

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

THE TRUSTEES OF COLUMBIA UNIVERSITY)	
IN THE CITY OF NEW YORK,)	
Employer,)	
)	
and,)	Case 02-RC-143012
)	
GRADUATE WORKERS OF)	
COLUMBIA-GWC, UAW)	
Petitioner.)	
_____)	

**BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AND
COMMITTEE OF INTERNS AND RESIDENTS, SEIU HEALTHCARE
*AS AMICI CURIAE***

Respectfully Submitted By:

Judith A. Scott
General Counsel
Johnda Bentley
Assistant General Counsel
Trisha Pande
Law Fellow
Service Employees International Union
1800 Massachusetts Ave, NW
Washington, DC 20036

Ralph DeRosa
Deputy General Counsel
Committee of Interns and Residents
SEIU Healthcare
520 8th Avenue, Suite 1200
New York, NY 10018

February 29, 2016

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE.....	1
INTRODUCTION	2
ARGUMENT	2
I. The Board Should Overrule <i>Brown</i> Because It Is Inconsistent With the Act and the Board’s Precedents.....	2
A. Students Are Employees Within The Plain Meaning and Intent of the Act.....	3
B. The Board In <i>Brown</i> Did Not Evaluate The Realities of The Relationships Between Student Assistants and Universities.....	3
C. Under A Standard Consistent With <i>Boston Medical Center</i> and <i>NYU</i> , Student Assistants Are Not Temporary Employees And Share An Appropriate Community of Interest.	4
II. Contrary to the Board’s Reasoning in <i>Brown</i> , Collective Bargaining Is Not At Odds With The Educational Process, But Enhances The Educational Process.....	6
A. Collective Bargaining Has Enhanced Graduate Medical Education at Hospitals Where Residents Are Represented by CIR.....	6
1. Resident Physicians Have Used Collective Bargaining to Seek Improvements in Their Medical Training and Education.....	7
2. Resident Physicians Have Used Collective Bargaining to Improve Patient Care.	11
III. The Board’s Determination in <i>Brown</i> Ignores The Realities Of The Modern Higher Education Landscape.	16
A. Higher Education Institutions Have Become More Corporate in Function and Structure Over The Last Three Decades.....	16
B. Contingent Faculty Appointments Have Increased Exponentially At Higher Education Institutions.....	18
C. The Increased Reliance of Higher Education Institutions on Contingent Labor Has Led To A Shift of Instructional Duties To Student Assistants.....	20
D. Recent Structural Changes in Higher Education Demonstrate A Significant Economic Relationship Between Student Assistants and University Administrators.....	21
CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

Boston Medical Center Corp., 330 NLRB 152 (1999)..... 2, 3, 4, 5

Brown University, 342 NLRB 483 (2004)..... passim

Kansas City Repertory Theatre, 356 NLRB No.28 (2010). 4

New York University, 332 NLRB 1205 (2000)..... passim

NLRB v. Town & Country, 516 U.S. 85 (1995) 3

Regents of the University of Michigan v. Michigan ERC, 204 N.W.2d 218 (Mich. 1973) 3

St. Clare’s Hospital, 229 NLRB 1000 (1977) 23

Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984). 3

Statutes

29 U.S.C. § 152(3) 2

Other Authorities

ADJUNCT ACTION, SEIU, THE HIGH COST OF ADJUNCT LIVING: BOSTON (2013), *available at* <http://www.seiu509.org/files/2013/12/The-High-Cost-of-Adjunct-Living-in-Boston-12113.pdf>.. 19

ADRIANNA KEZAR, TIAA-CREF INSTITUTE, CHANGING FACULTY WORKFORCE MODELS (2013), *available at* <https://www.tiaa-crefinstitute.org/public/pdf/changing-faculty-workforce-models.pdf>. 17

AM. ASS’N OF UNIV. PROFS., AAUP CONTINGENT FACULTY INDEX (2006), *available at* <http://www.aaup.org/sites/default/files/files/AAUPContingentFacultyIndex2006.pdf>. 20, 21

