[Note: The content of this document remains the same as was filed with the NLRB. The formatting, however, is slightly different.]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK UNIVERSITY,	:	
Employer,	:	CASE No. 2-RC-22082
and	:	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO,	:	
Petitioner.	:	

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF PETITIONER UNITED AUTOMOBILE WORKERS, AFL-CIO

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Introduction.

Speaking before the Texas Bar Association concerning unit determination decisions and the lack of empirical information on collective bargaining practices in the academy, former National Labor Relations Board Chair Miller once observed:

> I personally have felt sometimes as though we were having to make these [higher education] determinations pretty much in the dark, without the aid of information which could have enabled us to make more informed judgments. We must, of course, decide each case presented to us on the basis of information that is developed on that individual record. I hope that we have not decided cases unwisely because of too scanty information, and thus established precedential guidelines which we will later regret.

Miller, *Is the NLRB Still Alive?*, Address before the Texas Bar Association (July 6, 1973), at 10-11, *in* Matthew W. Finkin, *The NLRB in Higher Education*, 5 U. Tol. L. Rev. 608, 650 (1974). The American Association of University Professors "AAUP" or "the Association") welcomes the opportunity to participate in this case as *amicus curiae* before the Board to address the problem of "too scanty information" about collective bargaining in the academic community.

Interest of the Amicus Curiae.

The Association is a national educational organization of approximately 44,000 faculty members, research scholars, and graduate students in all academic disciplines. Local AAUP chapters exist on close to 400 campuses across the country. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. Approximately half of the Association's members are in collective bargaining units. Out of a total of 63 unionized AAUP chapters, 23 are at private sector higher education institutions.

The AAUP plays a unique role in the academic and labor communities. Among the organization's central functions is the development of policy standards for the protection of academic freedom, tenure,

due process, shared governance, and other elements central to higher education. *See, e.g.*, American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AAUP Policy Documents & Reports 3 (1995) (*1940 Statement*) (endorsed by 170 professional organizations and learned societies). AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1972) (citing AAUP's *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971) (citing AAUP's *1940 Statement).* AAUP has served as *amicus* in numerous cases involving faculty members and collective bargaining. *See, e.g., NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

AAUP provides policy assistance to the higher education community at large. As former AAUP President Robert A. Gorman stated at the AAUP Annual Meeting in 1982:

> The AAUP--by virtue of its history and traditions, its values and its procedures--is different from, and more than, a labor organization. . . . We do not require, and have never required, Association membership as a condition of receiving our aid and good offices. Promoting the academic freedom, or protecting the procedural rights, even of a nonmember is viewed as redounding not only to the benefit of our dues-paying members, and of all of the professoriate, but also to the benefit of all institutions of higher education. Institutions are better, and the quality of higher education improved for what we do, even on behalf of "strangers" to the Association.

Robert A. Gorman, *The AAUP and Collective Bargaining: A Look Backward and Ahead*, 68 Academe: Bulletin of the American Association of University Professors (Academe) 1a, 2a (Sept./Oct.1982).

Academic administrations heralded the "doomsday cry" of interference with its academic freedom in the 1960s and 1970s when faculty members initially began to organize unions. *See Regents of the University of California v. PERB*, 715 P.2d 590, 604 (Cal. 1986) (finding as "doomsday cry" university's contention that the unionization of medical school residents would lead to violation of the institution's academic freedom). Administrators predicted that unions of faculty members would interfere with

academic freedom and institutional governance. Actual experience in faculty collective bargaining has refuted these predictions and, in fact, has provided contractual protections for academic freedom, shared governance, and other professional values. *See* David M. Rabban, *Is Unionization Compatible with Professionalism?*, 45 Indus. & L.R. Rev. 97, 110 (Oct. 1991) (reviewing provisions affecting professional standards in collective bargaining agreements in a number of professions, including faculty, and finding "substantial, unambiguous support for professional values in many agreements," which suggests "at a minimum, that unionization and professionalism are not inherently incompatible").

Current predictions by the New York University ("NYU") administration that unions of graduate assistants would undermine the institution's academic freedom are even more unconvincing than those made about faculty collective bargaining almost three decades ago. At least in the 1970s these predictions were based on mere speculation. At NYU today, they are made despite empirical evidence that collective bargaining by faculty members has promoted academic freedom and shared governance in the academy.

Argument.

