, we start with the Act's text and purpose and demonstrate that the breadth of the term "employee" clearly encompasses graduate student assistants. We then show that *Brown*'s contrary holding conflicts with established precedent, ignores the Act's plain meaning, and has been eroded by subsequent developments.

1. The Act's text and purpose strongly support finding graduate student assistants to be statutory employees.

Section 2(3) of the Act states that "[t]he term 'employee' shall include any employee," 29 U.S.C. § 152(3), and contains only a few "specifically enumerated exceptions." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) ("The only limitations are specific exemptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the [Act]."). The Board, with Supreme Court approval, has long adhered to "a broad and literal reading" of who qualifies as an "employee." *NLRB v. Town & Country*, 516 U.S. 85, 91-92 (1995) (also noting that the legislative history of the Act supports such a reading). That reading is "consistent with the Act's avowed purpose of encouraging and protecting the collective-bargaining process," *Sure-Tan*, 467 U.S. at 892, "protecting 'the right of employees to organize for mutual aid without employer interference,'" *Town & Country*, 516 U.S. at 91 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945)); *see also* 29 U.S.C. § 157, and remedying the "inequality of bargaining power" between workers and their

employers, *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971); *see also* 29 U.S.C. § 151. Cognizant that "employee status must be determined against the background of the[se] policies and purposes," *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999), the Board has found employee status in a wide range of situations, provided that there is some "rudimentary economic relationship, actual or anticipated," between the workers and their employer, *Seattle Opera Assn.*, 331 NLRB 1072, 1073 (2000) (internal quotation marks omitted), *enforced*, 292 F.3d 757 (D.C. Cir. 2002). Thus, it has held that statutory employees include, for example, workers paid by a union to organize their employer, *Town & Country*, 516 U.S. at 85, undocumented workers, *Sure-Tan*, 467 U.S. at 891-92, and applicants for work, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941).

In applying the Act's expansive language and purpose to specific situations, the Board has made use of common-law agency rules governing the conventional master-servant relationship. *See Town & Country*, 516 U.S. at 93-95 (finding that the common law supported the Board's liberal interpretation of employee status); *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 12 (Aug. 27, 2015) (providing overview of the common-law agency test). Under those rules, an employee includes any person "who perform[s] services for another and [is] subject to the other's control or right of control. Consideration, i.e., payment, is strongly indicative of employee status." *Boston Medical Center Corp.*, 330 NLRB 152, 160 (1999); *see also NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) ("The Act's definition of 'employee' . . . includes any person who works for another in return for financial or other compensation." (internal quotation marks, brackets, and citations omitted)).

The Board's decision in *New York University*, 332 NLRB 1205 (2000) ("*NYU*"), which held that graduate student assistants are employees under the Act, followed directly from these

principles. As the Board found, graduate assistants, whether working in a teaching or research capacity, "perform their duties for, and under the control of" their university, which in turn pays them for those services—a situation "indistinguishable from a traditional master-servant relationship." *Id.* at 1206. They thus "plainly and literally" meet the Act's definition of "employee." *Id*.

Turning to the Act's purpose, the Board in *NYU* found "no basis to deny collective-bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students." *Id.* at 1205. Among other things, the Board rejected the argument that graduate assistants who spent only 15 percent of their time performing duties required by their positions were "predominantly" students and therefore could not be statutory employees. *Id*. at 1206. Regardless of their time commitment, the graduate assistants performed work under the university's control and so were "no less 'employees' than part-time or other employees of limited tenure or status." *Id.* (citing *University of San Francisco*, 265 NLRB 1221 (1982) (finding that certain part-time faculty at private, nonprofit university constituted unit appropriate for collective bargaining)).

The *NYU* Board also rejected the argument that graduate assistants should be denied the Act's protection because their work is "primarily educational" and instead explained that "obtain[ing] educational benefits from employment is not inconsistent with employee status." *Id.* (internal quotation marks omitted). In that regard, the Board relied upon its decision in *Boston Medical Center Corp.*, 330 NLRB 152 (1999), which had found interns, residents, and fellows at a nonprofit teaching hospital to be statutory employees, even though they were also "students learning their chosen medical craft." *Id.* at 152, 160-61. As the Board in *Boston Medical* explained, being a student and being an employee are not "mutually exclusive." *Id.* at

161. To the contrary, an educational component "complements, [and] indeed enhances" the work performed by employees and is present in many types of employment relationships. *Id.* at 160-61 (citing apprenticeships and other professional training programs as examples). Given that reasoning, *NYU* found it irrelevant that the employees in *Boston Medical* had already received their degrees while graduate assistants have not. 332 NLRB at 1207.

