

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

NEW YORK UNIVERSITY

Employer,

And

GSOC/UAW,

Petitioner.

Case No. 2-RC-23481

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POLYTECHNIC INSTITUTE OF NYU,

Employer,

And

UAW,

Petitioner.

Case No. 29-RC-12054

**BRIEF AMICI CURIAE OF UNITE HERE AND GRADUATE EMPLOYEES &  
STUDENTS ORGANIZATION**

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## I. BACKGROUND OF AMICI

Amici are the Graduate Employees and Students Organization (“GESO”) and UNITE HERE, an international union which has supported GESO’s organizing efforts. GESO has organized graduate student instructors at Yale University, but Yale has refused to recognize their employee status, leading to protest activities including work stoppage. *See Yale University*, 330 NLRB 246 (1999).

GESO in 2003 released a report based on Yale’s own publications calculating that 33% of teacher contact hours with undergraduates the prior year came from graduate Teaching Fellows, with only 30% instead from tenured or tenure-track teachers (and the balance coming from non-permanent adjunct professors). In Biology, Teaching Fellows provided 67% of such hours. The report documented how this reliance on Teaching Fellows has increased over time. GESO, “Blackboard Blues”, p.2 (at <http://www.yaleunions.org/geso/reports/BlackboardBlues.pdf>).

UNITE HERE Locals 34 and 35 represent Yale’s 4700 service, maintenance, clerical and technical workforce which last month reached a new 4-year contract. *See New Haven Register*, “Yale University, UNITE HERE union, reach labor agreement” (June 27, 2012) at [www.nhregister.com](http://www.nhregister.com).

GESO and UNITE HERE recommend the Board overrule *Brown University*, 342 NLRB 483 (2004), and hold that Teaching Assistants (“TAs”) and Research Assistants (“RAs”) at New York University (“NYU”) and the Polytechnic Institute of NYU (“NYU Poly”) are employees under the NLRA.

## II. THE BOARD CANNOT USE SOMETHING OTHER THAN A COMMON-LAW DEFINITION OF EMPLOYEE HERE BECAUSE THERE IS NO LEGAL BASIS FOR SUCH APPROACH

There is no statutory basis for holding that TAs and RAs are not “employees” under the Act. Congress carefully outlined the two situations where the Board can decline jurisdiction: where a state labor relations agency provides similar protections (Section 10(a)), or where the Board has a regulation exempting a class of employers because “the effect of such labor dispute on commerce is not sufficient substantial to warrant the exercise of its jurisdiction.” Section 14(c).<sup>1</sup> For the Board to imply a broader power of abdication is contrary to the intent of the statute that the Board help provide labor peace and prevent disruptions of commerce.<sup>2</sup> The

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<sup>1</sup> In *Trustees of Columbia University*, 97 NLRB 424 (1951), the Board indicated that it would not exercise jurisdiction over nonprofit, educational institutions; but it expressly did so as a matter of discretion, affirming that the activities of the University did come within the Act and the Board's jurisdiction. *Id.* at 425. In *Cornell University*, 183 NLRB 329 (1970), the Board held that changing conditions—particularly the increasing impact of such institutions on interstate commerce—now required a change in policy leading to the renewed exercise of Board jurisdiction.

<sup>2</sup> "This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause. *See, e. g., Guss v. Utah Labor Board*, 353 U. S. 1, 3; *Polish Alliance v. Labor Board*, 322 U. S. 643, 647-648; *Labor Board v. Fainblatt*, 306 U. S. 601, 607." *NLRB v. Reliance Fuel Oil Corp.*, 371 U. S. 224, 226 (1963). The legislative history reveals that Congress itself considered and rejected an exemption for nonprofit educational institutions. The Hartley bill, which passed the House of Representatives in 1947, would have provided the exception the *Brown* majority wrote into the statute:

"The term 'employer' . . . shall not include . . . any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . ." (Emphasis added.)

H. R. 3020, 80th Cong., 1st Sess., § 2 (2) (Apr. 18, 1947), reprinted in National Labor Relations Board, *Legislative History of the Labor Management Relations Act*, 1947, pp. 160-161 (hereinafter, "1947 Leg. Hist.").

But the proposed exception was not enacted. The bill reported by the Senate Committee on Labor and Public Welfare did not contain the Hartley exception. *See* S. 1126, 80th Cong., 1st

Board has little or no choice but to use a common-law test for employee status, as the *Brown University* majority never dealt with the Supreme Court's observations as to how "employee" must be interpreted under statutes like the NLRA which fail to expressly define the term in *Nationwide Mut. Ins. Co. v. Darden*, 503 US 318, 323-25 (1992):

We have often been asked to construe the meaning of "employee" where the statute containing the term does not helpfully define it. Most recently we confronted this problem in *Community for Creative Non-Violence v. Reid*, 490 U. S. 730 (1989), a case in which a sculptor and a nonprofit group each claimed copyright ownership in a statue the group had commissioned from the artist. The dispute ultimately turned on whether, by the terms of § 101 of the Copyright Act of 1976, 17 U. S. C. § 101, the statue had been "prepared by an employee within the scope of his or her employment." Because the Copyright Act nowhere defined the term "employee," we unanimously applied the "well established" principle that

"[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. . . . In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. See, e. g., *Kelley v. Southern Pacific Co.*, 419 U. S. 318, 322-323 (1974); *Baker v. Texas & Pacific R.*