The NYU administration misstates the facts of academic collective bargaining when it asserts that the unionization of graduate students who are employees will violate its institutional academic freedom, disrupt graduate student involvement in university governance, and interfere with the mentoring relationships between faculty members and their graduate students. Request for Review of New York University to the National Labor Relations Board 18-27 (Apr. 18, 2000); *see* Martin H. Malin, *Student Employees and Collective Bargaining*, 69 Ky. L.J. 1, 27 (1980) (In response to graduate assistant union drives in the mid-1970s, one commentator reflecting on then-current NLRB decisions noted: "Union organizing campaigns and collective bargaining by student employees at state institutions [such as at the

University of Wisconsin, Madison] indicate that the NLRB's fears of student misuse of bargaining power are misplaced.").

AAUP's policies and bargaining experience make clear that collective bargaining is consistent with academic freedom and shared governance. *See, e.g.*, American Association of University Professors, *Statement on Collective Bargaining*, AAUP Policy Documents & Reports 217 (1995) (AAUP Policy Documents). AAUP's policies and the experience of The Rutgers Council of AAUP Chapters support the rights of graduate students who are employees to unionize. No evidence exists that allowing graduate assistants to unionize interferes with mentoring relationships between faculty members and their graduate students. Courts have consistently rejected the argument that the First Amendment shields institutions from federal law, such as the National Labor Relations Act (NLRA). Moreover, the Board and other courts have found that affording student employees the right to unionize does not interfere with academic freedom. In the end, "unionism and collective bargaining" can address the "special functions" of graduate assistants in the academic workplace. *See National Labor Relations Board v. E.C. Atkins*, 331 U.S. 398, 405 (1947) ("special functions" of plant guards can be "accommodated" within collective bargaining); *Boston Medical Center Corp.*, 1999 WL 1076118, *21 (NLRB Nov. 26, 1999) ("special functions" of interns and residents can be "accommodated" through collective bargaining).

I. Unionization Is Consistent with Academic Freedom and Shared Governance Based on AAUP Policies and Collective Bargaining Experience.

AAUP has significant experience organizing faculty members to bargain collectively. In 1965-66 the AAUP first began "extensive discussions" about the issue of faculty unionization. Philo A. Hutcheson, A Professional Professoriate: Unionization, Bureaucratization, and the AAUP 145 (2000). In 1967 the faculty at Belleville Area College in Illinois became the first AAUP collective bargaining chapter. *See* AAUP, *Breaking the News*, 75 Academe 16 (May/June 1989). The culmination of deliberations resulted

in the Association's 1973 *Statement on Collective Bargaining*, which maintains that collective bargaining is one way "to reinforce the best features of higher education," such as academic freedom and shared governance. AAUP Policy Documents at 217. Local AAUP chapters have successfully negotiated in their collective bargaining agreements "explicit guarantees of academic freedom" and provisions that "enhance within the institution structures of representative governance. *Id.*

A. AAUP Policy Establishes that Collective Bargaining Is Consistent with Academic Freedom and Shared Governance.

The Association's 1973 *Statement on Collective Bargaining* provides that "[c]ollective bargaining is an effective instrument for achieving" and "securing" the objectives of the Association, serving "to protect academic freedom" and "to establish and strengthen institutions of faculty governance." *Id.* The *Statement* further provides that "[a]s a national organization which has historically played a major role in formulating and implementing the principles that govern relationships in academic life, the Association promotes collective bargaining to reinforce the best features of higher education." *Id.*

To promote "the best features of higher education," the *Statement on Collective Bargaining* encourages Association chapters that engage in collective bargaining to strive to

> obtain explicit guarantees of academic freedom and tenure in accordance with the principles and stated policies of the Association . . . [and] maintain and enhance within the institution structures of representative governance which provide full participation by the faculty in accordance with the established principles of the Association.

Id.

B. AAUP Collective Bargaining Agreements Protect Academic Freedom.

In the joint, often-cited *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP and the Association of American Colleges explain that academic freedom gives teachers "full

freedom in research and in the publication of the results" as well as "in the classroom [to] discuss[] their subject." AAUP Policy Documents at 3.[1]

AAUP's concern for academic freedom has shaped its involvement in collective bargaining. Pursuant to the 1973 *Statement on Collective Bargaining*, local AAUP chapters have successfully established "explicit guarantees of academic freedom" in their collective bargaining contracts.

