

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NEW YORK UNIVERSITY
Employer

and

Case 02-RC-023481

GSOC/UAW
Petitioner

POLYTECHNIC INSTITUTE
OF NEW YORK UNIVERSITY
Employer

and

Case 29-RC-012054

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

**BRIEF OF *AMICI CURIAE* UNITED ELECTRICAL, RADIO AND MACHINE
WORKERS OF AMERICA (UE) AND UE LOCAL 896/CAMPAIGN TO ORGANIZE
GRADUATE STUDENTS (COGS)
IN SUPPORT OF PETITIONERS**

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STATEMENT OF INTEREST

The United Electrical, Radio and Machine Workers of America (UE) is an independent rank-and-file union representing approximately 35,000 workers nationwide in a variety of private and public sector jobs. UE Local 896, the Campaign to Organize Graduate Students (COGS), is a constituent unit of UE in the public sector with nearly two decades of experience representing graduate student employees at the University of Iowa. Together, UE and UE Local 896/COGS (“*Amici*”) are dedicated to ensuring the collective bargaining rights of graduate student employees nationwide. For this reason, *Amici* have a substantial interest in the present matters reviewing the decision in *Brown University*, and in advocating for the inclusion of graduate student assistants at private nonprofit universities within the statutory definition of employees.

SUMMARY OF ARGUMENT

The decision by the National Labor Relations Board (“Board”) in *Brown University*, 342 NLRB 483 (2004), reversed a decision that was only four years old, *New York University*, 332 NLRB 1205 (2000), and established a broad holding that graduate student assistants are not statutory employees within the definition of Section 2(3) of the National Labor Relations Act (“Act”). The rationale for this holding was that graduate student workers “are primarily students and have a primarily educational, not economic, relationship with their university.” 342 NLRB at 487. Underlying the approach adopted in *Brown University* is an analytic framework based on a binary distinction between “student” and “employee,” and the proposition that an individual cannot be both with regard to a given employer. The Board’s decision is thus predicated on a technical test for determining employee status based on the “primary” or predominant character

of the individual worker and his or her relationship to the employer—whether “primarily educational” or economic, “primarily student” or employee. *Amici* submit that in adopting this primary-character test for determining employee status and interpreting the statutory term “employee,” the *Brown University* decision rests on a flawed reading of Board precedent and contravenes Congressional intent.

The origins of the primary-character test adopted by the *Brown University* Board lie in outdated Board precedent, which involved extending discretionary Board jurisdiction to cover nonprofit educational institutions. Such a test is inapposite to an interpretation of the statutory language of the Act or a determination of “employee” status, and yet the *Brown University* Board applies the test based on a flawed reading of past Board decisions, and a series of mistaken extensions of the primary-character test by the Board in earlier decisions. *Amici* submit instead that it is the clear intent of both Congress and the Supreme Court that the Board interpret the term “employee” based on common law agency doctrine and the plain meaning of the word, in contrast to a technical framework invented by the Board and more appropriately utilized in other contexts. Furthermore, *Amici* submit that legislative history, judicial precedent, and Board precedent in parallel contexts all weigh in favor of the specific inclusion of graduate student assistants within the statutory definition of “employee,” and all contradict the alleged policy and precedent-based justifications proffered by the *Brown University* Board.

For these reasons, *Amici* submit that the Board should overrule *Brown University* and reinstate a reading of the term “employee” consistent with common law agency doctrine, thus including graduate student assistants as individuals who are both students *and* statutory employees.

ARGUMENT

I. The primary-character test used by *Brown University* represents the flawed evolution of past Board precedent.

A. *University of Miami*: the origin of the primary-character test.

The “primarily educational” test was originally developed in the context of Board decisions regarding whether to include educational institutions as employers covered by the Act. In 1951, the Board declined to extend its discretionary jurisdiction over private, nonprofit educational institutions. *Trs. of Columbia Univ.*, 97 NLRB 424 (1951), *overruled by Cornell Univ.*, 183 NLRB 329 (1970).¹ In *University of Miami*, the Board reasoned that, “the activities of the Institute, including its research program, [were] *primarily educational* rather than commercial in character,” therefore precluding Board jurisdiction. *Univ. of Miami, Inst. of Marine Sci. Div.*, 146 NLRB 1448, 1451 (1964) (emphasis added). This analysis established that, despite having an effect on commerce above the Board threshold, *id.* at 1450, an entity would not be treated like a normal “employer” if educational purposes predominated; that is, if the character of the entity was “primarily educational.” The Board subsequently applied this primary-character test in a number of cases determining educational institutions’ status as employers under the Act. *See Mass. Inst. of Tech.*, 152 NLRB 598, 603 (1965) (finding that

¹ Prior to *Columbia University*, the Board had exerted employer jurisdiction over certain educational institutions that the Board found were *also* engaged in commerce to a sufficient degree. *See, e.g., Henry Ford Trade Sch.*, 58 NLRB 1535, 1535 (1944) (“[W]e are [not] of the opinion that the avowed educational purpose for which the School was organized is inconsistent with a finding that it is *also* engaged in a manufacturing enterprise which substantially affects commerce. We find that the School is engaged in commerce within the meaning of the Act.” (emphasis added)). *See also, e.g., Port Arthur Coll.*, 92 NLRB 152 (1950) (involving workers employed by college radio station); *Ill. Inst. of Tech.*, 81 NLRB 201 (1949) (directing election for machinists at research foundation affiliated with college).

computer center was “primarily educational rather than commercial” and thus exempted); *Mayo Clinic*, 168 NLRB 557, 558 (1967) (applying “primarily engaged in education and research activities” test to find that research hospital was not exempted from Act); *Quain & Ramstad Clinic*, 173 NLRB 1185, 1185 (1968) (citing test as applied in *Mayo Clinic*); *Centerville Clinics, Inc.*, 181 NLRB 135, 136 (1970) (same).

B. *Cornell University*: the Board abandons the primary-character test.

In *Cornell University*, the Board reversed precedent and extended discretionary jurisdiction to private universities. 183 NLRB 329 (1970). The clear implication of the *Cornell University* decision was that this type of primary-character analysis was being rejected in the context of educational employers. The Board in *Cornell University* first noted that it remained unpersuaded that Congress had intended to exclude nonprofit educational institutions from the definition of “employer” under the Act, and that “[t]he fact remains that Section 2(2) contains no express exemption for nonprofit employers.” 183 NLRB at 331. The Board then undertook an extensive factual review of the state of private higher education and found that universities had a clear “substantial effect on commerce” requiring their inclusion as normal “employers” under the Act, thus explicitly overruling *Columbia University*. *Id.* at 334. In reaching its decision, the Board stressed that “[n]o claim is made that education is not still the *primary goal* of such institutions . . . Yet to carry out its educative functions, the university has become involved in a host of activities which are commercial in character.” *Id.* at 332 (emphasis added).

As such, in *Cornell University*, Board rejected the *either educational or commercial* binary in order to find that private universities were both educational institutions *and* commercial actors. This approach was a direct repudiation of *University of Miami* and other earlier cases

decided under *Columbia University*, which all suggested that if an organization was “primarily educational,” it necessarily could not be a commercial employer covered by the Act, no matter how large its effect on commerce, *see* 146 NLRB at 1451. Thus, when the Board extended its jurisdiction to cover private nonprofit universities, it did so by rejecting just such a primary-character test. For example, only a few months after *Cornell University* the Board found that an art school was an employer under the Act covered by the Board’s jurisdiction despite the fact that “[t]he record clearly indicates that the Employer’s primary goal is education.” *Trs. of Corcoran Gallery of Art*, 186 NLRB 565, 566 (1970) (citing *Cornell Univ.*, 183 NLRB 32). The *Cornell University* decision established that, in the context of educational employers, actors can have concurrent roles that are both educational and economic in nature; and that even if an actor’s *primary* role is educational, it can still have an impact on commerce bringing it within the definitions of the Act.

C. *Adelphi University*: the Board revives the primary-character test for the limited purpose of determining the appropriate composition of bargaining units.

Just three years after the Board extended its discretionary jurisdiction to cover private nonprofit universities, the Board first acknowledged the issue of whether graduate students could be “employees” within the definition of Section 2(3) of the Act, but did not answer the question at that time. *Barnard Coll.*, 204 NLRB 1134, 1135 fn.5 (1973). In *Barnard College*, the Board held that student employees did not share a sufficient community of interests with nonstudent employees so as to belong to the same bargaining unit, *id.* at 1135, following a string of decisions reaching the same conclusion, *Adelphi Univ.*, 195 NLRB 639 (1972); *Coll. of Pharm. Scis.*, 197 NLRB 959 (1972); *Georgetown Univ.*, 200 NLRB 215 (1972); *Cornell Univ.*, 202

NLRB 290 (1973). In *Adelphi University*, the Board found that, since graduate students were “primarily students” working toward their advanced degrees and without the same employee benefits as nonstudents, they did not belong in the same bargaining unit as regular faculty. 195 NLRB at 640; *see also Coll. of Pharm. Scis.*, 197 NLRB at 960 (echoing “primarily students” language). However, none of these decisions suggested that graduate students were not covered by the Act as “employees,” or that a bargaining unit of graduate students alone would be improper.