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Sess., § 2 (2) (Apr. 17, 1947), 1947 Leg. Hist. 99, 102. Instead, the Senate proposed an exception limited to nonprofit hospitals, and passed the bill in that form. See H. R. 3020, 80th Cong., 1st Sess., § 2 (2) (Senate, May 13, 1947), 1947 Leg. Hist. 226, 229. The Senate version was accepted by the House in conference, thus limiting the exception for nonprofit employers to nonprofit hospitals. Ch. 120, 61 Stat. 136. See generally *NLRB v. Wentworth Institute*, 515 F. 2d 550, 555 (1st Cir. 1975) ("[P]erhaps the most obvious, interpretation of the rejection of the House exclusion would be that Congress meant to include nonprofit organizations [within the scope of the Act]."). Of course, even that limited exemption was ultimately repealed in 1974. Pub. L. 93-360, 88 Stat. 395. In doing so, Congress confirmed the Act was intended to cover all employers—including nonprofit employers— unless expressly excluded, and that the 1947 amendment excluded only nonprofit hospitals. See H. R. Rep. No. 93-1051 p. 4 (1974), reprinted in Senate Committee on Labor and Public Welfare, *Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974*, p. 272 (Comm. Print 1974) (hereafter "1974 Leg. Hist."); 120 Cong. Rec. 12938 (1974), 1974 Leg. Hist. 95 (Sen. Williams); 120 Cong. Rec. 16900 (1974), 1974 Leg. Hist. 291 (Rep. Ashbrook).

Co., 359 U. S. 227, 228 (1959) (per curiam); *Robinson v. Baltimore & Ohio R. Co.*, 237 U. S. 84, 94 (1915)." 490 U. S., at 739-740 (internal quotation marks omitted).

While we supported this reading of the Copyright Act with other observations, the general rule stood as independent authority for the decision.

So too should it stand here. ERISA's nominal definition of "employee" as "any individual employed by an employer," 29 U. S. C. § 1002(6), is completely circular and explains nothing. As for the rest of the Act, Darden does not cite, and we do not find, any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an "employee" under ERISA \* \* \*

In taking its different tack, the Court of Appeals cited *NLRB v. Hearst Publications, Inc.*, 322 U. S., at 120-129, and *United States v. Silk*, 331 U. S., at 713, for the proposition that "the content of the term 'employee' in the context of a particular federal statute is 'to be construed "in the light of the mischief to be corrected and the end to be attained.'" " *Darden*, 796 F. 2d, at 706, quoting *Silk, supra*, at 713, in turn quoting *Hearst, supra*, at 124. But *Hearst* and *Silk*, which interpreted "employee" for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring the term from the common law. In each case, the Court read "employee," which neither statute helpfully defined, to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning. See *United Ins. Co., supra*, at 256 ("Congressional reaction to [*Hearst*] was adverse and Congress passed an amendment. . . [t]he obvious purpose of [which] was to have the . . . courts apply general agency principles in distinguishing between employees and independent contractors under the Act"); Social Security Act of 1948, ch. 468, § 1(a), 62 Stat. 438 (1948) (amending statute to provide that term "employee" "does not include . . . any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor") (emphasis added); see also *United States v. W. M. Webb, Inc.*, 397 U. S. 179, 183-188 (1970) (discussing congressional reaction to *Silk* ).

To be sure, Congress did not, strictly speaking, "overrule" our interpretation of those statutes, since the Constitution invests the Judiciary, not the Legislature, with the final power to construe the law. But a principle of statutory construction can endure just so many legislative revisitations, and *Reid*'s presumption that Congress means an agency law definition for "employee" unless it clearly indicates otherwise signaled our abandonment of *Silk*'s emphasis on construing that term "in the light of the mischief to

*Inc. v. NLRB*, 467 U.S. 883 (1984)) were decided well after *Leland Stanford Jr. Univ.*, 214 NLRB 621 (1974). Accordingly, the *Brown* majority erred in urging deference to *Leland Stanford*. Indeed, the *Brown* majority never even took *Darden* into account.

### III. THERE IS NO CONSTITUTIONAL BARRIER TO ASSERTING JURISDICTION

#### A. Freedom of Speech in the Academy Does Not Present The Same “Entanglement” Concerns As The Establishment Clause

The only possibly-legitimate argument from exempting a common-law employee from the Act would be in order to prevent the Act from violating constitutional provisions, borrowing from the Court’s approach in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (exempting church-operated schools to avoid Religion Clauses problems of entanglement). However, no court has ever suggested First Amendment cases about academic freedom insulate private nonreligious colleges from employment statutes because of some risk of “entanglement.” These colleges stand in no more constitutionally-protected shoes than other nonprofit employers whose mission is to engage in speech (such as unions and the Associated Press), but which are regulated under the NLRA. Dispositive on this issue is *Associated Press v. NLRB*, 301 U. S. 103, 130-33 (1937):

Does the statute, as applied to the petitioner, abridge the freedom of speech or of the press, safeguarded by the First Amendment? We hold that it does not. It is insisted that the Associated Press is in substance the press itself, that the membership consists solely of persons who own and operate newspapers, that the news is gathered solely for publication in the newspapers of members. Stress is laid upon the facts that this membership consists of persons of every conceivable political, economic, and religious view, that the one thing upon which the members are united is that the Associated Press shall be wholly free from partisan activity or the expression of opinions, that it shall limit its function to reporting events without bias in order that the citizens of our country, if given the facts, may be able to form their own opinions respecting them. The conclusion which the petitioner draws is that whatever may be the case with respect to employees in its mechanical departments it must have absolute and unrestricted freedom to employ and to discharge those who, like Watson, edit the news, that there must not be the slightest

shall be wholly free from partisan activity or the expression of opinions, that it shall limit its function to reporting events without bias in order that the citizens of our country, if given the facts, may be able to form their own opinions respecting them. The conclusion which the petitioner draws is that whatever may be the case with respect to employees in its mechanical departments it must have absolute and unrestricted freedom to employ and to discharge those who, like Watson, edit the news, that there must not be the slightest opportunity for any bias or prejudice personally entertained by an editorial employee to color or to distort what he writes, and that the Associated Press cannot be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees. So it is said that any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press.