Some chapters for which AAUP is the local bargaining representative refer to the *1940 Statement* and quote it extensively in their collective bargaining contracts.[2] Other collective bargaining

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[1] The entire academic freedom provision in the *1940 Statement* reads:

(a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(2) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(3) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

Id. at 3-4.

[2] *See, e.g.*, Bard College (New York) (Art. VIII) ("All teachers (whether Faculty or not) will enjoy academic freedom as set forth in the Association of American Colleges-American Association of University Professors' *1940 Statement of Principles on Academic Freedom and Tenure*."); Bloomfield College (New Jersey) (Art. 3) ("The College and the Chapter accept the principles of academic freedom as defined in the *1940 Statement of Principles on Academic Freedom and Tenure* . . . formulated by the Association of American Colleges and the American Association of University Professors."); Curry College (Massachusetts) (Art. III) ("The College and the AAUP endorse the specific section on Academic Freedom from the document entitled *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*."); Indian River Community College (Florida) (Art. XIX) ("The Chapter subscribes to the AAUP 1940 Statement of Principles and the Interpretive Comments of 1940 and 1970."); Kalamazoo Valley Community College (Michigan) (Art. 3.54) ("The following excerpt is taken from the AAUP's *1940 Statement of Principles on*

agreements in which an AAUP chapter is party essentially adopt the *1940 Statement*, although not citing it, to define academic freedom.[3]

Morever, such AAUP collective bargaining agreements do not simply promote academic freedom, but make such protections legally enforceable. As former AAUP President Robert A. Gorman wrote in evaluating the initial ten-year AAUP effort in collective bargaining: "[C]ollective bargaining agreements leave no doubt that essential AAUP principles of academic freedom, tenure, due process, peer review, nondiscrimination, and the like, can be rendered fully enforceable as part of the contract rules prevailing in court cases and arbitration proceedings."

Gorman, *supra*, at 3a.

By demonstrating that parties to a collective bargaining agreement can negotiate a contract that does not infringe upon such academic freedom, AAUP policy and practice both support the Regional Director's finding that collective bargaining by graduate assistants does not undermine academic freedom. *New York University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO*, Case No. 2-RC-22082 (Apr. 3, 2000), at 34 (Region 2 Decision).

Academic Freedom and Tenure."); Kent State University (nontenured) (Art. III, §2) (tenured) (Art. IV, § 2) ("As stated in the American Association of University Professors' *1940 Statement of Principles on Academic Freedom and Tenure, . . .*"); Regis University (Colorado) (Art. 11.1) ("Regis University affirms and is guided by the ideal that all members of the faculty, whether tenured or not, are entitled to academic freedom as set forth in the *1940 Statement of Principles on Academic Freedom and Tenure*."); St. John's University (New York) (Art. VI) ("The parties incorporate herein by reference the *1940 Statement of Principles on Academic Freedom and Tenure* of the American Association of University Professors."); University of Rhode Island (Art. 7.2) (The Board and the University of Rhode Island unconditionally endorse the 1940 Statement.").

[3] *See, e.g.*, Central State University (Ohio) (Art. 5.1); University of Cincinnati (Art. 2); Eastern Michigan University (Art. II).

C. AAUP Collective Bargaining Agreements Protect Shared Governance.

AAUP's 1966 *Statement on Government of Colleges and Universities* enunciates the concept of "appropriately shared responsibility and cooperative action among the components of the academic institution." AAUP Policy Documents at 179 (editorial headnote). The 1966 *Statement* provides that "[t]he variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students, and others." *Id.* at 180. Numerous AAUP chapters have successfully fulfilled the call in the Association's *Statement on Collective Bargaining* "to maintain and enhance within the institution structures of representative governance which provide full participation by the faculty in accordance with the established principles of the Association." *Id.* at 217.

Accordingly, some AAUP chapters incorporate the AAUP's 1966 *Statement on Government* into their collective bargaining agreements, thereby creating and promoting traditional models of faculty participation, such as faculty senates.[4] Other AAUP chapters have adopted the concepts of the 1966 *Statement*, although not citing it, in the governance provisions of their collective bargaining agreements.[5]

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[4] *See, e.g.*, Curry College (Massachusetts) (Art. XIII) ("The AAUP and the College accept the principles of college governance as defined in the 1966 . . . *Statement on Government of Colleges and Universities*."); St. John's University (New York) (preamble) ("[T]he parties have endorsed in principle the general educational philosophy of the 1966 *Statement on Government of Colleges and Universities* . . . of the American Association of University Professors and have incorporated certain specific provisions of the 1966 *Statement* into the Agreement.").