D. *Stanford University*: the Board excludes a group of student research assistants from the coverage of the Act, and cites *Adelphi University*’s “primarily student” language without further analysis.

The first Board decision to decide whether a particular unit of graduate student workers were “employees” was *Stanford University*, wherein the Board held that a group of physics research assistants were not “employees” within the definition of the Act. *Leland Stanford Junior Univ.*, 214 NLRB 621, 621 (1974). In *Stanford University*, the Board’s reasoning took into account the fact that the students were paid with stipends that were not based on the students’ skill or the nature of the research performed, but primarily emphasized that the students generally chose the topic of their research and were not given tasks controlled by the university. *Id.* at 622. Citing the language of *Adelphi University*, the Board held that the research assistants were “primarily students” and were not employees covered by the Act. *Id.* at 623 (citing *Adelphi Univ.*, 195 NLRB at 640). The Board contrasted student research assistants with full-time research associates, who typically had already secured an advanced degree, who could be discharged, and whose work was “to advance a project undertaken by and on behalf of Stanford as directed by someone else.” *Id.*

However, the Board in *Stanford University* did not suggest that the research assistants were not “employees” under the Act based on the fact that their status as students *predominated* over their status as employees; rather, the Board found that, since the students were not expected to do any research other than to further their own dissertations, there was no issue affecting commerce, and thus the students were not traditional “employees.” *Id.*; *see also St. Clare’s Hosp. & Health Ctr.*, 229 NLRB 1000, 1005 (1977) (Fanning, Chairman, dissenting) (noting that the holding in *Stanford University* that the research assistants were not “employees” was based on the fact that they were not performing any actual “work” other than their own schoolwork).

E. *Cedars-Sinai Medical Center*: the Board revives the primary-character test in the context of medical student interns and residents, and in the context of defining “employees” under the Act.

Two years later, in *Cedars-Sinai Medical Center*, the Board established a binary approach with regard to medical students, finding that “interns, residents, and clinical fellows are *primarily* engaged in graduate educational training at Cedars-Sinai and that their status is therefore that of students *rather* than of employees.” 223 NLRB 251, 253 (1976) (emphasis added) *overruled by Bos. Med. Ctr. Corp.*, 330 NLRB 152 (1999). In response to a dissenting member, the Board stated that “employee” and “student” were not necessarily mutually exclusive categories; nevertheless, the Board went on to argue that there was a “fundamental difference between an educational and an employment relationship,” *id.*, seeming to suggest that with regard to a particular employer an individual could only be *either* a student *or* an employee. The Board also focused on the alleged intent of the individual workers, noting that that the medical students “participate in these programs not for the purpose of earning a living; instead

they are there to pursue the graduate medical education that is a requirement for the practice of medicine . . . their choice was based on the quality of the educational program [not the pay.]” *Id.*

Following this decision, the Board applied the *Cedars-Sinai* “primarily [a] student[.]” test for determining whether an individual’s employer-relationship was that of “student” or “employee” to preclude collective bargaining rights for medical students in a wave of cases. *See St. Clare’s Hosp. & Health Ctr.*, 223 NLRB 1002, 1002 (1976); *Univ. of Chi. Hosps.*, 223 NLRB 1032, 1032 (1976); *Buffalo Gen. Hosp.*, 224 NLRB 76, 76 (1976); *Barnes Hosp.*, 224 NLRB 552, 552 (1976); *Kan. City Gen. Hosp. & Med. Ctr.*, 225 NLRB 108, 109 (1976); *Mental Health & Family Servs. Ctr.*, 225 NLRB 780, 781 (1976) (involving psychology interns); *Wayne State Univ.*, 226 NLRB 1062, 1062 (1976); *Deaconess Hosp. of Buffalo, N.Y.*, 226 NLRB 1143, 1143 (1976). However, this wave of cases, all decided within the span of a single year, relied solely on the direct language and reasoning of *Cedars-Sinai*.

F. *St. Clare’s Hospital*: the Board fully adopts the primary-character test for medical student workers through the use of spurious reasoning and a mistaken reading of Board precedent.

Based on allegations that *Cedars-Sinai* constituted an “aberration in national labor policy” and that the decision lacked clarity, the Board attempted to elucidate the matter in *St. Clare’s Hospital & Health Center*, 229 NLRB 1000, 1000 (1977), *overruled by Bos. Med. Ctr. Corp.*, 330 NLRB 152 (1999). However, the Board’s attempt at clarity seemed in many respects to conflate its earlier decisions, as noted in a highly critical dissent, *id.* at 1005-09 (Fanning, Chairman, dissenting). The majority in *St. Clare’s Hospital* argued that the decision was “consistent with, and reflective of, longstanding national labor policy,” *id.* at 1000, and that pre-*Cedars-Sinai* Board precedent involving students could be divided into four categories. The first

category involved students working for a commercial employer in a capacity unrelated to their education, and the *St. Clare's* Board conceded that in these cases “student” status and the question of whether an individual should be considered “primarily [a] student[.]” would be “relevant only to the extent that it may affect traditional community-of-interest factors.” *Id.* at 1001.

The second category involved students employed by an educational institution in a capacity unrelated to their education, and the *St. Clare's* Board noted that here also “student” status was often used to exclude student employees from bargaining units with nonstudent employees based on community-of-interest concerns. *Id.* at 1001. However, the decision also argued that in this second situation, the Board had “not afforded [the student workers] the privilege of being represented separately . . . reason[ing] that in these situations employment is merely incidental to the students’ primary interest of acquiring an education” *Id.* This contention was problematic for two reasons. Firstly, the *St. Clare's* Board cited only one case in support of this proposition, *id.* (citing *S.F. Art Inst.*, 226 NLRB 1251 (1976)), which had been decided *after Cedars-Sinai* and thus could not have constituted earlier precedent. Furthermore, the actual issue in the cited case was “whether the student janitors manifest[ed] a sufficient interest in their conditions of employment to warrant representation in a separate unit.” 226 NLRB at 1252. The Board found that, based on the specific facts of the case, the student janitors did not possess enough of an interest in the part-time job’s working conditions so as to justify collective bargaining, and that the logistics of “certification would predictably present unusually vexsome problems” given rapid turnover and a general lack of interest in the outcome of bargaining. *Id.* There was no suggestion that the part-time student janitors were not “employees”

within the definition of the Act, even though this decision came after the holding in *Cedars-Sinai*.²

With regard to the third category—students working for a commercial employer in a capacity that is related to their education—the *St. Clare*'s decision noted that the Board often excluded such student employees from nonstudent bargaining units. *Id.* at 1001-02. However, the *St. Clare*'s Board was unable to make any claim based on precedent that such student workers were not “employees,” despite the fact that “the commercial employer in these situations is acting as a surrogate for the educational institution, and thus . . . the students’ interests in their employment is primarily educational in nature.” *Id.*

The fourth category proposed by the *St. Clare*'s Board involved students working at their educational institutions in a capacity directly related to their educational program. Again the Board rejected the suggestion that such students can also be employees, arguing that “[t]he rationale for dismissing such petitions is a relatively simple and straightforward one . . . they are serving primarily as students and not primarily as employees.” *St. Clare's Hospital*, 229 NLRB at 1002. This articulation of the test being applied by the *Cedars-Sinai* and *St. Clare*'s Boards, and later revived in *Brown University*, makes it clear that the Board was and is applying a

² Moreover, the Board has since long rejected the *St. Clare*'s theory and held that not only are student workers in this second category employees, but they can also sometimes be included in bargaining units with nonstudent employees. *See, e.g., Univ. of W. L.A.*, 321 NLRB 61, 62 fn.4 (1996) (including student law librarians in bargaining unit with nonstudent law librarians when student employment was not “directly related to . . . continued enrollment at the educational institution” and thus was not transitory).

predominance test; whichever status predominates, “student” or “employee,” will determine whether or not the worker will be defined as an “employee” under the Act.

The *St. Clare’s* Board made it clear that it was drawing solely from the language of *Adelphi University* and *Stanford University* to formulate this primary-character test and establish the alleged longstanding Board precedent. *See id.* at 1002 fn.20 (citing *Stanford Univ.*, 214 NLRB 621; *Adelphi Univ.*, 195 NLRB at 640). However, *Adelphi University* was explicitly concerned only with whether workers were “primarily students” for community-of-interest and bargaining unit purposes, not whether they were “employees” under the Act. *See Adelphi Univ.*, 195 NLRB at 640. The *St. Clare’s* Board then provided a number of policy rationales, later echoed in *Brown University*, to conclude that, “[i]n addition to believing that collective bargaining is not adaptable to the structure of higher education, we also believe that there exists a grave danger that it may unduly infringe upon traditional academic freedoms,” 229 NLRB at 1003, as well as to bolster its claim that graduate student workers can only be “students,” and not also statutory “employees.” Thus, while the actual holding in *Cedars-Sinai* and *St. Clare’s* only extended to medical interns and residents, the Board in those decisions suggested that graduate student workers in general were not statutory employees, based on a questionable reading of precedent and the proposition that an individual who was “primarily” a student could not also be a statutory employee.