Audrey Williams June & Jonah Newman, *Adjunct Project Reveals Wide Range in Pay*, CHRONICLE OF HIGHER EDUC. (Jan. 4, 2013), <http://chronicle.com/article/Adjunct-Project-Shows-Wide/136439> 19, 22

Audrey Williams June, *The Cost of a Ph.D.: Students Report Hefty Debt Across Many Fields*, CHRONICLE OF HIGHER EDUC. (Jan. 16, 2014), <http://chronicle.com/article/The-Cost-of-a-PhD-Students/144049>. 22

Background Facts on Contingent Faculty, AM. ASS’N OF UNIV. PROFS.,
<http://www.aaup.org/issues/contingency/background-facts> (last visited Feb. 29, 2016)..... 18

CIR SEIU Healthcare, *Resident Research Day at Metropolitan Hospital*, YOUTUBE (Mar. 26, 2012), <https://www.youtube.com/watch?v=VXQoqoTqZbc> 10

COAL. ON ACAD. WORKFORCE, *A PORTRAIT OF PART-TIME FACULTY MEMBERS* (2012), *available at* http://www.academicworkforce.org/CAW_portrait_2012.pdf 19

Collective Bargaining Agreement Between Boston Medical Center and the Committee of Interns and Residents (Oct. 1, 2013 – Sept. 30, 2016), *available at* http://www.cirseiu.org/files/2014/05/BMC_optimized.pdf. 13

Collective Bargaining Agreement Between Brooklyn Hospital Center and the Committee of Interns and Residents (Jan. 1, 2013 – Oct. 31, 2016), *available at* http://www.cirseiu.org/files/2014/05/Brooklyn_optimized.pdf. 13

Collective Bargaining Agreement Between Cambridge Public Health Commission and the Committee of Interns and Residents (July 1, 2013 – June 30, 2016), *available at* http://www.cirseiu.org/wp-content/blogs.dir/53/files/2015/04/CHA-2013-2016_optimized.pdf..... 13

Collective Bargaining Agreement Between Kingsbrook Jewish Hospital Center and the Committee of Interns and Residents (Jan. 1, 2014 – Dec. 31, 2016), *available at* http://www.cirseiu.org/wp-content/blogs.dir/53/files/2015/02/Kingsbrook-2014_optimized.pdf..... 8

Collective Bargaining Agreement Between Maimonides Medical Center and the Committee of Interns and Residents (Nov. 1, 2013 – Oct. 31, 2016), *available at* <http://www.cirseiu.org/files/2013/12/Maimo-contract-2013-2016-website.pdf>. 14

Collective Bargaining Agreement Between New York Methodist Hospital and the Committee of Interns and Residents (Nov. 1, 2013 – Oct. 31, 2016), *available at* http://www.cirseiu.org/files/2014/02/NYMethodist-2013-2016_PDF.pdf..... 7, 8, 14, 16

Collective Bargaining Agreement Between the University of New Mexico and the Committee of Interns and Residents (Aug. 1, 2015 – Aug. 31, 2017), *available at* <http://www.cirseiu.org/wp-content/blogs.dir/53/files/2015/09/UNM-2015.pdf>. 8, 13

COMM. ON CONTINGENT LABOR IN THE PROFESSION, MODERN LANGUAGE ASS’N, *PROFESSIONAL EMPLOYMENT PRACTICES FOR NON-TENURE TRACK FACULTY MEMBERS: RECOMMENDATIONS AND EVALUATIVE QUESTIONS* (2011), *available at* http://www.mla.org/pdf/clip_stmt_final_may11.pdf..... 18

Committee of Interns and Residents–University Of New Mexico, *J. QUALITY IMPROVEMENT IN HEALTHCARE* (Oct. 2015), *available at* <http://www.cirseiu.org/wp-content/blogs.dir/53/files/2016/01/QI-Journal-UNM-2015sm.pdf>. 9