[5] *See, e.g.*, Delaware State University (Art. 19.1) ("It is mutually desirable that the collegial system of shared governance be maintained and strengthened so that faculty and other members of the bargaining unit shall have a mechanism and procedure, independent of the collective bargaining process, for making recommendations to appropriate administrators and for resolving matters of concern to the faculty through the organizational structures of the Departments, the Faculty Senate, the Administrative Council, and the Board of Trustees."); University of Connecticut (Art. 4.1) ("[T]he parties recognize the necessity of a collegial governance system for faculty in areas of academic concern."); Cleveland State University (Art. 39) ("The Cleveland State University Board of Trustees/Administration and the CSU-AAUP recognize and affirm the Faculty Senate as the appropriate instrumentality for faculty participation in the governance of the University and fully support an independent and effective Faculty

AAUP's faculty union experience suggests that collective bargaining is consistent with, indeed is supportive of, shared governance as well as academic freedom.[6] In fact, the collective bargaining process, which involves "reason, reflection, conciliation, and persuasionBall qualities of mind which . . . characterize the academy and from which [faculty] come," is a form of shared governance. *See* Gorman, *supra*, at 2a.

Moreover, such efforts to protect and promote academic freedom and shared governance in higher education faculty collective bargaining contracts are not limited to AAUP. In 1976 then-AAUP President William W. Van Alstyne noted a trend that continues today:

> The presence of the Association in collective bargaining has also brought with it the flattery of widespread imitation: not only do our agreements reflect the enforceable contractualizing of the *1940* Statement and related AAUP standards, but the other associations and unions have now

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Senate."); Cincinnati State Technical and Community College (Art. V) ("The administration and the AAUP recognize the Faculty Senate as the primary means through which the faculty makes known its recommendations on those academic matters for which it has significant responsibility."); Portland State University (Art. 10.2) ("[T]he parties agree that it is mutually desirable that the collegial system of shared governance be maintained and strengthened so that faculty will have a mechanism and procedures, independent of collective bargaining, for appropriate participation in the governance of the University."); University of Toledo (Art. 7.1) ("The vital importance of faculty participation in the making of academic policy is hereby recognized. The Faculty Senate is the organ through which the faculty speak on matters of academic policy and other matters not subject to collective bargaining."); *see also* Frederick E. Hueppe, *St. John's University*, *in* Matthew W. Finkin, Robert A. Goldstein, & Woodley B. Osborne, A Primer on Collective Bargaining for College and University Faculty 93, 99 (1975) (AAUP Primer) (Appendix 1) (The 1966 *Statement*, which was negotiated into an initial collective bargaining agreement at St. John's."); Gorman, *supra*, at 3a ("It is laudable that so many of our chapters have negotiated agreements which revive or create forms of faculty participation, different from the union itself, which are patterned after those which the Association has championed for decades, such as faculty senates and committees.").

[6] *See* Rodger M. Govea, *The Unionization of Cleveland State*, 98 Academe 34, 38 (Nov./Dec. 1998) ("We have found . . . that collective bargaining has strengthened both the faculty's awareness of core AAUP values and our ability to protect those values on campus."); AAUP Primer at 99 (Most noteworthy was the incorporation into the [St. John's University (New York)] contract of the *1940 Statement of Principles on Academic Freedom and Tenure* and the 1966 *Statement on Government of Colleges and Universities*, thus rendering them legal documents governing the University. Among other features, the *1940 Statement* insured academic due process[,] while the 1966 *Statement. . . .* laid the cornerstone of 'shared authority', which would require faculty consultation on all levels.").

> reached the point where negotiation for recognition of AAUP standards is commonplace throughout collective bargaining in higher education.

William W. Van Alstyne, *The Strengths of AAUP*, 62 AAUP Bulletin 135, 137-38 (Aug. 1976).

In the end, the Regional Director correctly found that unionization of graduate assistants does not inevitably violate the NYU administration's academic freedom and shared governance because "the obligation to bargain does not involve the obligation to concede significant interests." Region 2 Decision at 12. Professors in AAUP chapters that serve as unions protect and promote academic freedom and shared governance through collective bargaining; the NYU administration may also through collective bargaining protect and promote its "educational decisionmaking" and shared governance model.