G. *Boston Medical Center*: the Board explicitly rejects the *Cedars-Sinai* and *St. Clare’s Hospital* primary-character test.

In 1999, the Board repudiated this logic entirely by explicitly overruling *Cedars-Sinai*, *St. Clare’s Hospital*, and the decisions following those cases, and by acknowledging that “students

learning their chosen medical craft . . . are *also* ‘employees’ within the meaning of Section 2(3) of the Act.” *Bos. Med. Ctr. Corp.* 330 NLRB 152, 152 (1999) (emphasis added). Underlying the core of the *Boston Medical* decision was a rejection of the notion that individuals can only be students *or* employees, thus recalling the similar conclusion reached by the Board in the context of educational employers nearly forty years earlier, *see Cornell Univ.*, 183 NLRB 329 (1970). In *Boston Medical*, the Board undertook an extensive analysis of the calls to precedent and policy justifications presented in *Cedars-Sinai* and *St. Clare’s Hospital*, and concluded that medical student workers were “employees” under the Act based on the legislative history, the purposes of the Act, and the policy implications of their inclusion. *See* 330 NLRB 152.

The Board first explicitly endorsed the position that “the Act’s definition of ‘employee’ [was] an out-growth of the common law concept of the ‘servant’ . . . At common law, a servant was one who performed services for another and was subject to the other’s control or right of control.” *Bos. Med. Ctr. Corp.* 330 NLRB at 160 (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 93-95 (1995); *Cedars-Sinai Med. Ctr.*, 223 NLRB at 254 (Fanning, Member, dissenting)). In adopting this framework for interpreting the term “employee,” the Board directly rejected the conclusion contained in *Cedars-Sinai* and *St. Clare’s* that the Board must give “employee” a more narrow, technical meaning based on the sort of primary-character analysis discussed above, regarding whether an individual is a “student” *or* an “employee.” In support of this reversal, the *Boston Medical* Board emphasized that the Supreme Court had recently adopted the same reading of the statute as part of the 1995 decision in *NLRB v. Town & Country Electric*, *see* 330 NLRB at 160 (citing 516 U.S. at 93-95).

The Board then cited to the legislative history of the Act to demonstrate that Congress had intended a broad meaning for the term “employee,” as well as Supreme Court decisions granting the term just such a broad meaning. *Id.* at 160 (“As the Court noted, the Board’s historic, broad, literal reading of the statute finds support in Supreme Court precedent.” (citing *Town & Country*, 516 U.S. at 91-92; *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *NLRB v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 189-190 (1981); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-186 (1941))). Thus, although the specific holding in *Boston Medical* was restricted to medical interns and residents alone, the Board in that case also made it clear that it was rejecting the *St. Clare’s* “primarily student” standard and adopting a framework for interpreting “employee” based on common law agency doctrine.

H. *New York University*: the Board extends its rationale from *Boston Medical Center* and finds graduate student workers to be employees under the Act.

Based on the holding in *Boston Medical*, the Board extended the same reasoning to the graduate student context the following year in *New York University*, 332 NLRB 1205 (2000), *overruled by Brown Univ.*, 342 NLRB 483 (2004). The Board determined that, “[c]onsistent with Supreme Court and Board precedent,” graduate student teaching assistants are statutory employees covered by Section 2(3) of the Act. *N.Y. Univ.*, 332 NLRB at 1205. The *New York University* Board echoed the *Boston Medical* conclusion that “employee” should be interpreted broadly based on common law agency doctrine, in accordance with both the intent of Congress and the precedent established by the Supreme Court, *see id.* at 1205-06 (citing many of the same cases as *Boston Medical*).

Thus, while *New York University* provided a number of policy rationales to justify extending Board jurisdiction to cover graduate student employees, it also made a strong argument based on legislative history and Supreme Court precedent that a primary-character test for determining “employee” status was inappropriate. For example, although *New York University* upheld the narrow holding in *Stanford University* that graduate research assistants were sometimes not statutory employees, it did so because “[t]he evidence [failed] to establish that the research assistants perform a service for the Employer,” *Id.* at 1209 fn.10 (citing *Leland Stanford Junior Univ.*, 214 NLRB 621), *not* because such individuals were “primarily students.” Both *Boston Medical* and *New York University* directly repudiated the primary-character logic for interpreting the term “employee,” instead reasserting the position of the legislative history and the Supreme Court, that the term should be given a broad common law interpretation.

I. *Brown University*: the Board overturns *New York University* and returns to the flawed primary-character test.

Despite the clear legislative history and ample Court precedent supporting the result in *New York University*, the Board overruled the decision and the extension of *Boston Medical* to the graduate student context four years later in *Brown University*, 342 NLRB 483 (2004). The *Brown University* decision considered *New York University* as an aberration in the “longstanding policy” and Board precedent of “holding that graduate students are not employees under Section 2(3) of the Act.” *Id.* at 490. Thus, with broad language the *Brown University* Board excluded graduate student assistants because they “are primarily students and have a primarily educational, not economic, relationship with their university,” *id.* at 487, stating that it was returning to “pre-*NYU* Board precedent.” *Id.* The language and reasoning of the *Brown*

University Board, as well as its reliance on earlier decisions such as *Stanford University* and *St. Clare's Hospital*, make it clear that *Brown University* represents the terminus of a long evolution—or mutation—of the primary-character framework originally established in the context of extending discretionary Board jurisdiction to cover educational employers. Yet the justification for applying this type of analysis to the interpretation of statutory language has never been fully articulated. Instead, it appears as though the evolution of Board precedent in this area has been based on a series of mistaken extensions of the primary-character test, from one context to the next, without a reassessment of the test's continued validity for the purposes of interpreting the term "employee."

II. The conclusion in *Brown University* represents a misapplication of Board precedent regarding the status of graduate student assistants as "employees," and the *Brown University* decision is the very first instance of the Board excluding graduate student assistants in general from the definitions of the Act.

The Board in *Brown University* argued that the "longstanding approach towards graduate student assistants," prior to the holding in *New York University*, 332 NLRB 1205 (2000), was that graduate student workers "have a predominantly academic, rather than economic, relationship with their school." *Brown Univ.*, 342 NLRB 483, 483 (2004). To support this claim, the *Brown University* Board cited a number of prior decisions. However, based on the above discussion of Board precedent, many of the claims made by the *Brown University* Board are highly questionable.

A. The *Brown University* Board improperly relied on *Adelphi University*, which had nothing to do with the definition of graduate students as statutory employees, and *Stanford University*, which had an exceedingly narrow holding.

The Board first cited to *Adelphi University* and *Stanford University* as the main precedential support for its holding that graduate students are not “employees” under the Act, claiming that “[t]he common thread in both opinions is that these individuals are students, not employees.” *Id.* at 486 (citing *Adelphi Univ.*, 195 NLRB 639; *Leland Stanford Junior Univ.*, 214 NLRB 621). And yet neither case supports the conclusion in *Brown University* that the Board may use a primary-character test to exclude graduate student workers in general from the definition of “employee” under the Act.

1. The *Adelphi University* decision had nothing to do with the status of graduate student workers as employees, and the use of the primary-character test in both *Adelphi University* and earlier cases occurred in contexts incongruent with interpreting the statutory definition of the term “employee.”

As previously noted, *Adelphi University* was the first application of the “primarily student” language in the context of student workers—language that had originally been developed to determine whether educational employers would be excluded from the discretionary jurisdiction of the Board, *see, e.g., Univ. of Miami, Inst. of Marine Sci. Div.*, 146 NLRB 1448 (1964). The decision in *Adelphi University* solely examined whether workers were “primarily students” to determine if they shared a community of interest with nonstudent workers. Yet, there is an obvious distinction between determining the appropriate bargaining unit, on the one hand, and defining the scope of the term “employee” under the Act, on the other.

Furthermore, as also previously noted, the extent of the holding in *Adelphi University* was that, since the workers in question were “primarily students,” they did not share a sufficient

community of interests to be included in the same bargaining unit as nonstudent faculty. 195 NLRB at 640. There was no implication that the student workers were not also statutory “employees,” as demonstrated by the fact that the Board considered graduate student “employee” status a question of first impression the following year, *see Barnard Coll.*, 204 NLRB 1134, 1134 n.5 (1973) (“[W]e see no reason at this time to reach the contention made by Wheaton College in its *amicus curiae* brief that student employees employed by the institutions they attend are not employees within the meaning of Sec. 2(3) of the Act.”). Thus, the use of the “primarily student” analysis in *Adelphi University* itself, to determine an appropriate bargaining unit, is also entirely incongruent with defining the statutory language of the Act itself. The fact that the graduate students in *Adelphi University* were “primarily students” meant that their interests were predominantly different from those of the regular nonstudent faculty. Quite simply, *Adelphi University* had nothing whatsoever to do with whether graduate student workers were “employees” under the Act. As such, the holding in *Adelphi University* cannot form the precedential basis for *Brown University*.