Daniel Massey, <i>Maimonides Residents Negotiate Efficiency Bonuses</i> , CRAIN’S NEW YORK BUSINESS, Nov. 9, 2010, http://www.crainsnewyork.com/article/20101109/FREE/101109854/maimonides-residents-negotiate-efficiency-bonuses	14
David Sklar, M.D. et al., <i>Experience With Resident Unions at One Institution and Implications for the Future of Practicing Physicians</i> , 86 ACADEMIC MED. 552 (2011).....	12
<i>For Scientists–For Participants</i> , TELLURIDE SCIENCE RESEARCH CENTER, http://www.telluridescience.org/reg/workshop_details.php?wid=353 (last visited Feb. 29, 2016).	10
Gary Rhoades & Sheila Slaughter, <i>Academic Capitalism in the New Economy: Challenges and Choices</i> , 1 AMERICAN ACADEMIC 37 (2004), available at http://firgoa.usc.es/drupal/files/Rhoades.qxp.pdf	17
Gregory M. Saltzman, <i>Union Organizing and the Law: Part-Time Faculty and Graduate Teaching Assistants</i> , 2000 NEA ALMANAC OF HIGHER EDUC. 43 (2000), available at http://www.nea.org/assets/img/PubAlmanac/ALM_00_05.pdf	19, 20, 22
HOUSE COMM. ON EDUC. AND THE WORKFORCE DEMOCRATIC STAFF, THE JUST-IN-TIME PROFESSOR: REPORT SUMMARIZING eFORM RESPONSES ON THE WORKING CONDITIONS OF CONTINGENT FACULTY IN HIGHER EDUCATION (2014), available at http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/1.24.14-AdjunctEforumReport.pdf	19
JACK H. SCHUSTER & MARTIN J. FINKELSTEIN, THE AMERICAN FACULTY: THE RESTRUCTURING OF ACADEMIC WORK AND CAREERS (2006).....	17
JOE BERRY, RECLAIMING THE IVORY TOWER: ORGANIZING ADJUNCTS TO CHANGE HIGHER EDUCATION (2005).	16
Joe Carlson, <i>Rewards and Their Risks</i> , MODERN HEALTHCARE Apr. 28, 2012, available at http://www.modernhealthcare.com/article/20120428/MAGAZINE/304289860	15
John W. Curtis & Saranna Thornton, <i>Here’s the News: The Annual Report on the Economic Status of the Profession 2012-13</i> , ACADEME (2013), available at http://www.aaup.org/sites/default/files/files/2013%20Salary%20Survey%20Tables%20and%20Figures/report.pdf . 19, 20	
JOHN W. CURTIS, AM. ASS’N OF UNIV. PROF., THE EMPLOYMENT STATUS OF INSTRUCTIONAL STAFF MEMBERS IN HIGHER EDUCATION, FALL 2011 (2014), available at http://www.aaup.org/sites/default/files/files/AAUP-InstrStaff2011-April2014.pdf	18
KEITH HOELLER, EQUALITY FOR CONTINGENT FACULTY: OVERCOMING THE TWO-TIER SYSTEM (2014).	18, 20