Finally, the *NYU* Board rejected the argument that recognizing graduate assistants as statutory employees would harm academic freedom. *Id.* at 1208; *see also Boston Medical*, 330 NLRB at 164-65 (rejecting similar argument). Citing its extensive experience with bargaining units of faculty members at private, nonprofit universities, the Board stated that the concern was "speculative," especially in light of the dynamic nature of collective bargaining and the compelling interests served by the Act. *NYU*, 332 NLRB at 1208 & n.9.

In the General Counsel's view, *NYU* was correctly decided. That graduate student assistants are statutory employees is a conclusion firmly based on Section 2(3)'s broad wording and the Act's overarching purpose. *NYU* also followed from well-reasoned precedent, including *Boston Medical*, and thus contributed to the overall stability and coherence of Board law.

2. *Brown University* was wrongly decided and should be reversed.

In *Brown University*, 342 NLRB 483 (2004), a 3-to-2 majority of the Board overturned *NYU* and held that "graduate student assistants are not statutory employees." *Id.* at 483. As explained below, the Board should now overturn *Brown*. In undoing *NYU*, issued less than four years prior, the *Brown* majority failed to articulate any convincing rationale for a decision fundamentally at odds with the Act. Furthermore, in the years since, *Brown* has become even more untenable due to improved empirical knowledge about, and further experience with, collective bargaining by graduate assistants, and the continued development of Board law.

a. *Brown* contravenes precedent and the Act's plain language and purpose.

The flaws in the *Brown* majority's decision are many, as a vast body of criticism by scholars and practitioners attests.[1] Overall, *Brown*'s chief errors lie in its failure to adequately reconcile its holding with precedent and its return to an unsound distinction between students and employees.

With regard to precedent, the *Brown* majority sought to portray its decision as no more than a return to pre-*NYU* Board law. *Id.* at 486-87, 490-91. But *Brown* did nothing to undermine *Boston Medical*, from which *NYU*'s holding directly followed. Indeed, the *Brown* majority expressly declined to overturn *Boston Medical* or to reinstate *St. Clare's Hospital*, 229 NLRB 1000 (1977), which *Boston Medical* had reversed. *Brown*, 342 NLRB at 483 n.4, 487, 490 n.25.

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[1] *E.g.*, Christopher Hexter, et al., *Twenty-Five Years of Developments in the Law Under the National Labor Relations Act*, 25 ABA J. LAB. & EMP. L. 299, 313-14 (2010) (stating that *Brown* "ignored more than thirty years of organizing history by graduate students at public-sector universities and the workable collective bargaining relationships that followed"); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L. J. 2013, 2076 (2009) (noting that the *Brown* majority "offered no empirical support, and instead simply reiterated its arguments from definition"); Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of* Chevron *and* Brand X, 89 B. U. L. REV. 189, 214-22 (2009) (critiquing the *Brown* majority's claim that its "result was mandated" by the Act and its refusal to consider available evidence bearing on its policy arguments); Ellen Dannin, *Understanding How Employees' Rights To Organize Under the National Labor Relations Act Have Been Limited: The Case of* Brown University, AM. CONST. SOC'Y FOR L. & POL'Y (2008), *available at* http://www.acslaw.org/files/Dannin%20Issue%20Brief.pdf (providing extensive critique of *Brown*); Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 CORNELL J. L. & PUB. POL'Y 263, 323-28 (2007) (describing how *Brown*'s student versus employee dichotomy is "inconsistent with the realities of [graduate assistants'] working conditions"); Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 582-83 & n.94 (2007) (identifying *Brown* as one of several cases that were based on "dubious policy grounds," gave too "little weight to the plain language of the Act," and "largely ignored the economic realities of the employment relationship in question"); James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 224-25 & n.15 (2005) (citing *Brown* as example of Board decisions that have impeded the Act's effectiveness in the modern workplace).

Boston Medical remains Board law to this day. The *Brown* majority attempted to distinguish *Boston Medical* on the basis that the employees there "were interns, residents, and fellows who had already completed and received their academic degrees" and were thus unlike "graduate assistants who have not received their academic degrees." *Id.* at 487. However, as already noted, *Boston Medical* did not turn on the employees there having already obtained academic degrees, but instead on the broader notion that an educational component to work is not inconsistent with employee status. 330 NLRB at 161. Beyond this, *Brown* gave no further justification for its distinction and simply stated that graduate assistants are "clearly students." 342 NLRB at 487. As a result, *Brown* not only departed from a core holding of *Boston Medical*, but did so without adequate explanation.