Similarly, in the pre-*Cornell University* cases in which the Board exempted employers that were “primarily educational,” *e.g.*, *Univ. of Miami*, 146 NLRB at 1451, the issue was not whether the educational institutions were “employers” under the Act, but merely whether the Board should extend its jurisdiction to cover those statutory employers. *See NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 497 (1979) (discussing history of Board’s discretionary jurisdiction over educational institutions). In the context of a policy of discretionary exemption for a certain class of employers, there is more flexibility for the Board to determine its own framework for evaluating individual entities; as the Court later noted, the Board applied an “ad hoc” policy of

exclusion for various nonprofits. See *Office Emp. Intern. Union, Local No. 11 v. NLRB*, 353 U.S. 313, 318 (1957).

In contrast, in the context of defining the statutory language in the Act itself, the Board faces an entirely different set of problems when attempting to invent its own technical standards for defining individual terms, as discussed later in this Brief. As a result, the “primarily educational” framework used by the Board in its pre-*Cornell University* cases is completely incongruent with the question of whether graduate student workers are covered by the term “employee” under the Act. And yet it seems clear that when the *Adelphi University* Board used the “primarily students” language, it was casually echoing the predominance framework and language of cases like *University of Miami*. Thus, the first mention of this primary-character framework in the context of graduate student employees in *Adelphi University*—as cited by *St. Clare’s Hospital*, 229 NLRB at 1002, and *Brown University*, 342 NLRB at 486, as precedent for the proposition that graduate students are not statutory employees—was likely a mere linguistic allusion to a test developed in an entirely inapposite context, and later overruled and made irrelevant by the Boards’ holding in *Cornell University*, 183 NLRB 329.

2. The *Stanford University* decision merely echoed the language of the primary-character test without justifying its use to interpret statutory language, and the narrow holding in the case only concerned specific research assistants who were in essence not common law servants of the university.

The *Brown University* Board’s reliance on *Stanford University* as the main precedent for the holding that the Board should apply a predominance test to determine “employee” status and exclude graduate students is also problematic. First, the *Stanford University* opinion itself should be called into question based on the fact that, to the extent it established a “primarily student[.]”

either-or framework, it relied on the flawed extension of an outdated test from *Adelphi University*, see *Stanford Univ.*, 214 NLRB at 623 (“In sum, we believe these research assistants are like the graduate teaching and research assistants who we found were primarily students in *Adelphi University* . . . We find, therefore . . . [that] they are not employees within the meaning of Section 2(2) [sic] of the Act.”). Given that the *Adelphi University* use of primary-character language was itself a distortion of an obsolete standard for extending discretionary jurisdiction to educational employers, the further transformation of this language in the *Stanford University* context to defining “employee” status was even more flawed. In neither case did the Board articulate the source of its authority to apply such a test to defining the terms of the statute itself, and in *Stanford University* the Board failed to justify its conclusion that an individual worker could not also be an “employee” if he or she was primarily a student with regard to a given employer.

Second, the actual holding in *Stanford University* was much narrower than the precedent that the *Brown University* Board claimed to draw from it. In *Stanford University*, the students in question were graduate research assistants in physics, who were given stipends to fund their education while they researched their Ph.D. dissertations. 214 NLRB at 622. The students were given no other benefits and the stipends were tax exempt. *Id.* Most significantly, the *Stanford University* Board emphasized that the research assistants were only expected to conduct research on their own chosen topics to further their own dissertations. *Id.* Thus, the Board noted that:

Based on all the facts, we are persuaded that the relationship of the RA’s and Stanford is 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 Board contrasted these students with full-time research associates, who the Board considered employees based on the fact that they could “not initiate projects and [are] not responsible for them.” *Id.* Thus, in Chairman Fanning’s dissent to *St. Clare’s Hospital*, he emphasized that “it was not the *nature* of the work of the research assistants which prompted the dismissal of the petition in *Leland Stanford*, but, rather, the absence of work in their duties, at least as the term is used in the classic definition of ‘an employee’-one who works for another subject to the latter’s control.” 229 NLRB at 1008 (Fanning, Chairman, dissenting). In essence, the primary rationale for excluding the physics research assistants from “employee” status in *Stanford University* was that they were not common law servants of the university. *See* 214 NLRB at 623 (noting that the work done by the research assistants was solely for their own academic projects, and was not in any way “designated or controlled by [the] employer”).

Furthermore, in concurring with the result in *St. Clare’s Hospital*, Member Jenkins, one of the authors of the three-member *Stanford University* decision, argued that a “basic misunderstanding leads the [*St. Clare’s Hospital*] majority into erroneous reasoning and a seeming willingness to regard any employees who also engage in structured studies as *per se* being somehow and in some respects disqualified from union representation.” *Id.* at 1004 (Jenkins, Member, concurring). Member Jenkins concurred in the specific result in *St. Clare’s*, but explicitly rejected the reasoning that any employee who was also a student was automatically brought outside the definition of “employee” under the Act; therefore, it is difficult to attribute such reasoning to *Stanford University*, when one of the opinion’s authors asserted his opposition to such a conclusion.

The vast majority of graduate student employees at modern universities do not fit the narrow facts of *Stanford University*. At the point that graduate students are given a multitude of tasks “designated and controlled” by the university, that they are often granted benefits and other compensation similar to nonstudent employees, and that they do not in general determine the content and timing of all the work they are given, the *Stanford University* fact pattern and holding are inapplicable. Nonetheless, the *Brown University* Board mistakenly relies on *Stanford University* as the main, in fact only, precedential support for its conclusion that all graduate student workers are excluded from the definition of “employee” under the Act, *see Brown Univ.*, 342 NLRB at 486-87. The dissenting members in *Brown University* noticed this error and highlighted it in their dissent, *see id.* at 495 (Liebman & Walsh, Members, dissenting) (“In fact, until today, the Board has never held that graduate teaching assistants (in contrast to certain research assistants and medical house staff) are not employees under the Act . . .”).

The Brown University majority responded by arguing that “[t]he language of the Board in [*Stanford University*] is directly contrary to this assertion” that the decision only extended to certain types of graduate research assistants, and then quoted from the decision:

In sum, we believe these research assistants are *like* the graduate teaching and research assistants who we found were primarily students in Adelphi University[]. We find, therefore, that *the research assistants in the physics department* are primarily students, and we conclude they are not employees within the meaning of Section 2(2) [sic] of the Act. *Brown Univ.*, 342 NLRB at 490-91 (quoting *Leland Stanford Junior Univ.*, 214 NLRB at 623) (original emphasis removed) (emphasis added).

It is unclear how this quoted language can be read to support the *Brown University* Board’s proposition that the *Stanford University* decision was meant to apply to all graduate students, and not just certain research assistants. The *Stanford University* Board used a simile to compare their

conclusion with the one on *Adelphi University*—which, as previously noted, had nothing to do with whether graduate students were statutory employees in the first place—but the actual holding was clearly limited to “the research assistants in the physics department” at Stanford. *See id.* Thus, one of the authors of the *Stanford University* decision itself later argued that student workers were not “per se” to be excluded from the protections of the Act. *See St. Clare’s Hosp.*, 229 NLRB at 1008 (Jenkins, Member, concurring).

Nonetheless, the *Brown University* Board quoted the above language and with that summarily dismissed the dissenting argument: “[o]ur colleagues’ assertions, therefore, turn a blind eye to the Board’s longstanding policy . . . holding that graduate students are not employees under Section 2(3) of the Act.” *Brown Univ.*, 342 NLRB at 491. The Board then cited to *Adelphi University*, which, as has been established, had nothing to do with interpreting statutory employee status; *Stanford University*, which, as is clear, was limited to certain research assistants who did no real work, unlike nearly all modern graduate student employees; and *St. Clare’s Hospital*, which was explicitly overruled by *Boston Medical*, a decision which remains good law, as the *Brown University* Board itself noted, 342 NLRB at 487. As a result, the *Brown University* Board’s repeated reliance on “the Board’s longstanding policy,” as allegedly ignored by the dissenting members, is highly questionable.

B. The *Brown University* Board mistakenly relies on the overruled decisions in *Cedars-Sinai Medical Center* and *St. Clare’s Hospital*, thereby extending those decisions’ flawed citation to precedent, and ignoring the fundamental ruling in *Boston Medical Center*.