We think the contention not only has no relevance to the circumstances of the instant case but is an unsound generalization. The ostensible reason for Watson's discharge, as embodied in the records of the petitioner, is "solely on the grounds of his work not being on a basis for which he has shown capability." The petitioner did not assert and does not now claim that he had shown bias in the past. It does not claim that by reason of his connection with the union he will be likely, as the petitioner honestly believes, to show bias in the future. The actual reason for his discharge, as shown by the unattacked finding of the Board, was his Guild activity and his agitation for collective bargaining. The statute does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner. These considerations answer the suggestion that if the petitioner believed its policy of impartiality was likely to be subverted by Watson's continued service, Congress was without power to interdict his discharge. No such question is here for decision. Neither before the Board, nor in the court below, nor here has the petitioner professed such belief. It seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.

The act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible.

The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business. The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt.

NYU in practice recognizes that its First Amendment protections are not contrary to collective bargaining, as NYU bargains with other unions. There is nothing which would make bargaining with TAs any more intrusive to academic freedom than bargaining with adjunct faculty members. “Academic freedom” has never been put on the same pedestal as the Religion Clauses at issue in *Catholic Bishop*. See *Cuesnongle v. Ramos*, 835 F.2d 1486, 1502 (1st Cir. 1987)(“The instant case does not involve the ‘entanglement’ element of free exercise doctrine; it involves a purported right of academic freedom. We decline to construct a new ‘entanglement’ rule in addition to that used in freedom of religion cases. Such a rule might virtually preclude any state regulation of private universities.”).<sup>3</sup>

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<sup>3</sup> For example, the Establishment Clause involves discrimination on the basis of speech content that is antithetical to ordinary free speech principles: “There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995). See also *Sumnum v. Duchesne City*, 482 F.3d 1263, 1271 (10th Cir. 2007) vacated on other grounds, 555 U.S. 1210 (2009)(reversing district court for confusing free speech and Establishment Clause principles: “ the court analogized the present case to the facts in *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir.2000), which involved an Establishment Clause challenge to a statue of Christ in a city park. \* \* \* But a determination of whether the government is endorsing religion is not the same as a determination of whether speech is occurring in a public forum.”).

## B. Regulation of Universities Under Other Statutes, Including Employment Statutes, Is Commonplace Despite Academic Freedom Arguments

The Supreme Court has recognized that employment regulations which do not dictate speech content by a school (like statutory requirements that an employer not fire employees for specified reasons) are not barred by notions of academic freedom. *University of Pa. v. EEOC*, 493 U.S. 182, 197 (1990). *See also Burt v. Gates*, 502 F.3d 183, 191 (2nd Cir. 2007)(same approach taken to university’s “academic freedom” defense for its conduct of excluding recruiters); *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wash. 2d 243, 264, 884 P.2d 592, 604 (1994)(same approach taken to university’s claim of constitutional “academic freedom” immunity from public records statute); *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 643 N.E.2d 126 (1994)(same).<sup>4</sup>

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<sup>4</sup> A thorough review of the caselaw and literature on the concept of “academic freedom” is found in *Urofsky v. Gilmore*, 216 F.3d 401, 410-12 (4th Cir. 2000)(*en banc*):

“Academic freedom” is a term that is often used, but little explained, by federal courts. *See W. Stuart Stuller*, “High School Academic Freedom: The Evolution of a Fish Out of Water”, 77 *Neb. L.Rev.* 301, 302 (1998) (“[C]ourts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom.”); *See also J. Peter Byrne*, “Academic Freedom: A ‘Special Concern of the First Amendment’”, 99 *Yale L.J.* 251, 253 (1989) (“Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles.”). As a result, decisions invoking academic freedom are lacking in consistency, *See Stuller, supra*, at 303, and courts invoke the doctrine in circumstances where it arguably has no application, *See Byrne, supra*, at 262–64. \* \* \* It is true, of course, that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment. [cites]. **Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom.** [emphasis supplied]

*Accord, Emergency Coalition to Defend Educ. Travel v. U.S. Dept. of the Treasury*, 545 F.3d 4, 20 (D.C. Cir. 2008)(Silberman, J., conc.).

**C. The Board Can Easily Accommodate Academic Freedom of Speech, As It Has With Employers in Publishing**

A blanket exemption of TAs from the Act cannot be justified by concerns of “academic freedom.” To protect “academic freedom”, the Board can construe the scope of the bargaining duty more narrowly in this context – the Board does not also need to relieve colleges of their duty to negotiate with the TAs’ chosen representative over the decidedly-nonacademic and mundane issues typically addressed in labor agreements such as vacations and holidays, pay rates, hours of work, workplace, etc. The Board has reached a similar accommodation with the First Amendment in the media industry. *See Peerless Publications*, 283 NLRB No. 54 (1987)(holding newspaper had no duty to bargain over rules of ethics for its journalists); *KIRO Inc*, 317 NLRB 1325, 1327 (1995)(broadcasters need not bargain with unions over editorial content of programs); *Calif. Newsp. Ptsps dba ANG Newspapers*, 343 NLRB 564 (2004)(following *Peerless* to hold media employer had right to request journalist not testify before a City Council on which he was reporting). The Board has also been respectful of academic management prerogatives in the faculty unionization context. *See, e.g., Kendall College of Art*, 288 NLRB 1205, 1209-10 (1988)(holding college employer had not committed ULP by deciding to offer students a Bachelor of Fine Arts degree, even though this decision would require it, by law, to lay off faculty who did not have advanced degrees in art).