II. AAUP Policy Promotes the Right of Graduate Students Who Are Employees to Bargain Collectively.

In recent years the collective bargaining rights of graduate assistants have emerged as an important policy issue before the Association. AAUP policies clearly support the right of graduate students who are employees to bargain collectively.

The Association long has recognized that graduate students--as future professors and, in some cases, current educators--are entitled to the protections of academic freedom: "Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time tenured and probationary faculty teacher, but also to all others, such as part-time faculty and teaching assistants, who exercise teaching responsibilities." *1940 Statement*, AAUP Policy Documents at 6.

More recently AAUP's 1998 Annual Meeting adopted the *Resolution on the Right of Graduate Students and Part-Time Employees to Choose Unionization*. That resolution extended AAUP's 1973 *Statement on Collective Bargaining* "to include graduate students . . . who perform instructional, administrative, or research services for compensation." *AAUP Supports Right of Graduate Students*

and Part-Time Employees to Choose Unionization, AAUP Press Release (Nov. 16, 1998) (www.aaup.org). The resolution affirms "the right of all groups of employees at public and private colleges and universities to decide for themselves whether to negotiate their salaries, benefits, and working conditions. We believe all groups of employees have the right to bargain collectively by the way of union representation if they so choose." *Id.*; *see also Faculty Appeal: Let the Students Decide* (members.aol.com/gsocuaw/fromfaculty.html) (As of June 14, 2000, 141 NYU professors signed a petition that states: "As faculty at NYU, we have a range of views on graduate-student unionization. We, the undersigned, believe that in a democratic society graduate-student employees should be free to choose for themselves whether to belong to a union.").

This month at AAUP's 2000 Annual Meeting the Association adopted a number of policies endorsing the position that graduate students who are employees have the right to unionize. On June 9, 2000 the AAUP Annual Meeting adopted the *Statement on Graduate Students*, which provides that "graduate student assistants should have the right to organize to bargain collectively. . . . [and] [a]dministrations should honor a majority request for union representation." *Statement on Graduate Students* 3 (www.aaup.org); *see* Courtney Leatherman, *AAUP Approves Statements on Graduate Students, Faculty Workload, and Catholic Colleges*, The Chronicle of Higher Education (June 12, 2000). In so doing, the *Statement* reflects that "[g]raduate students not only engage in more advanced studies than their undergraduate counterparts, they often hold teaching or research assistantships. As graduate assistants, they carry out many of the functions of faculty members and receive compensation for these duties." *Statement on Graduate Students* at 1; *see also* AAUP's *Statement on Faculty Workload*, AAUP Policy Documents at 125, amended June 9, 2000 (www.aaup.org) (providing that "the teaching loads of graduate assistants should permit those who hold these positions to meet their own educational responsibilities as well as to meet the needs of their students"). The *Statement on Graduate*

Students also provides that "[g]raduate students should have a voice in institutional governance at the program, department, college, graduate school, and university levels." *Statement on Graduate Students* at 2.

In conclusion, AAUP policy supports the right of graduate students who are employees to unionize.

III. The Experience of The Rutgers Council of AAUP Chapters Indicates No Interference with Academic Freedom.

The sole bargaining unit in the United States that includes both full-time faculty and graduate student employees is at Rutgers, The State University of New Jersey. The Rutgers Council of AAUP Chapters was recognized as the statewide bargaining agent for full-time faculty in 1970. Teaching and graduate assistants were added to the unit in 1972. Currently, the unit includes approximately 2,500 full-time faculty members and approximately 1,700 teaching and graduate assistants.

While most provisions of the parties' collective bargaining agreement cover all unit members, some contract provisions--notably salary schedules, criteria and procedures for appointment and reappointment, and workload--differentiate between faculty and graduate assistants.

The parties' collective bargaining agreement includes language, applicable to all unit members, that recognizes the principles of academic freedom. In the twenty-eight years since the inclusion of teaching and graduate assistants in the bargaining unit, no disputes of any kind have arisen either in the grievance forum or in contract negotiations over any arguable conflict between academic freedom protections as they pertain to faculty members, on the one hand, and teaching and graduate assistants, on the other. Nor have any significant disputes arisen with respect to the sometimes differing economic interests of members of the two groups encompassed by the bargaining unit.