In addition to its inaccurate readings of *Adelphi University* and *Stanford University*, the *Brown University* Board also relies heavily on alleged precedential weight of *St. Clare’s*

Hospital, 229 NLRB 1000, and *Cedars-Sinai Medical Center*, 223 NLRB 251, despite acknowledging that these two decisions have been explicitly overruled, *Brown Univ.*, 342 NLRB at 487 (citing *Bos. Med. Ctr.*, 330 NLRB 152). Again, the Board’s reliance on these earlier decisions as support for its conclusion regarding graduate students is problematic for two reasons. First, the *Brown University* Board attempts to distinguish *Boston Medical* by noting that the latter holding only concerned medical interns, residents, and fellows, and not graduate students. *Id.* While this contention is partially true, it also ignores the fact that the foundation of the holding in *Boston Medical* was an explicit adoption of a common law standard for interpreting the term “employee,” endorsing the dissent from *Cedars-Sinai*. *See Bos. Med. Ctr.*, 330 NLRB at 160 (“In his dissent in *Cedars-Sinai*, then-Member Fanning traced the Act’s definition of ‘employee’ as an out-growth of the common law concept of ‘servant’ . . . In turn, the master-servant relationship itself finds its antecedents in common law agency doctrine . . . We agree with this analysis.”); *see also id.* (citing *Town & Country*, 516 U.S. at 93-95); *id.* (discussing legislative history and basic purposes of the Act itself).

While the Board might distinguish the specific fact-patterns in *Brown University* and *Boston Medical*—for example, to avoid the direct application of *Boston Medical* to graduate student employees without further analysis—it is unclear how the Board can overcome the explicit holding in *Boston Medical* regarding how the Board is to interpret “employee.” Indeed, the *Brown University* Board declines to evaluate the appropriateness of the *Boston Medical* decision at all, 342 NLRB at 487, and instead merely states that, “[i]n the instant case, the graduate assistants are seeking their academic degrees and, thus, are clearly students.” *Id.* Given that *Boston Medical* remains good law, and that it explicitly overruled the portions of the

Cedars-Sinai and *St. Clare's Hospital* reasoning that the *Brown University* Board relies on, this lack of engagement is problematic.

Second, the holdings in *Cedars-Sinai* and *St. Clare's Hospital* and those decisions' alleged reliance on Board precedent were themselves flawed. The *St. Clare's* Board proposed four categories of student employment in an attempt to argue that Board precedent overwhelmingly supported the conclusion that student employees are excluded from the Act, and that "*Cedars-Sinai* [was not] an aberration in national labor policy." 229 NLRB at 1000. As previously mentioned, the *St. Clare's* Board's use of precedent in this analysis bordered on the disingenuous. It cited to *San Francisco Art Institute* for the proposition that students working for their educational institute were refused separate bargaining units and as precedent for *Cedars-Sinai*, despite the fact that that decision came *after Cedars-Sinai* and involved a narrow fact-pattern that did not hint at excluding students from the definition of "employee." And it cited to *Stanford University*, despite that decision's narrow holding as applied to a subset of research assistants who did not actual "work" in a traditional sense, and despite the fact that one of the authors of the *Stanford University* opinion remained on the Board and *rejected* the *St. Clare's* majority's reasoning, *see St. Clare's Hosp.*, 229 NLRB at 1004-05 (Jenkins, Member, concurring). Thus, excluding all graduate and medical students from the definition of "employee" was not "longstanding national labor policy," *id.* at 1000, when the *St. Clare's* Board advocated such a reading, and that Board's call to precedent remained flawed some years later when *Brown University* revived this mistaken reading of past Board decisions.

Furthermore, either prior to or since *St. Clare's*, the Board has unequivocally upheld the "employee" status of student employees in each of the four categories that allegedly

demonstrated the “longstanding” policy of viewing students as distinct, *see, e.g., Macke Co.*, 211 NLRB 90 (1974) (first category); *Univ. of W. L.A.*, 321 NLRB 61 (1996) (second category); *Research Found. of the State Univ. of N.Y.*, 350 NLRB 197 (2007) (third category); *N.Y. Univ.*, 332 NLRB 1205 (2000) (fourth category), *overruled by Brown Univ.*, 342 NLRB 483 (2004); *see also Bos. Med. Ctr.*, 330 NLRB 152 (1999) (fourth category), until *Brown University* reasserted the flawed *St. Clare’s* reasoning in the context of graduate students working for universities in an educational context. Indeed, after *Brown University*, the Board found in two decisions that student research assistants were “employees” when working for a “not-for-profit ‘educational corporation’” closely affiliated with their universities and doing research that contributed to their academic pursuits. *Research Found. of the State Univ. of N.Y.*, 350 NLRB at 198; *see also Research Found. of the City Univ. of N.Y.*, 350 NLRB 201 (2007).

Although the *Brown University* Board bases its conclusions on the alleged “longstanding policy . . . holding that graduate students are not employees under Section 2(3) of the Act,” 342 NLRB at 491, it does not appear that such longstanding policy or Board precedent exists. In reversing *New York University*—which reached its conclusion that graduate students can be statutory employees on the basis of the legislative history and Court precedent—*Brown University* relies primarily on the revival of the primary-character test used in *Cedars-Sinai* and *St. Clare’s Hospital*. Yet, the use of the primary-character test in those flawed cases was a mistaken application of the “primarily students” language in *Stanford University*, a decision with a narrow holding incongruent with the general graduate student assistant context, and a decision which in turn had misapplied the language of *Adelphi University*. This analysis makes it clear that the “pre-NYU Board precedent” relied upon by *Brown University* is not so much sound

precedent as it is a series of misapplications of a primary-character standard more appropriate in the discretionary jurisdiction context than in the interpretation of statutory language, and long ago abandoned entirely, in *Cornell University*. These facts are partially recognized by both *Boston Medical Center* and *New York University*, yet wholly ignored by the Board majority in *Brown University*.

C. The primary-character test that has been revived by the *Brown University* Board was directly rejected in the educational context more than forty years ago in *Cornell University*.

In reestablishing the primary-character test in order to exclude graduate student workers from the definition of “employee,” *Brown University* also revives a binary framework that considers employment relationships to be *either* economic *or* educational. Thus, according to the *Brown University* reasoning, a student worker who may have *some* economic relationship affecting commerce will still be excluded from the Act if their overall relationship to the employer is “primarily educational.” Not only is this primary-character test problematic due to the flawed reading of precedent described above, but it also fundamentally ignores the fact that the Board directly rejected this sort of reasoning in *Cornell University*, 183 NLRB 329 (1970), in which the Board extended its discretionary jurisdiction to cover nonprofit educational institutions.

In that case, the Board emphasized that the employer retained the “primary goal” of education, but that it was a simple reality that the educational employer also had a substantial affect on commerce, thus requiring the extension Board jurisdiction. *Id.* at 332. This was a clear rejection of the earlier *University of Miami* framework, in which the Board acknowledged that the educational employer had an affect on commerce above the traditional Board threshold, 146

NLRB at 1450, but declined jurisdiction due to its overall “primarily educational” character, *id.* at 1451. As noted above, the origins of the primary-character test used by *Brown University* can be traced to *St. Clare’s Hospital*, which misapplied *Stanford University*, which merely quoted without further analysis from *Adelphi University*, which extended the language of *University of Miami* and similar cases in an entirely inapposite context.

The ultimate origins of the test were in the Board policy of excluding educational employers who had an affect on commerce but were predominantly educational; reasoning that was overruled long ago. The *Brown University* Board makes no compelling argument as to why employees who are “primarily students” should be treated differently than employers who are “primarily educational [institutions]” are under well-established Board precedent. Contrary to the holding in *Brown University*, *Cornell University* clearly stands for the proposition that entities can be considered *both* educational *and* economic actors under the Act.

III. The type of test used by the *Brown University* Board to interpret the statutory term “employee” has been rejected by both Congress, in drafting the Act, and by the Supreme Court, in favor of a standard for interpreting “employee” based on common law agency doctrine.

To begin an analysis of the meaning of “employee” as contemplated by Congress, one must first consider the statute itself. The language of Section 2(3) of the Act states:

The term ‘employee’ shall include *any employee*, and shall not be limited to the employees of a particular employer, unless this subchapter *explicitly* states otherwise . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual employed as a supervisor . . . or by any other person who is not an employer as herein defined. 29 U.S.C. § 152(3) (emphasis added).

The Supreme Court has held that the initial task of interpreting the term “employee” is assigned primarily to the Board, *see NLRB v. Hearst Publications*, 322 U.S. 111, 130 (1944), *overruled in part*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), though subject to judicial oversight, *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 166 (1971). In *Pittsburgh Plate Glass*, the Court conclusively held that, based on “the legislative history of [Section] 2(3) itself . . . the term ‘employee’ is not to be stretched beyond its plain meaning.” 404 U.S. at 166. This “plain meaning” reading of the term “employee” has been adopted by both Congress and the judiciary.

A. Congress deliberately rejected the Board’s use of a more technical, policy-based test for interpreting the term “employee,” in favor of the plain meaning reading of the statute and a test based on common law agency doctrine.