But rather than seeking accommodation of the NLRA and First Amendment, Respondents here would turn the First Amendment on its head, empowering colleges to fire TAs for engaging in concerted speech to better working conditions is utterly contrary to First Amendment values. The First Amendment would be used to suppress speech, not support it.

Moreover, the same First Amendment argument would justify immunizing universities from every other anti-discrimination statute, both federal and state: there is no principled basis

for saying an NLRA retaliation claim involves any more “entanglement” in academia than a claim of discrimination on the basis of sex, race or disability. *See Ivan v. Kent State University*, 863 F.Supp. 581, 585-86 (N.D. Ohio 1994), *aff'd*, 92 F.3d 1185 (6th Cir. 1996)(holding TA was employee but granting summary judgment to university on motive issue).

Courts interpreting employment laws in cases involving TAs have not exempted them entirely, but instead have been readily able to separate out academic issues from employment issues. *See, e.g., Stillely v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 968 F. Supp. 252, 261-62 (W.D. Pa. 1996)(defendant wins summary judgment on Title VII claim as to alleged retaliation as to dissertation interview: “All issues pertaining to the completion of plaintiff’s dissertation relate to plaintiff’s role as a student and not as an employee. Accordingly, any allegations of ‘quid pro quo retaliation’ regarding plaintiff’s dissertation are not proper for a Title VII claim and will not be considered by the Court in its Title VII analysis.”); *Seaton v. Univ. of Penn.*, 2001 WL 1526282 (E.D. Pa. 2001)(“The complaint does not suggest that Seaton was retaliated against as an employee; indeed, it emphasizes that the recipient of the letter is Seaton’s academic advisor. [cite] It describes at length the impact of the letter on Seaton’s graduate studies and degree. [cite] What it does not describe is any effect of the letter on Seaton’s job, or that the letter was inspired by Seaton’s conduct on the job. We cannot infer such effect, since the amended complaint is silent about what Seaton’s job is. Since there is no demonstrable connection between the offending letter and Seaton’s employment, if any, with the University, Boe’s letter cannot be the predicate for a claim of employment discrimination.”).

**D. The Brown Test Is Inconsistent With How The Board Treats Other Employers With Dual Relationships With Their Employees, Even Employers Engaged In Speech**

The *Brown* test for employee status – that if some employee has another kind of relationship with his employer, then the Board decides which relationship “predominates” – is utterly unworkable in the real world, because numerous employees have dual relations with their employer: some are union staffers who also are members of the union; millions of employees are regular customers of their own employers; millions are investors in their employers through employee stock option plans or otherwise;<sup>5</sup> some work for membership organizations to which they belong, such as consumer and environmental groups and membership-owned retailers like REI. Is the Board now going to start excluding employees who also own company stock from the Act’s coverage because some Board members think ownership more important than employment? While some union leaders might well prefer not to have to allow their own staffs to unionize, the Board has continually required them to deal with staff organizing even though the identical First Amendment argument can be made that such organizing and Board litigation can interfere with the unions’ mission of advocating for workers which is protected by the freedoms of speech and association. *See, e.g., Oregon State Employees Ass’n*, 242 NLRB No. 150 (1979)(finding union violated §8(a)(1) by reassigning and then terminating staffperson).

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<sup>5</sup> “There are now over 25 million employees who own stock in their companies through employee stock ownership plans (ESOPs), broadly granted stock options, or 401(k) plans with heavy concentrations of employer stock.” National Center for Employee Ownership, “A Comprehensive Overview of Employee Ownership”, [www.nceo.org/articles/comprehensive-overview-employee-ownership](http://www.nceo.org/articles/comprehensive-overview-employee-ownership) (viewed 7/2/2012). Indeed, in the start-up world, it has often been observed that workers are working more for future stock profits rather than current wages and benefits. *See, e.g., In re Marriage of Robinson and Thiel*, 35 P. 3d 89, 93 (Ariz. App. 2001)(“stock options often represent a significant part of an employee's compensation. *See Murray v. Murray*, 128 Ohio App.3d 662, 716 N.E.2d 288, 294 (1999) (stock options granted to father annually were ‘an integral part of his compensation package’).”).

In short, the exception created by *Brown* for TAs and RAs of universities alone out of all the many dual-role employees has absolutely no legitimate basis in law. See *Emergency Coalition to Defend Educ. Travel v. U.S. Dept. of the Treasury*, 545 F.3d 4, 20 (D.C. Cir. 2008)(Silberman, J., conc.)("I do not perceive any principled reason why the First Amendment should be thought to protect internal governance of certain academic institutions (are 'think tanks' included?) but not other eleemosynary bodies or, for that matter, trade unions or corporations.").

#### **IV. WHEN A STATUTORY SCHEME FORCES ANALYSIS OF DUAL STATUS, AS IN TAX LAW, TEACHING ASSISTANTS ARE FOUND TO BE PRIMARILY EMPLOYEES**

If somehow it were proper to use a "primary purpose" test here – as tax authorities were forced to use because income for work is taxable whereas tuition aid is not – the Board should follow the unanimous court cases finding payments to TAs to primarily result from employment, as reviewed in *Logan v. United States*, 518 F.2d 143, 145-47 (6th Cir. 1975):

Section 117(a) of the Internal Revenue Code of 1954 provides for an exclusion from taxable income of "a scholarship at an educational institution" or for a fellowship grant. The terms "scholarship" and "fellowship grant" are not defined in the statute and it is therefore necessary to look to the case law for interpretation of the terms.