Based on the experience of The Rutgers Council of AAUP Chapters, the Association believes

that the unionization of graduate students indicates no interference with academic freedom.

IV. Unionization Does Not Interfere with the Mentoring Relationship.

The NYU administration asserts that unionization will disturb the cooperative relationships between faculty mentors and their graduate student mentees.[7] The evidence suggests to the contrary, however. At least one administrative law judge (ALJ), upon hearing the claims of graduate students within the University of California system, ordered that the state's graduate assistants attending public institutions be allowed to unionize. The ALJ explained that "[t]he mentor relationship, which is crucial to education at the University and about which numerous University witnesses testified, is limited primarily to the relationship between a graduate student and a dissertation committee chair, or sometimes a committee member. Any impact upon that relationship . . . is virtually non-existent." *Regents of the Univ. of California*, 20 PERC ¶ 27129 (1996).

In addition, a recent study conducted by an institutional research analyst at Tufts University makes clear that graduate student unions do not hurt professor-graduate student relations. Gordon Hewitt, *Graduate Student Unionization: A Description of Faculty Attitudes and Beliefs*, Annual Forum of the Association for Institutional Research (1999). The study, which surveyed a random sample of faculty

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[7] This "doomsday cry" echoes the unfounded objections of other institutions. *See Regents of the University of California v. PERB*, 715 P.2d 590, 604 (Cal. 1986). University of California, Los Angeles, Chancellor Charles E. Young opined in a letter to deans and department chairs, for example, that "unionization would seriously harm the flexibility, collegiality and harmony the university strives to foster between our students and their academic mentors." Amy Wallace, *Teaching Assistants Call Strike at UCLA*, L.A. Times, Nov. 18, 1996, at B1. A representative of the University of California, San Diego, remarked similarly that "a union would interfere with the student-faculty relationship, which is central to the education of our students." Jeff Ristine, *Teaching Assistants At UCSD Walk Off the Job*, San Diego Union & Trib., Nov. 20, 1996, at B1. Despite these claims, an administrative law judge held that student employees within the California system have a right to unionize. *Regents of the Univ.*

members at five universities where graduate student unions had existed for at least four years, reveals that professors generally do not believe that their relationships with graduate students have suffered because of collective bargaining. Close to 90 percent of the survey participants asserted that bargaining had not kept them from forming close mentoring relationships with their graduate students. *Id*. at 15. Perhaps even more significantly, over 90 percent surmised that collective bargaining had not inhibited their ability to advise or instruct graduate students. *Id*. And 95 percent of those surveyed believed that collective bargaining had not inhibited the free exchange of ideas between faculty members and students. *Id.* at 16. "The results show that faculty . . . support the right of graduate students to bargain collectively, and that collective bargaining is appropriate for graduate students. . . . [B]ased on their experiences, collective bargaining does not inhibit [professors'] ability to advise, instruct or mentor their graduate students." *Id*. at 21. The researcher observed that in their open-ended comments, faculty members never characterized the effect of

bargaining on their relationships with students as "negative." *Id*. at 22. Nor did they consider bargaining to be an "educational hindrance." *Id*.; *see also* Malin, *supra*, at 28 ("The Wisconsin experience [of unionized graduate assistants] demonstrates the fallacy of the NLRB's concern that student unions will misuse the collective bargaining process to the detriment of their educational institutions.").

In the end, no evidence suggests that such graduate assistant unionization interferes with the mentor-mentee relationship.

V. The First Amendment Does Not Immunize the NYU Administration From the National Labor Relations Act.

The NYU administration's claim that its academic freedom is violated by allowing graduate

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of California, 20 PERC ¶ 27129 (1996).

assistants to bargain collectively misunderstands the nature of academic freedom in the legal context. Request for Review of NYU to the NLRB at 18-27.