KEN JACOBS, IAN PERRY & JENNIFER MACGILLVARY, UC BERKELEY CTR. FOR LABOR RESEARCH & EDUC., THE HIGH PUBLIC COST OF LOW WAGES (2015), available at http://laborcenter.berkeley.edu/pdf/2015/the-high-public-cost-of-low-wages.pdf	20
MARISA ALLISON, RANDY LYNN, & VICTORIA HOVERMAN, INDISPENSABLE BUT INVISIBLE:A REPORT ON THE WORKING CLIMATE OF NON-TENURE TRACK FACULTY AT GEORGE MASON UNIVERSITY (2014), available at https://contingentfacultystudy.files.wordpress.com/2013/08/gmu-contingent-faculty-study.pdf	21, 22
<i>Patient Care Trust Fund for HHC Hospitals</i> , CIR SEIU HEALTHCARE, http://www.cirseiu.org/pctf (last visited Feb. 29, 2016).....	10
Paul Levy, <i>Educate the Young, Regulate the Old</i> , NOT RUNNING A HOSPITAL (June 10, 2012), http://runningahospital.blogspot.com/2012/06/educate-young-regulate-old.html	11
Paul Levy, <i>Jumping for Joy in Telluride</i> , NOT RUNNING A HOSPITAL (June 12, 2012), http://runningahospital.blogspot.com/2012/06/jumping-for-joy-in-telluride.html	10, 11
PULLIAS CENTER FOR HIGHER EDUCATION, USC ROSSIER SCH. OF EDUC., THE CHANGING FACULTY AND STUDENT SUCCESS: NATIONAL TRENDS FOR FACULTY COMPOSITION OVER TIME (2012), available at http://www.uscrossier.org/pullias/wp-content/uploads/2012/05/Delphi-NTTF_National-Trends-for-Faculty-Composition_WebPDF.pdf	18, 19
Rebecca Clay, <i>The Corporatization of Higher Education</i> , 39 MONITOR ON PSYCHOLOGY 50 (2008), available at http://www.apa.org/monitor/2008/12/higher-ed.aspx	17
<i>Research Project Grant</i> , CIR SEIU HEALTHCARE, http://www.cirseiu.org/pctf-grant/ (last visited Feb. 29, 2016).....	10
Sedipeh Sedgh et al., <i>Resident-Driven Quality Improvement to Inpatient Medication Reconciliation in an Academic Setting</i> , 28 AM. J. MED. QUALITY 357 (2013).	15
Seth Freed Wessler, <i>Your College Professor Could Be On Public Assistance</i> , NBC (Apr. 2, 2014), http://www.nbcnews.com/feature/in-plain-sight/poverty-u-many-adjunct-professors-food-stamps-n336596	20
Stacey Patton, <i>The Ph.D. Now Comes With Food Stamps</i> , CHRONICLE OF HIGHER EDUC. (May 6, 2012), http://chronicle.com/article/From-Graduate-School-to/131795	22
<i>Through Negotiated Patient Care Funds, Residents Translate Needs into Action</i> , CIR VITALS (Jan. 26, 2012), http://www.cirvitals.org/2012/01/26/through-negotiated-patient-care-funds-residents-translate-needs-into-action	14

INTEREST OF AMICI CURIAE

The Service Employees International Union (“SEIU”) and Committee of Interns and Residents, SEIU Healthcare (“CIR”) submit this brief in response to the National Labor Relations Board’s (“the Board”) January 13, 2016 Notice and Invitation to File Briefs concerning the decision in *Columbia University* Case 02-RC-143012. SEIU is an international labor organization representing approximately two million members working in healthcare, property services, and the public sector.

CIR is the largest organization of resident physicians in the country, representing more than 13,000 physicians-in-training. As physicians whose status as employees under the National Labor Relations Act (“the Act”) was at one time in question, CIR believes that those who perform services for pay while under the control of others, regardless of whether they derive an educational benefit from their employment, should be covered by the Act. In addition, CIR believes collective bargaining enhances—not harms—the education of student employees and that granting collective-bargaining rights to such individuals is in furtherance of sound labor policy.

SEIU Faculty Forward represents over 38,000 faculty members at private and public institutions of higher education who hold tenured, tenure-track, and part-time and full-time contingent appointments. Through organizing and representing faculty across the country, SEIU has firsthand insight into the transformation of modern higher education institutions as they have become more corporate in function and structure. In light of these changes, and increased reliance of colleges and universities on contingent faculty, SEIU strongly believes in the right of student assistants to organize and collectively bargain for better working conditions.

INTRODUCTION

SEIU and CIR submit this brief to address (1) whether student assistants are employees under the Act and (2) what standard the Board should apply to determine whether they constitute temporary employees.