Precedent aside, the crux of the *Brown* majority's decision—that graduate assistants are "primarily students and have a primarily educational, not economic relationship with their university," 342 NLRB at 487—is wrong in light of the Act's plain language and purpose. As noted above, Section 2(3) lists specific exceptions to its otherwise broad grant of employee status. An exemption for "students" is not among them. Likewise, the common-law agency definition of "employee" does not contain an exception for students, but instead broadly covers those "who perform[] services for another . . . subject to the other's control or right of control," with consideration being "strongly indicative of employee status." *Boston Medical*, 330 NLRB at 160; *see also* RESTATEMENT (SECOND) OF AGENCY § 220(1) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."). It is clear that graduate assistants are employees under this test. *NYU*, 332 NLRB at 1206 (finding graduate

assistants' relationship with their university "indistinguishable from a traditional master-servant relationship").

But the *Brown* majority brushed aside the Act's plain language and stated that, even assuming that "graduate student assistants are employees at common law . . . it does not follow that they are employees within the meaning of the Act." 342 NLRB at 488, 491. Such a refusal to meaningfully engage with the common law represents a glaring departure from standard practice. *See Town & Country*, 516 U.S. at 94 (suggesting that the Board's "departure from the common law of agency" may "render[] its interpretation unreasonable" (citing *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968))); *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 12-20 (conducting extensive and detailed application of common law). Moreover, by revealing the economic nature of the relationship between graduate student assistants and their universities, application of the common law test proves just how untenable the *Brown* majority's student-versus-employee dichotomy is. Specifically, it highlights the fact that, by means of their services, graduate assistants render an economic benefit to their university, subject to the university's control. In return, they receive compensation in the form of stipends and other funding and benefits.[2] That shows that graduate assistants "are clearly neither volunteers nor independent contractors." 342 NLRB at 495-96 n.9 (Members Liebman and Walsh, dissenting).

[2] As stated above, the General Counsel expresses no view on the ultimate merits of this particular representation proceeding. Nonetheless, he observes that this case illustrates the general appropriateness of finding graduate student assistants to be statutory employees. Under the facts found by the Regional Director, the Employer receives substantial economic value from the graduate assistants' work. As she noted, "[i]n many respects the duties of student assistants are the same as those of admittedly 'employee' counterparts on the Columbia University faculty." Supplemental Decision and Order Dismissing Petition, at p. 29. Teaching assistants "relieve faculty of tasks, such as grading, proctoring, and administrative work, that would otherwise fall within their job duties in their capacity as paid employees." *Id.* Research assistants "perform[] many of the same tasks and advanc[e] the work of the lab and the mission of the University" just like other faculty and staff and "contribute to the financial coffers of the

That graduate assistants also receive a personal educational benefit from their work is fully consistent with the common law because that work is "actuated, *at least in part*, by a purpose to serve" the university. *See* RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (emphasis supplied) (defining scope of employment). Furthermore, as the Supreme Court has held, an individual can serve two different masters at the same time and still satisfy the common-law definition of "employee." *Town & Country*, 516 U.S. at 94-95; *see also* RESTATEMENT (SECOND) OF AGENCY § 226 ("A person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other."). *A fortiori*, then, graduate assistants serving only one master—their university—cannot be viewed as having abandoned their employee status simply because that same service simultaneously furthers their own educational and professional goals. Put another way, they are "still employees, regardless of other intended benefits." *Boston Medical*, 330 NLRB at 161 (collecting supporting Board and court decisions).