In a relatively early case interpreting the term “employee” as defined by the Act, the Court held in *Hearst Publications* that the term “must be read in light of the mischief to be corrected and the end to be attained,” 322 U.S. at 124 (citation omitted), and “must be understood with reference to . . . the facts involved in the economic relationship.” *Id.* at 129. This approach rejected a definition of “employee” based on the common law or other “previously established legal classifications,” *id.*, and instead granted the Board significantly more authority to consider the contours of a particular “economic relationship” and the potential “mischief” that was to be avoided. The Board’s current position after *Brown University* echoes this early approach by suggesting that the Board has the authority to exclude certain individuals from the definition of “employee” based on a binary predominance test for determining the status of the economic relationship, either “employee” or “student,” and based on the Board’s policy

considerations about the sanctity of the “student-teacher” relationship and the alleged dangers of collective bargaining.

Yet, this *Hearst Publications* approach to defining “employee” under the Act was almost immediately disclaimed by Congress, and later by the Supreme Court. In passing the 1947 Taft-Hartley Amendment, Congress added an explicit exception for “independent contractors,” to directly repudiate the holding in *Hearst Publications* that newspaper carriers were “employees” even though they were considered independent contractors in other legal contexts, *see* H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947) (noting that Congress was reacting in order “[t]o correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board’s expertness, has approved” in *Hearst Publications*). According to the legislative history, Congress intended “employee” to be defined “according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone.” H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947). As later observed by the Court, Representative Hartley, in submitting his report on the Labor-Management Relations Act to the House in 1947, argued that:

It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. *Pittsburgh Plate Glass*, 404 U.S. at 167-68 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947)).

Thus, the legislative history of the Taft-Hartley Amendment demonstrates that Congress explicitly rejected an approach allowing the Board the authority to define “employee” beyond the ordinary meaning of that word. The Supreme Court too later recognized that the *Hearst*

Publication approach, wherein the Board may create new definitions of “employee” based on independent considerations of “the mischief to be corrected and the end to be attained,” had been repudiated by Congress and subsequently overruled by the Court. *Nationwide Mut. Ins. Co. v. Durden*, 503 U.S. at 325 (citation omitted). According to the Court, Congress rejected the position that the Board could define “employee” based on the creation of technical standards or “economic and policy considerations within the labor field,” and instead, “[t]he obvious purpose of [the Taft-Hartley Amendment] was to have the Board and the courts *apply general agency principles* in distinguishing between employees” and non-employees under the Act. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (emphasis added).

The Court reaffirmed the conclusion that the term “employee” should be interpreted broadly based on common law agency doctrine—and also rejected a dual-status exemption similar to the one later created by the Board in *Brown University*— in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 93-94 (1995). The issue in that case was whether the Board could consider individuals “employees” under the Act who were both employees and union organizers. The Board held that the union organizers were also statutory employees, but the Eighth Circuit reversed, arguing that the dual-status workers “will follow the mandates of the union, not [their] new employer.” *Town & Country Elec., Inc. v. NLRB*, 34 F.3d 625, 629 (8th Cir. 1994). The Eighth Circuit’s reasoning—that the union-worker relationship would *predominate* over the employer-worker relationship, and thus the workers were not statutory employees—mirrored the position later revived by the *Brown University* Board regarding graduate students—that the student-university relationship predominated over the worker-university relationship.

However, the Supreme Court rejected this reasoning from the Eighth Circuit, and reaffirmed both the Board ruling, and the proposition that “employee” should be interpreted based on common law agency doctrine, *see Town & Country*, 516 U.S. at 93-94; *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 322-23 (“[W]hen Congress has used the term ‘employee’ without [clearly] defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”). In fact, the Board relied directly on the binding precedent of *Town & Country* in both *Boston Medical*, 330 NLRB at 160, and *New York University*, 332 NLRB at 1205-06, in finding that the Board should interpret “employee” based on the term’s obvious meaning, and not a technical primary-character test invented by the Board. Yet, in *Brown University*, the Board wholly dismissed the relevance of *Town & Country* with the confusing and circular proposition that “the individuals found to be employees [in that case] worked in fundamentally economic relationships” and thus were distinguishable. *Brown Univ.*, 342 NLRB at 491.

Not only does the *Brown University* Board’s logic tautologically rely on its own conclusion—that individuals who are students cannot also be in “fundamentally economic relationships” with their employers—to support its argument, but it also ignores the basic premise underlying *Town & Country* and other Court decisions. Although the specific holding in *Town & Country* was limited to dual-status union organizers, a class of individuals potentially distinct from graduate students in certain respects, to reach its holding the Court also held as a first principle that the Board is meant to interpret “employee” based on common law agency doctrine, *see* 516 U.S. at 94; *see also, e.g., Seattle Opera v. NLRB*, 292 F.3d 757, 765 fn.11 (D.C. Cir. 2002) (suggesting that the Board’s “neglect of the common law definition [of employee]

could . . . render[] its decision[s] arbitrary and capricious” (citing *Town & Country*, 516 U.S. at 94)).

Furthermore, by weakly attempting to distinguish *Town & Country*, the *Brown University* Board also ignores the second portion of the holding in that case. The issue was not whether the union organizers were in “fundamentally economic relationships” with the employer as employees, but whether their dual-status as union organizers predominated so as to exclude them from the term “employee” under the Act. The Court rejected this reading of the statute and reaffirmed the Board’s finding that the term “employee” under the Act may “include company workers who are *also* paid union organizers.” *Town & Country*, 516 U.S. at 89 (emphasis added). The *Brown University* Board pays little attention to the holding of the Supreme Court and the holding’s clear incongruence with the primary-character analysis later used to exclude graduate students from statutory employee status.

B. Board precedent involving other categories of workers excluded from the statutory definition of “employee” but not explicitly listed does not support the Brown University proposition that graduate student assistants in general can be excluded.

In an attempt to counter the weight of authority described above, regarding the type of test that the Board should apply in interpreting the term “employee,” the *Brown University* Board also cites to other classes of excluded employees. *See* 342 NLRB at 488, 491. As the *Brown University* opinion and Board precedent both demonstrate, there are in essence only two other classes of workers that are excluded from the definition of the term “employee” despite the lack of an explicit exclusion in the statute itself: managerial employees, and rehabilitative employees in sheltered workshops. The *Brown University* Board claims that, like the Board decisions establishing these two classes of exceptions, with regard to graduate students it is looking “to the

fundamental premise of the Act, viz. the Act is designed to cover economic relationships. The Board's longstanding rule that it will not assert jurisdiction over relationships that are 'primarily educational' is consistent with these principles." 342 NLRB at 488. However, neither class of exceptions supports the Board's fundamental contention that it may invent a new framework for excluding student employees based on its independent evaluation of "Congressional policies," *id.*

1. The Board exception for managerial employees developed as a result of overwhelming evidence regarding Congressional intent, and thus does not support the Board's creation of a technical rationale for excluding graduate student workers in *Brown University*.

It is clear that the development of the managerial employee exception shares few similarities to the type of primary-character standard that the *Brown University* Board attempts to invent. The legislative history provides overwhelming evidence that Congress did not intend for the Act to cover managerial employees. The assumed self-evident reason for the supervisory employee exception added in the Taft-Hartley Amendment was that, "[s]upervisors are management people," and thus must obviously be excluded. *See* H.R. Rep. No. 245, 80th Cong., 1st Sess., 16 (1947). It was precisely because Congress considered supervisory employees a mere species of "management" that it desired their exclusion from the definition of "employee." *See id.* (describing supervisors as part of management). It is not superficial to note that the very title of the 1947 legislation, the *Labor-Management Relations Act*, presupposed an axiomatic division between employees and management. *See also, e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess., 5 (1947) (explaining that the explicit exclusion of supervisory employees was added in order to "draw[] a more definite line between management and labor").

As a result, when the Board subsequently excluded managerial employees from the definitions of the Act, it did not do so based on an independent evaluation of “Congressional policies” or the creation of new policy standards, but based on the finding that “[i]t was the clear intent of Congress to exclude from the coverage of the Act all individual allied with management . . . [s]uch individuals cannot be deemed to be employees for the purposes of the Act.” *Swift & Co.*, 115 NLRB 752, 753-54 (1956). When the Court upheld the exclusion of managerial employees it based its decision primarily on a reading of the legislative history, and the conclusion that “Congress recognized there were other persons so much more clearly ‘managerial’ that it was inconceivable that the Board would treat them as employees.” *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 284 (1974) (quoting *Bell Aerospace Co., Div. of Textron, Inc. v. NLRB*, 475 F.2d 485, 491-492 (2d Cir. 1973)).

Thus, by excluding managerial employees from the definition of “employee,” the Board and the courts acted in compliance with the overwhelming evidence from the legislative history that Congress did not conceive of management as possible “employees.” However, no such support for the *Brown University* Board’s exclusion of graduate student employees exists in the legislative record, or is cited to in the *Brown University* decision. Managerial employees are excluded due to the obvious evidence of Congressional intent, while graduate student employees are excluded based on a technical primary-character framework invented a half-century later by the Board. As a result, the fact that management employees are excluded despite the absence of explicit language in the Act itself does not lend support to the proposition that the Board may interpret “employee” by means other than a basic common law agency analysis in contexts where the intent of Congress is not clearly defined, such as the graduate student context.