The Board should overrule *Brown University*, 342 NLRB 483 (2004) (“*Brown*”), and hold that student assistants are employees under Section 2(3) of the Act.¹ Furthermore, the Board should generally find that student assistants are not temporary employees unless hired for a period of less than one academic unit with no reasonable expectation of rehire.

In addition to addressing legal arguments, this brief will also provide facts from SEIU’s relevant experiences representing both medical interns and residents and contingent faculty to describe (1) the role of collective bargaining in enhancing the educational process for interns and residents and (2) the increased reliance of higher education institutions on contingent labor, including that provided by students.

ARGUMENT

I. The Board Should Overrule *Brown* Because It Is Inconsistent With the Act and the Board’s Precedents.

The Board’s holding in *Brown* is inconsistent with the Act. Therefore, the Board should reject *Brown* and embrace the plain meaning of the Act and the legal determinations made in *Boston Medical Center Corp.*, 330 NLRB 152 (1999) (“*Boston Medical Center*”) and *New York*

¹ 29 U.S.C. § 152(3). The petitioned-for unit in this case of both graduate and undergraduate student assistants is appropriate under traditional community-of-interest standards.

University, 332 NLRB 1205 (2000) (“*NYU*”). As we show, *Brown* was misguided as a matter of law and policy.

A. Students Are Employees Within The Plain Meaning and Intent of the Act.

As pointed out by the dissent in *Brown*, the holding contravenes the Board’s historically broad interpretation of the term “employee” under the statute. 342 NLRB at 496 (Liebman, W., Walsh, D., dissenting). The plain language of Section 2(3) defines “*any employee*” broadly such that *any* category of workers should come within the statutory definition unless specifically exempted. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–92 (1984). It follows that “[t]he exclusions listed in the statute are limited and narrow, and do not, on their face, encompass . . . ‘students.’” *Boston Med. Ctr.*, 330 NLRB at 160.

A major concern of the Board in *Brown* was the presence of an educational benefit derived from student assistants’ employment. *See Brown Univ.*, 342 NLRB at 489. However, as pointed out in *Boston Medical Center*, evidence of an educational benefit from employment does not preclude status as an employee. 330 NLRB at 160; *see also Regents of the Univ. of Michigan v. Michigan ERC*, 204 N.W.2d 218, 226 (Mich. 1973) (“[Fledgling lawyers employed by a law firm spend a great deal of time acquiring new skills, yet no one would contend that they are not *employees* of the law firm.”). More salient to the determination of employee status, rather, is whether an individual provides services under the control or direction of another for compensation. *See NLRB v. Town & Country*, 516 U.S. 85, 93-95 (1995) (citing to common law agency doctrine); *Boston Med. Ctr.*, 330 NLRB at 160.

B. The Board In *Brown* Did Not Evaluate The Realities of The Relationships Between Student Assistants and Universities.

In evaluating the status of graduate students as employees, the Board in *Brown* did not take into account any empirical evidence regarding the services performed by student assistants

or the broader context of modern academic hiring. *See Brown Univ.*, 342 NLRB at 493 (Liebman, W., Walsh, D., dissenting) (“[The majority’s] decision is woefully out of touch with contemporary academic reality.”). By contrast, the Board in *Boston Medical Center* correctly “assessed the realities of the relationship between house staff and the hospitals that they serve . . . [to find] sufficient factors to warrant a finding of employee status.” 330 NLRB at 163. Based on an “understanding of developments in labor relations in the intervening years,” the Board in *Boston Medical Center* overruled outdated precedent and held that medical interns and residents are employees under the Act. *Id.* The Board in *NYU* followed suit by considering recent evidence on the services performed by graduate student assistants and finding it to be analogous to the facts in *Boston Medical Center*. *See NYU*, 332 NLRB at 1207.

C. Under A Standard Consistent With *Boston Medical Center* and *NYU*, Student Assistants Are Not Temporary Employees And Share An Appropriate Community of Interest.