The courts have followed the guidelines set forth in the applicable regulations promulgated by the Internal Revenue Service in deriving the meaning of these terms. Thus, the Supreme Court in *Bingler v. Johnson*, 394 U.S. 741, 89 S.Ct. 1439, 22 L.Ed.2d 695 (1969), relied upon and upheld Reg. s 1.117-4(c), which excepts from the definition of scholarship or fellowship grant any amount paid as compensation for services or primarily for the benefit of the grantor. In formulating its interpretation of Section 117(a), the Court thus stated:

The thrust of (Reg. s 1.117-4(c)) is that bargained-for payments, given only as a "quo" in return for the quid of services rendered whether past, present, or future should not be excludable from income as "scholarship" funds. That provision clearly covers this case.

394 U.S. at 757-58, 89 S.Ct. at 1448-49. (Footnote omitted)

It is evident, however, under either formulation of the test, that the payments made here to the student-taxpayer were payments for services rendered for the primary benefit of the university. Affidavits filed in connection with motions for summary judgment showed that the school required a service in return for its payments, that approximately 1300 of the university's undergraduate students were taught English courses by graduate assistants each year, and that graduate assistants were paid approximately the same amount as other part-time teachers. Other evidence established that graduate assistants were added to fill the gap when other personnel resigned, that budget requests indicate that graduate students were hired to meet increased teaching requirements resulting from expanded undergraduate enrollment, and that salaries for graduate assistants were determined on the basis of competition with other local universities.

Any employment relationship is, of course, theoretically for the benefit of both the employer and employee. It would, therefore, be possible in this case to demonstrate a substantial benefit conferred upon the university's graduate assistants. This does not alter the fact, however, that payments made to such teachers constitute compensation for teaching services and, as such, are not excludable under Section 117(a). \*\*\* Payments under virtually identical programs have been found by numerous courts not to be excludable. See, e. g., *Worthington v. Commissioner*, 476 F.2d 589 (10th Cir. 1973); *Steinmetz v. United States*, 343 F.Supp. 384 (N.D.Cal.1972); *Reese v. Commissioner*, 45 T.C. 407 (1966), *aff'd per curiam*, 373 F.2d 742 (4th Cir. 1967).

Accord, *Sebberson v. CIR*, 781 F. 2d 1034 (4th Cir. 1986)(finding “clearly correct” the Tax Court’s holding that “We are unable to accept the proposition that the use of such a large group of teaching assistants had a primary purpose other than to enable the department to discharge its and the University's obligation to impart knowledge to students--obligations which but for the teaching assistants would have had to have been discharged through the employment of other personnel.”); *Rundell v. C. I. R.*, 455 F.2d 639 (5th Cir. 1972); *Meek v. United States*, 608 F.2d 368 (9th Cir. 1979); *Parr v. United States*, 469 F.2d 1156 (5th Cir. 1972); *Hembree v. United States*, 464 F.2d 1262 (4th Cir. 1972); *Quast v. United States*, 428 F.2d 750 (8th Cir. 1970); *Woddail v. Commissioner*, 321 F.2d 721 (10th Cir. 1963); *Wertzberger v. United States*, 315 F.Supp. 34 (W.D.Mo.1970), *aff'd*, 441 F.2d 1166 (8th Cir. 1971); *Rockswold v. United States*,

620 F.2d 166, 170 (8th Cir. 1980); *Tobin v. United States*, 323 F.Supp. 239 (S.D.Tex.1971); *Kwass v. United States*, 319 F.Supp. 186 (E.D.Mich.1970).<sup>6</sup>

**V. THERE IS NO REASON TO AFFORD RESEARCH ASSISTANTS ANY FEWER RIGHTS THAN TEACHING ASSISTANTS.**

The RAs' employee status at NYU and NYU Poly under the common law is just as clear as for the TAs. *See Cuddeback v. Florida Board of Edu.*, 381 F.3d 1230, 1235 (11th Cir. 2004)(holding "district court correctly found [research assistant] Cuddeback was an employee for Title VII purposes").

The fact there is outside funding for RAs' work makes them no different than the many employees of government contractors working on public works projects whose coverage by the NLRA has never been questioned on that basis. The Board made clear that government contracting does not call for exemption from the NLRA in *Management Training Corp.*, 317 NLRB 1355 (1995). The Board has not found that government funding means no effect on commerce. The courts have agreed. *See Teledyne Economic Development v. NLRB*, 108 F. 3d 56, 59 (4th Cir. 1997):

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<sup>6</sup> The Tax Court decisions in accord are numerous. *See, e.g., Kopecky v. C.I.R.*, 27 T.C.M. (CCH) 1061, T.C. Memo. 1968-215, T.C.M. (P-H) P 68215 (T.C. 1968)("If a graduate student were not available to teach a course, a 'regular' staff member would be hired to teach it. If there were no teaching positions open, an otherwise qualified student would not receive a teaching assistantship; apparently no teaching positions would be added merely to accommodate a student in need of financial assistance. The only conclusion that we draw from this is that when ISU needed teachers, qualified graduate students were selected therefor when available. While it is true that payments for the teaching might enable the student to further his own education and training, it is equally clear that the primary purpose of such payments is to compensate the recipient. Any benefit to the recipient, whether in substantive knowledge, self-confidence, or economical (such as tuition reduction) appears to be strictly incidental."); *Zolnay v. C.I.R.*, 49 T.C. 389, 1968 WL 1584 (T.C. 1968); *Littman v. C. I. R.*, 42 T.C. 503, 1964 WL 1211 (T.C. 1964); *DiBona v. C.I.R.*, T.C. Memo. 1968-214, T.C.M. (P-H) P 68214, 27 T.C.M. (CCH) 1055, 1968 WL 1310 (T.C. 1968).