Because the economic nature of graduate assistant positions is undeniable in light of the common law, *Brown*'s classification of those positions as "primarily educational" would be viable only if the Act contemplated some relative weighing of economic and "non-economic" aspects of employment relationships. But all that the Act requires to find employee status is a "rudimentary economic relationship, actual or anticipated." *Seattle Opera Assn.*, 331 NLRB at 1073 (paid auxiliary choristers in community opera were statutory employees, notwithstanding

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University" via work on certain types of grants. *Id.* It also appears that some research assistants may work on projects resulting in patents that the Employer then owns. *Id.* at 15. In return, graduate assistants receive financial support including "full tuition, health insurance, University facilities fees, and a stipend for living expenses." *Id.* at 6. Payments to graduate assistants "are sometimes described and treated . . . as salaries." *Id.* at 29. The Regional Director also noted testimony supporting the view that graduate assistant teaching duties are performed "primarily as fulfillment of . . . obligations in return for the stipend support" received. *Id.*

that they sang for personal pleasure and satisfaction and not to earn a living); *see also Town & Country*, 516 U.S. at 87 (paid union organizers are statutory employees, even though their primary purpose is to organize the employer's workers); *WBAI Pacifica*, 328 NLRB at 1274 (unpaid radio staff were not statutory employees in absence of a basic economic relationship). Graduate assistants' receipt of compensation—stipends and other funding and benefits—in return for services they provide to the university underscores that they meet that requirement. Finding graduate assistants to be employees, even if there are also some "non-economic" aspects to their relationship with their university, is therefore also in harmony with the Act's broad goal of encouraging collective bargaining by workers and protecting their organizational rights across a wide range of economic relationships. *Cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 284 n.13 (1974) (noting that the Act "was designed to protect 'laborers' and 'workers'" and distinguishing individuals clearly within the traditional "managerial hierarchy").

Instead of engaging with the Act's plain meaning and purpose, the *Brown* majority based its decision on the policy view that collective bargaining "would have a deleterious impact on overall educational decisions" by universities. 342 NLRB at 490. It cited no specific instances where that had occurred and provided no empirical support for that prediction. *See id.* at 492-93 (admitting the absence of such evidence and dismissing it with the circular argument that "inasmuch as graduate student assistants are not statutory employees, that is the end of our inquiry"). Nor did it explain how that policy view can be reconciled with the Board's longstanding exercise of jurisdiction over private, nonprofit educational institutions, *see Cornell University*, 183 NLRB 329, 334 (1970), or its approval of bargaining units composed of employees whose duties involve educational decision-making, *see C. W. Post Center*, 189 NLRB

904, 905 (1971) (full-time university faculty members are "entitled to all the benefits of collective bargaining if they so desire").

In addition, the *Brown* majority failed to demonstrate how importing hypothetical concerns about the results of collective bargaining into the interpretation of Section 2(3) is consistent with proper administration of the Act. Even assuming, for the sake of argument, that collective bargaining by graduate assistants could cause difficulties in certain cases, the Board's general practice is to deal with those issues when they arise and with reference to the portions of the Act concerning the duty to bargain, such as Section 8(d) and 8(a)(5). *See* 29 U.S.C. § 158(d), (a)(5); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958) (identifying these provisions as the basis for distinguishing mandatory and permissive subjects of bargaining). The *Brown* majority's preemptive exclusion of a whole category of workers from the Act's protection, based on speculation that the substantive outcome of bargaining would be inconsistent with its own policy preferences, is unprecedented and based on an improper conception of the Board's role in the collective-bargaining process. *Cf. H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970) ("The object of th[e] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions.").

In sum, the *Brown* majority failed to give due consideration to precedent, the Act's plain text and purpose, or empirical fact. Using pure conjecture and a policy preference divorced from the statute, it revived an unsound distinction between students and employees so as to deny to

graduate assistants their collective-bargaining rights. The Board should overturn *Brown* and once again recognize graduate student assistants as statutory employees.[3]

b. Subsequent developments have further undermined *Brown*.

While *Brown* was wrong on the day it was decided, its errors have become more evident and troubling in the years since. These developments provide further grounds for overturning *Brown*, particularly given the Board's "responsibility to adapt the Act to changing patterns of industrial life," *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975), and to take account of its "cumulative experience in dealing with labor-management relations," *id.* (citing *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)); *see also Am. Trucking Ass'n v. Atchison*, 387 U.S. 397, 416 (1967) ("Regulatory agencies do not establish rules of conduct to last forever; they are supposed . . . to adapt their rules and practices to the Nation's needs in a volatile, changing economy.").