Courts have long recognized academic freedom as a "special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *id.* ("Teachers and students must always remain free to inquire, to study and to evaluate.") (quotations and citations omitted). Such academic freedom typically protects both professors and institutions. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) ("'[T]he four essential freedoms' of a university[, which includes administrators and professors, are] . . . 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study'.") (citations omitted); *Regents of the University of California v. Bakke*, 438 U.S 265, 312-13 (1978) (Powell, J., concurring) (quoting Frankfurter's concurrence in finding that the First Amendment is implicated in connection with the right of universities--administrators and professors--"to select those students who will contribute the most to the 'robust exchange of ideas'.") (citations omitted); *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1983) ("Academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment.", *aff'd*, 482 U.S. 578 (1987). However, institutional First Amendment academic freedom has never been a basis for "immunizing" higher education administrations from the application of federal law, including the NLRA. *See Associated Press v. NLRB*, 301 U.S. 103, 133 (1937); *Powell v. Syracuse University*, 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

In *Associated Press v. NLRB*, 301 U.S. at 103, the United States Supreme Court ruled that the application of the NLRA to an editorial employee did not violate the First Amendment. In that case the Court rejected the Associate Press's (AP) argument 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." *Id.* at 131. The majority roundly criticized the publisher for relying on a hypothetical and counterfactual claim of bias to assert a total prohibition against the application of the NLRA to editorial employees. The Court found the employer's argument "an unsound generalization," reasoning that "[t]he 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." *Id.* at 132-33. Accordingly, the NLRA applied to the AP, and journalists had the right to bargain under the Act. *See also Hausch v. Donrey of Nevada, Inc.*, 833 F. Supp. 822 (D. Nev. 1993) (rejecting newspaper publisher's argument that the First Amendment insulated it from a Title VII sex discrimination claim).

Similarly, in *Powell v. Syracuse University*, 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978), the Second Circuit held that a university's First Amendment right to academic freedom did not allow it to violate Title VII. In that case, a female professor sued the university for race and gender discrimination in the nonrenewal of her employment contract. The Second Circuit, in affirming the trial court decision, ruled that the then-current judicial "anti-interventionist policy" afforded to higher education institutions, which made them "virtually immune to charges of employment bias," had "been pressed beyond all reasonable limits." *Id.* at 1153. The court concluded that judicial precedent did not, and "was never intended to, indicate that academic freedom embraces the freedom to discriminate." *Id*. at 1154; *see also University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (ruling that First Amendment does not preclude the applicability of Title VII to the tenure review process at a private university).

Nor does the NYU administration have a "special immunity" from the NLRA. *See Associated Press*, 301 U.S. at 132. Just as the publisher in *Associated Press* had the employer prerogative not to hire or retain an editor who "fails faithfully to edit the news to reflect the facts without bias and prejudice," so too does the university administration, as an employer, have the right to hire and retain those graduate

assistants who best meet its academic needs. *See id.* The NYU administration's academic freedom argument is an "unsound generalization," *id*. at 131; the university is entitled to no "special privilege" in seeking to prohibit the unionization of its graduate assistants. *Id*. at 132. Just as academic freedom fails to "embrace" the right of a university to discriminate, it does not "embrace" the right of a university to prohibit graduate assistants from unionizing. *See Powell*, 580 F.2d at 1154. Ultimately, the application of the NLRA to the university need not circumscribe the academic freedom of the institution to hire and retain those graduate assistants who best meet the needs of the university's academic programs.

VI. The Board and Courts Have Rejected the "Doomsday Cry" that the Unionization of Student-Employees Interferes with Academic Freedom.

The Board and other courts have rejected the "doomsday cry" by academic administrators, voiced here by the NYU administration, that unionization of student-employees interferes with academic freedom. *See Regents of the University of California v. PERB*, 715 P.2d 590, 604 (Cal. 1986).

The U.S. Supreme Court has rejected speculation, such as fear of potential infringement of academic freedom, as a basis for denying employees the right to unionize. In *National Labor Relations Board v. E.C. Atkins*, 331 U.S. 398 (1947), the Court ruled that collective bargaining was consistent with the functions of militarized guards. In so doing, the Court reasoned that the Board

> cannot assume . . . that labor organizations will make demands upon plant guard members or extract concessions from employers so as to decrease the loyalty and efficiency of the guards in the performance of their obligations to the employers. There is always that possibility, but it does not qualify as a legal basis for taking away from the guards all their statutory rights. In other words, unionism and collective bargaining are capable of adjustments to accommodate the special functions of plant guards.