Section 2(2) of the NLRA exempts from its coverage, and from the Board's jurisdiction, 'the United States or any wholly owned Government corporation, ... or any State or political subdivisions thereof.' 29 U.S.C. § 152(2). There is nothing ambiguous about this language. By its terms, section 2(2) exempts only government entities or wholly owned government corporations from its coverage — not private entities acting as contractors for the government. When enacting section 2(2), Congress was surely aware that private employers contracted with government entities to provide needed goods and services. Congress could not have intended to compel the Board to decline jurisdiction over private employers based upon constraints that their government contracts might impose upon the collective bargaining process. If it had so intended, it would have exempted private contractors as well as governmental entities from the Act.

Given the enormous dollar volume of government research contracts for universities, the volume of laboratory equipment and supplies purchased to carry out such contracts, and the results of such research frequently entering commerce, clearly there is no basis for exempting the university research industry from Board jurisdiction.

If there were somehow special constitutional protection for the university's teaching function because of a need to avoid government entanglement in "academic freedom", work funded by federal research grants does not share such protection, for the government is already entangled in the administration of its grant monies.<sup>7</sup> *See, e.g.*, 2 CFR Part 215 and 45 CFR Part

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<sup>7</sup> Many argue the current focus of universities on research grants is actually the antithesis of academic freedom:

In the case sub judice, it appears that the applicant's ability to procure external funding or revenue was a very important factor, if not the most important factor [in denial of tenure]. We note that a January 1, 2008 letter to the Columbus Dispatch from Dr. Albert A. Gabel may both shed some light on this topic and show that other institutions have also grappled with this issue. That letter provides:

{¶ b} This is in response to a brief on the Insight front of Nov. 25, "Fewer professors have tenure." It stated, "The shift results from financial pressures, administrators' desire for more flexibility in hiring, firing and changing courses and the growth of community colleges and regional public universities focused on teaching basics and preparing students for jobs."

{¶ c} The shift also is occurring in universities nationwide, including Ohio State University. It makes the universities become more purely research institutions, with good teachers having little influence in guiding the departments and colleges. One of the major ways the administrators and boards of trustees balance the budgets is by deducting 40 percent from "traditional" research grants for overhead.

74 (just a few hundred out of the thousands of regulations for grantees). However, that is not to suggest RAs really work for the government rather than the university. These grants often function for many universities as their equivalent of a for-profit subsidiary to subsidize other less remunerative university activities like teaching and executive salaries. The research on which RAs work generates immediate overhead income for the University and also longer-term income from intellectual property rights. *See* GAO Report 10-937 “University Research: Policies for the Reimbursement of Indirect Costs Need to Be Updated” (Sept. 2010)(found at <http://www.gao.gov/assets/310/309243.html>)(surveying research grants to find negotiated grants from HHS and Defense Department allowed an average of 49.1-51.6 percent to be used for indirect overhead);<sup>8</sup> House Committee on Science, Subcommittee on Technology and Innovation,

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{¶ d} Those who get big grants, irrespective of the quality of their research, get promoted, get raises and bonuses, and control the institutions. New hires are not allowed to go on tenure track unless they show outstanding ability to procure research grants. Others must become contract professors.

{¶ e} A few decades ago, the unwritten rule was “publish or perish”; now, it is “get grants or perish.” The former was easy, because some of the most valuable publications are produced from shoestring funding or small “nontraditional” grants which will not permit overhead to be charged. Professors get little credit for good teaching. Because real teachers no longer have much control, the quality of teaching decreases.

*Ohio Univ. v. Ohio Civ. Rights Comm.*, 887 N.E.2d 403, 435 n. 6 (Ohio App. 2008)

<sup>8</sup> Florida State Law School Professor Lorelei Ritchie de Larena (formerly UCLA’s Intellectual Property Manager) also noted the large overhead charges in her article “The Price of Progress: Are Universities Adding to the Cost?”, 43 *Hous. L. Rev.* 1373, 1411 (2007): “If a donor wishes to give a faculty researcher \$1 million to study treatments for Spinal Muscular Atrophy, the donor need give only the \$1 million, sometimes with a small fee. A grantor who wishes to fund the same project at the same level, however, finds a much higher price from the university grantee. [262] So, the grantor must be prepared to pay about \$1.5 million to the university in order to get \$1 million to the researcher. The other 49-52% is called ‘indirect costs.’ The question is where does that money go? Universities are notoriously opaque about the process. Like the Bayh-Dole income, which by law is earmarked for ‘scientific research or education,’ [263] indirect costs on research funds go into a black hole of university administration, [264] which may or may not provide any clear payback to the funding public, or for that matter, to the university community including students who see rising tuition every year.[265].\*\*\*

*Hearing on “Bayh-Dole – The Next 25 Years”* (Jul 17, 2007), testimony of Stanford Law Prof. Mark Lemley (“Bayh-Dole<sup>9</sup> fundamentally changed the way universities approach technology transfer. Universities obtain 16 times as many patents today as they did in 1980, and their share of all patents is five times greater than it was before Bayh-Dole. They license those patents for upwards of \$1 billion a year in revenue.”);<sup>10</sup> Henry Etkowitz (Science Policy Institute at SUNY

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262. Clearly Bayh-Dole funds, with their multiple requirements, must fit into the latter category, as grants rather than gifts. The average amount spent on ‘indirect costs’ is probably somewhere around 50%. See *Leaf, supra* note 4 [Clifton Leaf, “The Law of Unintended Consequences”, *Fortune*, Sept. 19, 2005] at 262 (stating that 49% is the ‘[t]ypical share of each federally funded research grant’ used to cover ‘indirect costs’); Jeffrey Brainard, “The Ghosts of Stanford”, *Chron. Higher Educ.*, Aug. 5, 2005, at A16 (stating that the ‘overhead rate’ is 52%).

263. 35 U.S.C. §202(c)(7) (2000).