To begin, recent empirical research has proven false the *Brown* majority's negative predictions about collective bargaining by graduate assistants. In 2013, labor relations researchers published a study based on data gathered from four unionized and four nonunion public universities. Sean E. Rogers, Adrienne E. Eaton, and Paula B. Voos, *Effects of Unionization on Graduate Student Employees: Faculty-Student Relations, Academic Freedom, and Pay*, 66 INDUS. & LAB. REL. REV. 487, 497, 508 (2013) (noting that it was not possible at the time to obtain data on graduate assistant unionization at private research universities because the *Brown* decision had impeded such organization). Utilizing statistical techniques, they found "no support for the [Board]'s contention in the *Brown* decision that union representation would harm

[3] Additionally, the General Counsel believes that the Board should apply the same analysis to determine the employee status of undergraduate student assistants who perform services at a university in connection with their studies. As stated above, the General Counsel expresses no view on the unit composition or temporary employee issues presented in questions 3 and 4.

the faculty-student relationship." *Id.* at 507. On the contrary, where graduate assistants had union representation, they "reported better personal and professional support relationships with their primary advisors than were reported by their nonunion counterparts." *Id*. The researchers also found "no support" for *Brown*'s prediction that graduate assistants' unionization "would diminish academic freedom," and actually found some support "for a positive impact of unionization on the overall climate of academic freedom (both departmental and university-wide)." *Id*. Lastly, the report found support "for the notion that unionization improves the economic terms of graduate student employees in the form of annual stipends as well as perceptions of pay fairness and adequacy." *Id*.

Recent events at New York University have also proven the productiveness of collective bargaining by graduate assistants at private universities. Following a protracted battle, NYU in late 2013 voluntarily agreed to permit its graduate assistants to vote on union representation. They selected an affiliate of the United Auto Workers as their bargaining representative by a vote of 620 to 10, making it "the only graduate assistants' union recognized by a private university in the United States." Steven Greenhouse, *N.Y.U. Graduate Assistants to Join Auto Workers' Union*, N.Y. TIMES, Dec. 13, 2013, at A33, *available at* http://www.nytimes.com/2013/12/13/nyregion/nyu-graduate-assistants-to-join-auto-workers-union.html. The parties' subsequent negotiations resulted in a collective-bargaining agreement in March 2015. Collective Bargaining Agreement Between New York University and International Union, UAW, AFL-CIO and Local 2110, UAW, *available at* http://www.makingabetternyu.org/gsocuaw/read-it/; *see also* Avi Asher-Schapiro, *NYU's Graduate Student Union Just Won a Historic Contract*, THE NATION, Mar. 11, 2015, http://www.thenation.com/article/nyus-graduate-student-union-just-won-historic-contract/

(reporting on course of bargaining at NYU); Emma Kolchin-Miller, *NYU Contract Process Serves as Framework for Columbia Graduate Students Seeking Union Recognition*, COLUMBIA DAILY SPECTATOR, Apr. 2, 2015, http://columbiaspectator.com/news/2015/04/02/nyu-contract-process-serves-framework-columbia-graduate-students-seeking-union (same). That agreement includes provisions governing such issues as compensation, health insurance, the terms of appointment of graduate assistants, professional conditions (e.g., access to desk space, telephone, voicemail, and photocopy equipment; latitude for the exercise of professional judgment in accomplishing assignments; and acknowledgement of projects and contributions), reimbursement for travel and meal expenses, holiday and vacation procedures, leaves of absence, health and safety, discipline and discharge, child care subsidies, and grievance and arbitration procedures. In addition, the contract contains a "Management and Academic Rights" clause that reserves to NYU the right to, among other things, "determine the processes and criteria by which graduate employees' performance is evaluated" and "exercise sole authority on all decisions involving academic matters."

Far from confirming the *Brown* majority's fears, the agreement at NYU shows that graduate assistants' work encompasses many topics amenable to collective bargaining, and that private parties are fully capable of negotiating agreements about those topics without detrimentally affecting the educational process. At the same time, graduate assistants at other private universities have expressed a desire for similar arrangements, but *Brown* remains a major roadblock. *See, e.g.*, Thomas Gould, *State of the Unions: As Grad Students Organize, Tension Mounts*, THE POLITIC, Jan. 18, 2016, http://thepolitic.org/state-of-the-unions-as-grad-students-organize-tension-mounts/ (covering organizational efforts of Yale graduate assistants); Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective*

Action, 16 CORNELL J. L. & PUB. POL'Y at 326 & n.250 (mentioning strikes by graduate assistants at NYU, Yale, and Columbia). Taken together, these facts represent "significant developments in industrial life . . . warrant[ing] a reappraisal" and reversal of *Brown*. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. at 265.