2. The Board’s exclusion of some workers in the rehabilitative context is based mainly on considerations of common law agency doctrine, and the use of primary-character language is a relatively recent development.

The *Brown University* Board further suggests that its reading of the Board precedent “is also consistent with nearly one-half century of Board decisions holding that the disabled who are in primarily rehabilitative rather than an [sic] economic or industrial work relationships are not statutory employees” 342 NLRB at 491. However, this position clearly misstates Board precedent. The earliest decision cited by the *Brown University* Board to establish the alleged “one-half century” of precedent is *Sheltered Workshops of San Diego, Inc.*, 126 NLRB 961 (1960); see 342 NLRB at 491 fn.30 (citing *id.*). Yet, that case was merely an example of the Board choosing to exclude sheltered workshops as *employers* based on its policy of restricting its discretionary jurisdiction to certain nonprofit organizations. 126 NLRB at 963. As previously discussed in this Brief, a framework used by the Board for deciding to extend discretionary jurisdiction, as in the pre-*Cornell University* cases limiting jurisdiction over universities, is incongruent with the Board’s contemporary attempt to redefine the statutory language. Furthermore, in *Sheltered Workshops of San Diego*, the Board did not apply any type of primary-character analysis, but excluded the employer because its “purposes [were] directed *entirely* toward rehabilitation” and not commerce. *Id.* (emphasis added).

This type of rehabilitative-character analysis was eventually transferred to the context of declining discretionary jurisdiction over otherwise eligible employees at sheltered workshops. See *Cincinnati Ass’n for the Blind*, 235 NLRB 1448, 1448 (1978). Significantly, the focus seems to have shifted from the status of the employers to the status of the employees, with an analysis of the character of the employment relationship, by the same Board that had decided *Cedars-*

Sinai (1976) and *St. Clare's Hospital* (1977) in the late 1970s, see *Brevard Achievement Ctr.*, 342 NLRB 982, 993 (2004) (Liebman & Walsh, Members, dissenting) (tracing history of disabled worker exclusion and noting the “unexplained conversion” of the analysis beginning in 1978). It was not until the early 1990s that the Board, “for the first time,” articulated a standard for excluding workers from the definition of “employee” if their employment relationship was “primarily rehabilitative.” See *id.* (citing *Goodwill Indus. of Denver*, 304 NLRB 764 (1991); *Goodwill Indus. of Tidewater*, 304 NLRB 767 (1991)); *cf. id.* (“But the Board still did not explain how the standard could be used to supplant the plain language of the Act.”).

The above facts suggest that the development of this primary-character analysis in the sheltered-workshop context was merely a mutation of the same flawed test as it existed in the educational context, as outlined earlier in this Brief. And thus, there is much less than “one-half century” of clearly defined Board precedent applying a predominance-type analysis in the disabled worker context. In fact, it is likely that the use of the “primarily rehabilitative” language merely echoes the Board’s prior use of such language in the educational context, *e.g.*, *St. Clare's Hosp.*, 229 NLRB at 1000, when the real precedential justification for excluding certain disabled workers is that they do not demonstrate a “typically industrial” relationship with their employer, see *Goodwill Indus. of Denver*, 304 NLRB at 765, or in other words, they do not meet the common law master-servant definition of “employee.”

Indeed, although sheltered-workshop Board decisions mimic the language developed in the educational context beginning in the 1990s, by describing certain employment relationships as “primarily rehabilitative” in order to exclude sheltered-workshop employees, the underlying conclusion appears more that such workers did not fit the common law agency definition of

“employee” that the Board is meant to apply. *Cf. N.Y. Univ.*, 332 NLRB at 1207-08 (“The Goodwill clients’ atypical working conditions contrast sharply with the working conditions of the Employer’s graduate assistants . . . [whose] working relationship with the Employer more closely parallels the traditional economic relationship between faculty and university than the atypical relationship between ‘clients’ and Goodwill.” (citing *Goodwill Indus. of Tidewater*, 304 NLRB at 768)). In fact, the “primarily rehabilitative” predominance framework does not take center stage as the determinative analysis for excluding such workers until *Brevard Achievement Center*; an opinion decided a few months after *Brown University* and by the exact same composition of the Board in the majority and dissent, *compare Brevard Achievement Ctr.*, 342 NLRB 982 (2004) (involving majority of Chairman Battista and Members Schaumber and Meisburg), *with Brown Univ.*, 342 NLRB 483 (2004) (same). The continued validity of the “primarily rehabilitative” justification for excluding disabled workers is not at issue in the present cases—although its continued validity may be questionable—but in any case it is clear that there is no “longstanding” Board precedent in this arena to support the notion that the Board may invent its own predominance frameworks for interpreting the language of the Act, as the *Brown University* Board attempts to argue.

Additionally, the sheltered-workshop context is distinguishable because in those cases the Board has not created a blanket exception for all disabled workers in sheltered workshops. *See, e.g., Cincinnati Ass’n for the Blind*, 235 NLRB 1448 (1978) (applying primary-character type, “overriding purpose” test, but finding that sheltered-workshop employees at issue were statutory employees based on facts of the case), *enforced*, 672 F.2d 567 (6th Cir. 1982). In contrast, the holding in *Brown University* is that all graduate student assistants have a “primarily educational”

relationship to their university, and thus are excluded from the statutory definition of “employee.” *See* 342 NLRB at 489. Yet, the Supreme Court has dismissed the creation of such blanket exceptions that are not rooted in the language and clear intent of Congress itself. For example, in *Office Employees International Union*, the Court rejected the claim that the Board could uniformly refuse to assert jurisdiction over labor unions as employers, stating that: “such an arbitrary blanket exclusion of union employers as a class is beyond the power of the Board . . . While it is true that ‘the Board sometimes properly declines to (assert jurisdiction)[’] . . . here the Board renounces jurisdiction over an entire category of employers.” *Office Emp. Intern. Union, Local No. 11 v. NLRB*, 353 U.S. 313, 318 (1957) (citation omitted). There is no obvious distinction between this type of blanket exclusion, and the exclusion of the entire category of graduate student assistants expressed in *Brown University*; both are beyond the power of the Board and have no basis in the language of the Act or the intent of Congress.

The Board retains substantial authority to interpret the term “employee” in difficult situations based on common law agency doctrine and the consideration legal definitions used elsewhere. Yet, the Court has made it clear that when graduate students are defined as “employees” under the common law notion of a master-servant relationship, the Board does not have the power to ignore these facts and invent its own definitional framework, or implement its own independent policy considerations to circumvent the “plain meaning” of the statute as adopted by Congress. This type of framework is precisely what the Brown University Board creates by inappropriately applying the primary-character test to the context of graduate student assistants, and by going beyond the intent of language of Congress to assert the flawed proposition that an individual may only have *either* an employee *or* a student relationship to his

or her employer. Given the weight of authority suggesting that both Congress and the Court have rejected this reasoning, the primary-character interpretive framework at the heart of *Brown University* should be rejected, and the more correct reasoning of the *New York University* Board should be reinstated to include graduate student employees within Section 2(3) of the Act.

IV. The specific exclusion of graduate student assistants from the definition of the word “employee” is not supported by the legislative history of the Act, or by subsequent judicial and administrative decisions interpreting Congressional intent.

In addition to both Congress and the Court rejecting the type of technical, primary-character tested invented by the Board and revived by *Brown University*, both the legislature and the judiciary have implicitly rejected the specific exclusion of graduate student workers from the definition of “employee.” Foremost, by emphasizing that the Board is meant to interpret the term “employee” by looking to the “plain meaning” of the word, or to common law agency doctrine, Congress, the Supreme Court, and past Board precedent all indicate that graduate student assistants are the type of employees that are included within the term. As the *New York University* Board noted: “[t]he uncontradicted and salient facts establish that graduate assistants perform services under the control and direction of the Employer, and they are compensated for these services by the Employer.” 332 NLRB at 1206. These basic facts of the graduate student employment relationship are sufficient to satisfy the traditional common law, master-servant definition of “employee.” Even the *Brown University* Board did not dispute the fact that graduate student assistants are common law employees. See 342 NLRB at 495 (Liebman & Walsh, Members, dissenting) (“We do not understand the majority to hold that the graduate assistants in this case are *not* common-law employees, a position that only Member Schaumber reaches

toward.”). This understanding of graduate student workers, even graduate research assistants, as “employees” under common law agency doctrine has also been endorsed by the courts.

For example, in a decision issued a few months after the *Brown University* holding, the Eleventh Circuit applied an “economic realities” test, based on “the common law principles of agency and the right of the employer to control the employee,” to find that a graduate research assistant was an “employee” for Title VII purposes. *Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1234 (11th Cir. 2004). That case involved a graduate research assistant in a pharmacology lab, who primarily did work “for the purpose of satisfying the lab-work, publication, and dissertation requirements of her graduate program.” *Id.* Nonetheless, since she received a monetary stipend and other benefits, since the university provided her equipment and training, and since the university retained the right to revoke her research appointment, the court found that she was an “employee” under the common law definition of that word. *Id.* at 1234-35.