264. See *Leaf, supra* note 4, at 262 (noting that nothing provides universities with instructions on how to spend licensing income). University administrators frequently do not even know how this money is spent. See, e.g., *Brainard, supra* note 262, at A18 (quoting one professor as commenting that ‘faculty see indirect costs and how these costs are used as a black box’). Although, they still complain that the charges for indirect costs do not sufficiently cover their expenses. See *id.* (recognizing that universities ‘are complicit in underpayments for overhead’ and tend to ‘agree to take less than the negotiated rate’).

265. See *Leaf, supra* note 4, at 262 (discussing how the ‘unrestricted dollars’ seem to be spent on everything except tuition).”

<sup>9</sup> Prof. Lemley refers to the Bayh-Dole Act (P.L. 96-517, now codified at 35 U.S.C. §§ 200 *et seq.*), which allowed universities to patent and receive license revenue from federally-funded university research.

<sup>10</sup> Some observers disagree that Bayh-Dole was the primary cause of this expansion, but agree such expansion occurred. See D. Mowery, R. Nelson, B. Sampat, A. Ziedonis, “The Growth of Patenting and Licensing by U.S. Universities: An Assessment of the Effects of the Bayh–Dole Act of 1980,” 30 *Research Policy* (2001) 99–119 (“The Bayh–Dole Act is contemporaneous with a sharp increase in U.S. university patenting and licensing activity. \*\*\* Having grown by approximately one-third between 1969 and 1974, the number of patents issued to U.S. universities and colleges more than doubled between 1979 and 1974, more than doubled again between 1984 and 1989, and doubled yet again between 1989 and 1997. \* \* \* universities increased their patenting per R&D dollar during a period in which overall patenting per R&D dollar was declining. In tandem with increased patenting, U.S. universities expanded their efforts to license these patents. The Association of University Technology Managers [“AUTM”] [cite] reported that the number of universities with technology licensing and transfer offices increased from 25 in 1980 to 200 in 1990, and licensing revenues of the AUTM universities increased from

Purchase College), 27 *Research Policy* (1998) 823–833 at p. 823 (“During the past two decades, however, an increasing number of academic scientists have taken some or all of the steps necessary to start a firm by writing business plans, raising funds, leasing space, recruiting staff, etc. [cites] \* \* \* faculty inventing and commercialization has had significant cognitive and organizational consequences. A complex web of relationships has grown up among academics, university originated start-ups and larger firms.”) (available at <http://www.rvm.gatech.edu/bozeman/rp/read/32404.pdf>).

The expansion of universities’ intellectual property income and activities, and the increasing ties between university research and private industry,<sup>11</sup> are basic changes in the

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US\$222 million in fiscal 91 to US\$698 million in fiscal 1997.” These authors also noted the increase in private industry’s financing of university research: “In 1970, federal funds accounted for 70.5% of university-performed research and industrial support 2.6%; by 1997, federal funds accounted for 59.6% of total university research, and industry’s contribution had increased to 7.1% .” Id. at 102 (at [http://www.genderinscience.org.uk/downloads/BMS\\_references/Mowery%20et%20al%202001.pdf](http://www.genderinscience.org.uk/downloads/BMS_references/Mowery%20et%20al%202001.pdf) at pp. 103-4).

<sup>11</sup> See T. Behrens & D. Gray, “Unintended Consequences of Cooperative Research: Impact of Industry Sponsorship on Climate for Academic Freedom and Other Graduate Student Outcome,” 30 *Research Policy* (2001) 179–99 at pp. 179-80: “Efforts to promote research cooperation and interaction between industry and university have been one of the most stable and widely supported elements of US science and technology policy over the past three decades. Virtually every presidential administration since Nixon has supported policy and/or programmatic initiatives to strengthen ties between these two sectors and that support continues to up to the current administration. [cite]. These initiatives have included a variety of legislative reforms including the Bayh–Dole Act, the Economic Recovery Tax Act of 1981 and 1986 [cite], the Stevenson-Wydler (1980) and National Cooperative Research Act of 1984 [cite] . These efforts have also included a variety of programmatic attempts to directly stimulate industry–university cooperation through various subsidized partnership programs. [cite]. The federal government has not been alone in targeting cooperative research. Over the past two decades state governments have also been very active in this area. [cite]. To a large extent, support for these initiatives has been premised on a belief that increased and more intense cooperation between these two sectors will lead to a variety of benefits including increased support for academic research, increased and accelerated technology transfer, enhanced competitiveness, and, ultimately, economic development. The research policy community has contributed to these efforts by examining whether these benefits have in fact been delivered. For instance, there is a great deal of evidence that industry has in fact increased its support of academic research. Industry now supports almost 7% of all university research, nearly double the amount it supported during the early 1980s; the

academic research world since the Board decided *Leland Stanford*. This has contributed to soaring executive salaries in the university world. See, e.g., Chronicle of Higher Education, *Survey of University Executive Compensation*, “Highest Paid Private College Presidents, 2009” (at <http://chronicle.com/article/Executive-Compensation/129979>)(finding based on private universities’ 2009 federal tax returns that top 10 university presidents all made at least \$1.5 million annually, with top 5 ranging from \$1.8 million to \$4.9 million, up from prior year while average professor compensation declined). RAs join TAs not in the 1% where university presidents dwell, but instead in the 99% of American earners, and are in need of collective bargaining to address this imbalance.