In addition, decisions since *Brown* have eroded its validity and increasingly rendered it an outlier in Board law. First, in *St. Barnabas Hospital*, 355 NLRB 233, 233 (2010), the Board refused to overturn a Regional Director's decision directing an election among a hospital's house staff (i.e., medical interns and residents) and rejected the employer's argument that *Brown* compelled reevaluation of *Boston Medical*. The Board explained that *Boston Medical* "ha[d] been the law for over a decade, and no court of appeals has questioned its validity." *Id.* This strong reaffirmation of *Boston Medical*, a case in deep tension with *Brown*, evidences the continued weakness of *Brown*'s rationale, as well as the Board's considered judgment that it should not be extended.

Second, in a pair of post-*Brown* decisions, the Board found research assistants to be statutory employees. *See Research Foundation–CUNY*, 350 NLRB 201 (2007); *Research Foundation–SUNY*, 350 NLRB 197 (2007). Each of those two cases involved a private corporation, for which the research assistants directly worked, and an affiliated, but technically separate, university. As recounted in the *SUNY* case, the research assistants were required to be enrolled as students at the affiliated university and to leave their research positions upon graduation. Furthermore, their research work had to be substantially related to their academic dissertations, and their research supervisors often simultaneously served as their university dissertation advisors. *Research Foundation–SUNY*, 350 NLRB at 199. While acknowledging that these factors showed a "primarily educational" relationship, the Board found that that

relationship was between the research assistants and the university, not the corporation for which they were directly doing research. *Id.* With respect to the corporation, the Board found, the research assistants had an economic relationship because they worked and received compensation under awards administered by it, their compensation was subject to its benchmarks, they were placed on its payroll, and they were subject to its labor and employment policies. *Id.* On those facts, the Board deemed *Brown* inapplicable. *Research Foundation–CUNY*, 350 NLRB at 201 (stating that the corporation for which the research assistants worked was not an "educational institution" and that the research assistants and the corporation had "an economic and not an educational relationship.").

Although the *Research Foundation* cases technically left *Brown* in place, they distinguished it in a manner that severely undermines its continued viability. Under their holding, *Brown* only applies to entities that formally qualify as "educational institution[s]," regardless of practical realities. Even where an entity closely ties work and tenure to the requirements of a degree program at a university with which it is affiliated, *Brown* is not controlling, so long as the entity is legally separate. That a relationship considered "primarily educational" under *Brown* would instead be considered "economic" based on such an insignificant difference—one having little to do with the content of the work being performed, the type of control being exercised, the compensation being earned, or the resulting educational benefit— lays bare the economic core of all such relationships and thereby undercuts *Brown*'s student-versus-employee dichotomy. The outcome of the *Research Foundation* cases—recognition of the research assistants as employees—was correct in light of the Act's text and purpose, and the fact that such a straightforward result required *Brown* to be distinguished on such formalistic grounds supports overturning *Brown* altogether.

In short, empirical understanding of collective bargaining by graduate assistants has improved since *Brown* and shown that decision's assumptions to be false. The productiveness of such bargaining has also been borne out by recent events at New York University. At the same time, the Board has resisted applying *Brown* in several important cases and has increasingly narrowed its applicability.[4] These developments militate strongly in favor of the Board now directly overruling *Brown*.

C. Question 2: The Board Should Return to the Standard Set Forth in *New York University* for Determining Whether Graduate Student Research Assistants Are Statutory Employees but Should Clarify That Those Engaged in Research Funded By External Grants Also Meet That Standard.

In overruling *Brown*, the Board should not create a new standard for determining whether graduate assistants engaged in research are statutory employees. Rather, it should simply return to the standard set forth in *NYU*. There, the Board concluded that graduate assistants who receive stipends or other compensation, whether engaged in teaching or research, are employees under the Act. 332 NLRB at 1205-06. In so holding, the Board looked first to the plain language of Section 2(3) and found that "graduate assistants plainly and literally" meet that provision's broad definition of "employee." *Id.* at 1206. It then applied the common-law agency test, which supports a finding of employee status where a worker "performs services for another, under the other's control or right of control, and in return for payment." *Id.* (citing *Town &*

[4] The Board cited *Brown* in *Brevard Achievement Center*, 342 NLRB 982, 985 (2004) (finding that disabled workers in a primarily rehabilitative relationship with their employer are not statutory employees under the Act). However, the "typically industrial/primarily rehabilitative test" used there represents a distinct strand of Board law based on unique policy concerns inapplicable to graduate assistants. Moreover, the Board has not used that test to broadly exclude an entire class of workers from the Act's protections, as it did in *Brown*, but has instead applied it with attention to the facts of each case. *See Goodwill Industries of North Georgia*, 350 NLRB 32, 36-39 (2007) (finding disabled janitorial workers to be statutory employees).