Id. at 405. The NYU administration's contention that the unionization of graduate students who are employees will interfere with its academic freedom is also speculative. "[U]nionism and collective bargaining" are able to address the "special functions" of graduate students as employees. *See id.*; *see*

also William M. Weinberg, *Patterns of State-Institutional Relations Under Collective Bargaining, Faculty Bargaining, State Government and Campus Autonomy: The Experience in Eight States, in* Pennsylvania State University and The Education Commission of the States Report 103 (Apr. 1976) ("It is quite obvious that after more than six years of collective bargaining [academic practices] have displayed an unusual amount of vitality. . . . The higher education "industry" has adapted collective bargaining, as has every other industry, to match its own administrative structure, product and institutional needs, and relationships with unions.").

This Board has recognized the compatibility between collective bargaining and academic freedom in considering unionization efforts by graduate students who are employees. In *Boston Medical Center Corp*., 1999 WL 1076118 (NLRB Nov. 26, 1999), the Board recently rejected the academic freedom argument raised by the employer. In that case the Board ruled that interns and residents are employees under the NLRA. The employer argued "strenuously that by granting employee status to house staff, the Board will improperly permit intrusion by collective bargaining into areas involving academic freedom." *Id*. at *20. The Board refuted this argument:

> This argument puts the proverbial cart before the horse. The contour of collective bargaining is dynamic with new issues frequently arising out of new factual contexts: what can be bargained about, what the parties wish to bargain about or concentrate on, and what the parties are free to bargain about, may change. But such problems have not proven to be insurmountable in the administration of the Act. . . . An employer is always free to persuade a union that it cannot bargain over matters in the manner suggested by the union. . . . But that is part of the bargaining process: the parties can identify and confront any issues of academic freedom as they would any other issue in collective bargaining.

Id. And so, the Board concluded that it could not

> assume that the unions that represent [house staff] will make demands upon [employers] or extract concessions . . . that will interfere with the educational mission of the institutions they serve, or prevent them from obtaining the education necessary to complete their professional training. If there is anything we have learned in the long history of this Act, it is that unionism and collective bargaining are dynamic institutions capable of adjusting to new and changing work contexts and demands in every sector of our evolving economy. We have no doubt that they can also adjust to accommodate the special functions of medical house staff.

Id. at *21.

Other courts have also found collective bargaining compatible with academic freedom. For example, in *Regents of the University of California v. PERB*, 715 P.2d 590 (Cal. 1986), the California Supreme Court rejected a similar academic freedom argument raised by a university seeking to halt unionization of its student employees. In ruling that the interns and residents were employees under its state law, the court opined:

> The University asserts that if collective bargaining rights were given to house staff the University's educational mission would be undermined by requiring bargaining on subjects which are intrinsically tied to the educational aspects of the residency programs. This "doomsday cry" seems somewhat exaggerated in light of the fact that the University engaged in meet-and-confer sessions with employee organizations representing house staff prior to the effective date of [the relevant state statute.] . . . . Moreover, the University's argument is premature. The argument basically concerns the appropriate scope of representation under the Act.

Id. at 605.

The NYU administration raises a similar "doomsday cry" that its academic freedom will be violated if its graduate assistants are allowed to unionize. *See id*. Based on AAUP's union experience with faculty members and, to a lesser extent, graduate students (The Rutgers Council of AAUP Chapters), the Association believes that such arguments are specious. "Unionism and collective bargaining" are able to address the "special functions" of graduate assistants, just as that process has "adjusted" to "accommodate" professors who choose to unionize. *See E.C. Atkins*, 331 U.S. at 405; *Boston Medical Center Corp.*, 1999 W.L. at *20-21. In this case, the Regional Director properly found that

> [t]he conclusion that graduate students are employees entitled to engage in collective bargaining . . . does not imply that the . . . elements of academic freedom referred to by the Employer are necessarily mandatory subjects of collective bargaining. Indeed, it is precisely because collective bargaining negotiations can be limited to only those matters affecting wages, hours and other terms and conditions of employment that the critical elements of academic freedom need not be compromised. And, of course, the obligation to bargain does not involve the obligation to concede significant interests[,]

such as academic freedom and shared governance. *See* Region 2 Decision at 34.

Conclusion.

For the above stated reasons, the Board should affirm the Regional Director's finding that graduate students who are employees may collectively bargain in the academic workplace without violating the NYU administration's institutional academic freedom, disrupting graduate student involvement in university governance, or interfering with mentoring relationships between faculty members and their graduate students. On the contrary, three decades of AAUP experience in faculty collective bargaining as well as current law suggest that academic administrations may sustain and promote academic freedom and shared governance through collective bargaining with graduate assistants.

Respectfully submitted,

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