One expert observer of university research operations with no stated position on the legal issue in this case commented on how employment goals dictate what RAs do and noted the parallels between university research operations and the corporate world:

The Ph.D., the highest degree that a university can award, is the key that unlocks many gates for budding scientists. Some students believe that, “although an undergraduate degree in the natural sciences or engineering has been considered the prerequisite for many types of inventive employment, the graduate degree is preferable.” Faculty appointments and top-level decision-makers in industry are held almost exclusively by

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number of institutions receiving over 10% of their research support from industry has also doubled. [cite] \*\*\* These centers spent over US\$2.5 billion in R&D during the fiscal year studied or roughly 15% of total academic R&D expenditures. Add to this, the industry support not channelled through centers, and industry probably influences 20% to 25% of academic research. \*\*\*”). See also *id.* at 184: “In many instances, it is students rather than faculty who actually conduct the research. Further, access to students trained in industrially oriented research is one reason often given by firms for participating in cooperative research [cite]”; *id.* at 194: “we know that almost 7% of all university R&D is sponsored by industry. [cite] However, this aggregate picture does not do a very good job of conveying the kind of environment large subgroups of students are experiencing. According to our data, graduate students in the engineering departments we surveyed are exposed to an environment where industry’s presence and influence is ubiquitous. Nearly half of all students spent most of their time working on a project which was supported by industry. At the same time, almost three out of every four student surveyed reported that their faculty advisor received some support from industry.”) (available at [www.ncsu.edu/iucrc/PDFs/IUCRC%20Pubs/Behrens%20and%20Gray%202001.pdf](http://www.ncsu.edu/iucrc/PDFs/IUCRC%20Pubs/Behrens%20and%20Gray%202001.pdf)).

Ph.D. recipients. Since the Ph.D. confers considerable prestige, privilege, and power, **the degree is a means to an end.** The key to professional and intellectual growth in science, as well as the concomitant increase in earning potential, is the doctorate.

The bridge between the end of college and the conferral of the Ph.D. is a stint in a research group at a university. \* \* \* **A modern research group in academic science functions like a small company.** The professor, having articulated a particular research focus, writes grant proposals to secure funding and assembles a research group to perform the funded research projects. The research group is often a diverse assemblage of “mentees” consisting of undergraduates, graduate students, postdoctoral associates (“postdocs”), and visiting scientists. The composition of a research group is in constant flux. Students graduate, postdocs find permanent positions in industry or academia, and visiting scientists return to their home institutions. **Graduate students spend the most time in the group** because they must complete a substantive independent research project in order to complete the doctoral thesis.

Everyone involved in academic research has something to gain. The graduate student receives research training, the all-important letter of recommendation, an academic pedigree, and an elevated status in the scientific community. The professor publishes the fruits of the research, which forms the basis for tenure, promotion, increased funding, the recruitment of additional group members, and prestige in the academic community. The academic department bolsters its reputation and ranking by having a research-active faculty. The university receives valuable overhead from the funded research projects as well as the prestige and ancillary financial benefits that accrue from having academic departments populated with research-active faculty.

Although **graduate students are the backbone of a healthy research university**, professors are at its heart. Universities give professors unbridled freedom to practice their craft . . . . Graduate students are also judged by their publication record, especially when they enter the job market. Publications where the graduate student is the “first author” are particularly noteworthy because they indicate that the graduate student made the most substantial contribution to the project. Whether a graduate student seeks a position in academia, industry, or a government laboratory, the employer wants to see a history of successful, independent research accomplishments and professional promise. In some institutions co-inventorship of a patent carries at least as much weight as first-authored publication in a top-tier journal. Therefore, graduate students seek due recognition for research, not simply for ideological reasons; proper accountability for publications and patents has a direct impact on success.

Sean B. Seymore,<sup>12</sup> “My Patent, Your Patent, or Our Patent? Inventorship Disputes Within Academic Research Groups,” 16 *Alb. L.J. Sci. & Tech.* 125, 130-32 (2006)(emphasis added)

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<sup>12</sup> Mr. Seymore was a law student at Notre Dame at the time he wrote this article, but he is now an Associate Professor of Law at Vanderbilt and a Visiting Professor at MIT. He speaks from personal experience about university science research as he received his PhD in Chemistry from Notre Dame in 2001 and published at least four peer-reviewed articles on chemistry. See <http://>

Determining the “predominance” of the student relationship “versus” the employment relationship as the *Brown* majority attempted is meaningless and impossible, as the RAs’ goals and functions are all ultimately employment-related, just like with other apprentices.<sup>13</sup>

The realities of the RAs’ workplace thus strongly support the Board simply applying to them the common-law definition of employee: clearly RAs are controlled in their work by agents of the University and paid thereby for University purposes. The evidence before Regions 2 and 29 established employee status for RAs here.

## VI. CONCLUSION

The Board should recognize the NLRA rights of teaching assistants and research assistants, and order the Regional Director to continue processing the petitions.

Dated: July 23, 2012

Respectfully submitted,

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lawyerchemist.net/ research.html; S. Seymore, “Rethinking Novelty in Patent Law”, 60 *Duke L.J.* 919 (2011).

<sup>13</sup> Many observers of university research not commenting on the issues in this case have referred to RAs as “apprentice researchers.” *See, e.g.*, Profs. Janet Bond-Robinson & Amy Preece Stucky (Kansas State Univ. Chemistry Dept.) “Grounding Scientific Inquiry and Knowledge in Situated Cognition” (“The graduate research experience is one where researchers are apprentices interacting to practice organic synthesis in a specialized laboratory.”) (available at <http://csjarchive.cogsci.rpi.edu/proceedings/2005/docs/p310.pdf>); A. Feldman, K. Divoll, A. Rogan-Klyve, “Research Education of New Scientists: Implications for Science Teacher Education”, 46:4 *Journal of Research in Science Teaching* (April 2009) pp. 442–459 at 442 (“It was found that the education of the students occurs as part of an apprenticeship. The apprenticeship takes place in research groups.”).

**CERTIFICATE OF SERVICE**

This is to certify that copies of the Brief Amici Curiae of UNITE HERE and Graduate Employees Students Organization in Case Nos. 2-RC-23481 and 29-RC-12054 has been served by electronic mail on July 23, 2012 on:

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