Furthermore, the legislative history demonstrates that Congress did not intend for the Board to exclude any class of workers from the definition of “employee” that was not explicitly excluded in the statute itself. The most obvious evidence of this is the language of the Act itself, which states: “[t]he term ‘employee’ shall include *any* employee, and shall not be limited to the employees of a particular employer, unless this subchapter *explicitly* states otherwise” 29 U.S.C. § 152(3) (emphasis added). This understanding of the Act and the Board’s powers can also be seen in the legislative history of the Taft-Hartley Amendment. In Senator Taft’s report to the Senate, he argued that Congress was compelled to add an explicit exclusion for supervisory employees, because “unless Congress amends the act in this respects its processes can be used to

unionize even vice presidents since they are not specifically exempted from the category of ‘employees.’” S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947).

According to the legislative history, Congress understood the Board’s powers to be restricted such that *only* Congress could exempt certain categories of employees from the definitions of the Act, *see id.* (citing *Jones & Laughlin Steel Corp.*, 71 NLRB 1261 (1946)), and yet it is readily apparent that Congress included no such exception for dual-status graduate students or any analogous category of employees. Although graduate students in the 1930s and 1940s likely did not perform as many functions as modern graduate student employees, such workers nonetheless still existed at the time of passage of the Act and its subsequent amendments; it is beyond the power of the Board to presume, more than a half-century later, that Congress was simply ignorant of such workers or that the lack of an explicit exclusion was a mistaken oversight.

To the contrary, Congress was aware of comparable categories of workers and its definition of “professional employees” in Section 2(12) supports the contention that workers like graduate student assistants were considered “employees.” In drafting Section 2(12), Representative Hartley’s suggested in the amendment’s conference report that the definition was meant to cover “such persons as legal, engineering, scientific and medical personnel *together with their junior professional assistants.*” H.R. Rep. No. 510, 80th Cong., 1st Sess., 36 (1947) (emphasis added). Section 2(12)(b) includes as a professional employee:

[A]ny employee, who (i) has completed the courses of specialized instruction and study [requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction], and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee. 29 U.S.C. § 152(12).

Although the statutory language is partially ambiguous—for example, graduate students do not have their final advanced degree, but clearly a graduate teaching assistant has “completed” the courses in the subject that he or she is teaching to undergraduates—it is not necessary to argue that graduate student assistants are directly contained within the definition of professional employees. Whether or not that is the case, it is clear that Congress intended to include analogous individuals performing work on “legal, engineering, scientific[,] medical,” and other academic topics, who were attempting to *qualify* to be professional employees, but who were not yet professionals as described in Section(12)(a).

The fact that Congress intended to include as “employees” individuals working on qualifying for professional status while under the supervision of an academic mentor renders moot many of the post hoc policy considerations emphasized by the *St. Clare’s Hospital* and *Brown University* Boards; it is not within the Board’s role to revise the policy judgments of Congress. It is true that the language of Section(12)(b) specifically states that the individuals must have “completed” their specialized courses, but this requirement is ambiguous and in any event would only cut against graduate students being “*professional* employees.” It does not suggest that Congress intended to *exclude* student workers who had not yet completed their courses from being “employees” entirely. Indeed, the very fact that Congress added the requirement that professional employees must have completed their specialized courses makes it clear that Congress was *aware* of workers who had *not* completed all of their courses, and yet Congress declined to add an explicit exclusion, as it understood in 1947 to be necessary in order to remove given workers—such as supervisors—from the definition of “employee.”

In the legislative history of the original National Labor Relations Act, it is also clear that Congress generally intended the term “employee” to have a broad scope. In analyzing the list of explicit exclusions included by Congress, the Senate Committee on Education and Labor Report on the Act suggested that the exclusions were important for “mak[ing] it clear that the [Board] is to have jurisdiction over only those disputes which are of a certain magnitude and which affect commerce.” S. Rep. No. 1184, 73d Cong., 2d Sess., 3 (1934). Thus, for example, the Act excluded workers such as domestic servants and individuals employed by family members; economic relationships that would have a minimal direct impact on national commerce. Yet, the legislative history demonstrates that the primary focus of Congress was on any disputes that *affect commerce* above some threshold. There is no implication that disputes involving dual-status workers, which sufficiently affect commerce but which *also* contain elements of an educational or pedagogical relationship, were meant to be excluded. The original intent of Congress was to adopt an inclusive framework—any employment relationship with a sufficient impact on commerce should be *included*—whereas the Board in *Brown University* transposes its reading of the Act into an exclusionary framework—any employment relationship with a sufficient educational element should be *excluded*. Support for this alternative framework is not found anywhere in the legislative history of the language of the Act itself.

Outside of the narrow context of graduate student employees in *St. Clare’s Hospital* and *Brown University*, past Board decisions are also consistent with a reading of the legislative history that would include these workers. For example, apprentices and other employees with an analogous teacher-student relationship have been unquestioningly considered statutory employees since the earliest days of the Act. *See, e.g., Goldstein Hat Mfg. Co.*, 4 NLRB 125

(1937) (certifying bargaining unit including “blockers, apprentice blockers, operators, apprentice operators, trimmers, [and] apprentice trimmers”); *Great Lakes Eng’g Works*, 3 NLRB 825 (1937) (certifying bargaining unit including “helpers and apprentices”). The Board has also found an “employee” relationship in instances of nontraditional compensation. *See, e.g., Seattle Opera Ass’n*, 331 NLRB 1072, 1073 (2000) (finding employment relationship for individuals whose minimal remuneration was only intended to “defray transportation and parking costs”).

Recently, the Board has also found “employee” status for student research assistants working for a dedicated nonprofit educational organization, in a capacity requiring continued enrollment in an affiliated university, doing research substantially related to their own dissertations, and often with a supervisor who simultaneously served as their dissertation advisor. *See Research Found. of the State Univ. of N.Y.*, 350 NLRB at 197; *see also Research Found. of the City Univ. of N.Y.*, 350 NLRB 201. The lone substantive distinction between these latter cases and *Brown University* is that the nonprofit research foundations do “not confer degrees or admit students.” *State Univ. of N.Y.*, 350 NLRB at 197. This distinction only further highlights the lack of support for the *Brown University* position in the fundamental policies of the Act, in the plain common law meaning of the term “employee,” or in the substantial weight of legislative, judicial, and administrative precedent.

The degree-conferment distinction made in *State University of New York and City University of New York* is also particularly tenuous given the realities of modern graduate student education. Recent data suggests that graduate student attrition may be as high as fifty percent, with only forty-five percent of Ph.D. students completing their degrees within seven years, and in some specialties—like the humanities—with only forty-nine percent receiving their degrees

within ten years. Comm'n on the Future of Graduate Educ. in the U.S., *The Path Forward: Executive Summary* (2010), available at <http://www.fgereport.org>. The fact is, a substantial portion of graduate student assistants do not receive a final degree from their employer universities, and yet the universities still make a substantial profit from the students' work on research, teaching, and other tasks. In contrast, roughly ninety-six percent of medical students complete their M.D. degrees. See Ass'n of Am. Med. Colls., *Analysis in Brief*, Apr. 2007, at 1. And a similarly high proportion likely complete the one-year medical internship required to be able to practice, or the longer residency required for board certification—educational accomplishments that do not appear practicably different than a Ph.D. diploma or other degree—and yet such medical student workers *are* statutory employees after *Boston Medical Center*.

In sum, the weight of the legislative history, the judicial precedent, and the Board decisions in parallel or analogous contexts, all suggest that the *Brown University* exclusion of graduate student assistants is an anomalous and flawed interpretation of the Act. Congress explicitly contemplated “junior professional assistants” and other advanced academic “employees” and yet declined to include a specific exclusion of such workers in the Act. As a result, the Board should consider the “plain meaning” or the common law reading of the term “employee,” under both of which it is clear that graduate students qualify as traditional employees—a position not disputed by the *Brown University* majority. Instead, *Brown University* supplants the appropriate common law agency analysis with an invented primary-character framework predicated on the unsubstantiated notion that individuals can only be employees *or* students. This conclusion is inconsistent with the intent of Congress and with existing Court precedent, and comes into direct conflict with Board precedent in other areas; not

least of which *Boston Medical Center*, which remains good law. Thus, the Board should reject the reasoning in *Brown University* and return to an interpretation of “employee” more consistent with the Act itself.

CONCLUSION

For all of the foregoing reasons, *Amici* submit that the Board should realign its standard for interpreting the term “employee” with the intent of Congress and the Supreme Court, by interpreting “employee” based on the traditional common law agency definition; thus overruling *Brown University*, rejecting the primary-character framework adopted by *Brown University*, and including all graduate student workers as statutory employees.

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