Country, 516 U.S. at 90-91, 93-95). The Board found that graduate assistants clearly meet that test. *Id.* There should be no distinction between graduate teaching and research assistants. *See Research Foundation–SUNY*, 350 NLRB at 197-99 (finding research project assistants were statutory employees based on similar considerations).

However, in adopting *NYU*'s broad standard, the Board should clarify that graduate student assistants engaged in research funded by external grants are, as a general matter, statutory employees, just as other graduate research assistants are. In particular, the Board should reject the notion that graduate research assistants who receive funding from external grants do not perform a service for their university. That clarification is necessary because of the following footnote in *NYU*:

> For the reasons set forth by the Regional Director, we agree that the Sackler graduate assistants and the few science department research assistants funded by external grants are properly excluded from the unit. *Leland Stanford Junior Univ.*, 214 NLRB 621 (1974) [hereinafter, "*Stanford*"]. The evidence fails to establish that the research assistants perform a service for the [e]mployer and, therefore, they are not employees as defined in Section 2(3) of the Act.

332 NLRB at 1209 n.10. The relevant portions of the Regional Director's decision in *NYU* found that, unlike other graduate assistants, who were required to perform certain services in exchange for their stipends and other funding, the externally-funded research assistants and Sackler graduate assistants were "not required to perform any specific services" at all for the university. 332 NLRB at 1212 n.19, 1214-15. Rather, they performed research in connection with their own dissertations and were "simply expected to progress towards their dissertation" or achieve "satisfactory academic performance" in order to continue receiving their stipends and remain in the program. *Id*. at 1214-15. The Regional Director therefore found their funding "more akin to a scholarship." *Id.* at 1220. In addition, the Regional Director distinguished them from other research assistants, also funded by grants, but who were "assigned specific tasks" and

"work[ed] under the direction and control of [a] faculty member" rather than on their own dissertations. *Id.* at 1221 n.51.

With these facts in view, the very limited nature of the *NYU* Board's footnote becomes clear. The research assistants at issue were not excluded from employee status because they received external funding, but rather because they performed no services to the university while under its control. *See id*. at 1220 n.50 (evidence of incidental benefits produced by excluded individuals did not show that they "provid[ed] services to the [e]mployer under its control in exchange for compensation"); *Stanford*, 214 NLRB at 623 (holding that certain research assistants were not statutory employees because they did not perform services under the employer's direction and control; the relationship 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"). In other words, the research assistants were not employees under the common-law test. On that point, *NYU* and *Stanford* appear to have involved exceptional situations unlikely to recur with much frequency. In the present case, for example, the Regional Director found that graduate research assistants "are compensated out of income from an external grant which has been awarded to the [u]niversity for a project overseen by a lead faculty member." Supplemental Decision and Order Dismissing Petition, at p. 14. The university itself "requires that the [graduate research assistant]'s work on a grant must both fulfill conditions of the research project" and ultimately relate to a dissertation. *Id.* at 13. Moreover, "[f]inancial benefits of outside grants inure to the [university], which is relieved of providing the financial support to students from its own budgets," and where intellectual property, like patents, results from a research grant, the university becomes the owner. *Id.* at 14-15. It is therefore evident that these externally-funded research assistants render substantial services to the Employer and do so under

the Employer's control. Given the Board's holding in *BFI Newby Island Recyclery* that, under common-law principles, indirect control, rather than direct and immediate control, is sufficient to establish an employment relationship, 362 NLRB No. 186, slip op. at 14, graduate research assistants whose work is funded by external grants will generally be employees of their university.

III. CONCLUSION

For the foregoing reasons, the General Counsel respectfully urges the Board to overrule *Brown University* and restore to graduate student assistants their proper status as employees under Section 2(3) of the Act. The decision in *Brown* was wrongly decided and cannot be reconciled with the text or purpose of the Act, established Board precedent, or subsequent developments. With regard to determining whether graduate assistants engaged in research are statutory employees, the Board should apply the broad standard articulated in *NYU*. However, the Board should clarify that graduate student assistants engaged in research funded by external grants are not generally excluded from being employees under the Act.

Respectfully submitted,

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