The issue of temporary status is relevant only in the context of a community of interest analysis. *See Kansas City Repertory Theatre*, 356 NLRB No.28 (2010). Temporary employees are typically excluded from a bargaining unit that includes full-time or regular part-time employees under a community-of-interest analysis, but the Board has recognized units composed solely of temporary employees as appropriate. *Id.* (certifying a unit of musicians who were all temporary employees because they shared a community of interest). Consistent with a traditional community-of-interest analysis, the Board should generally find as a threshold matter that student assistants are not temporary employees if they are employed for one academic unit or longer. If a student assistant is employed for less than one academic unit, then she should be considered temporary only if the objecting party can prove no reasonable expectation of rehire.

In *Boston Medical Center*, the Board found that medical residents were not temporary employees even though “their employment was to terminate on a date certain.” 330 NLRB at 166. The Board clarified that not all employees hired for a finite period should be considered temporary employees, comparing the medical interns, whose residencies range between three and seven years, to other employees working on a contractual basis, such as athletes and teachers. *Id.* Thus, student assistants are not temporary employees simply because their employment will end at graduation.

Setting the threshold for temporary employees at one academic unit is consistent with the Board’s decision in *NYU* to exclude from the bargaining unit students who work in small, varying assignments of less than one semester. *See NYU*, 332 NLRB at 1221. The determination that student assistants are not temporary employees is also consistent with SEIU’s experiences representing faculty units encompassing contracts ranging from one semester to several years, and reflective of modern academic hiring practices.

It is critical that the board protect the rights of employees in finite employment agreements in light of the shift in our economy away from permanent employment and toward a repetition of assignments or contracts, also known as the “gig” economy. The Board should thus find that student assistants are employees, and not temporary, in accord with proper statutory interpretation and in light of the increasing reliance of higher education institutions on a contingent workforce. In the following sections, this brief will draw from SEIU’s experiences to

highlight some of the policy considerations and evidence in support of restoring collective-bargaining rights to student assistants.

II. Contrary to the Board’s Reasoning in *Brown*, Collective Bargaining Is Not At Odds With The Educational Process, But Enhances The Educational Process.

In denying graduate student employees the right to collectively bargain, the Board in *Brown* opined “collective bargaining would have a deleterious impact on overall educational decisions” and would “be detrimental to the educational process.” 342 NLRB at 490, 493. The *Brown* majority criticized the dissent’s confidence in the collective bargaining process as speculative. Yet, CIR’s experience after *Boston Medical Center* makes clear that concerns about the potential harm extending collective-bargaining rights to graduate students could cause to the educational process are based upon unsupported speculation.

Although there are clear differences between resident physicians and graduate student employees—residents, for example, have already obtained their professional degree and are not responsible for tuition—those differences have nothing to do with whether collective bargaining and graduate education are compatible. Instead, evidence of the positive impact that collective bargaining has had on resident training is entirely relevant to the question of how collective bargaining would impact the education of graduate student employees. The alarmist predictions about the end of graduate medical education as we know it when *Boston Medical Center* was decided have not come to pass. Therefore, the Board should overrule *Brown* to find that student assistants are employees.

A. Collective Bargaining Has Enhanced Graduate Medical Education at Hospitals Where Residents Are Represented by CIR.

Since *Boston Medical Center* was decided, CIR has successfully negotiated dozens of collective-bargaining agreements on behalf of resident physicians in both the private and public

sectors. In addition to improving their wages, benefits, and working conditions, the resident members of CIR have used negotiations to enhance their training by winning paid time off to attend medical conferences and funding for journals, textbooks, and other items. They have also bargained for funding to purchase equipment to aid in the care of patients and have won contract language to create quality improvement programs designed to improve patient care and save money for their hospitals. The result has been that the unionization of resident physicians has led to improvements in medical education, patient care, and a strengthened relationship between resident physicians and their employers.

1. Resident Physicians Have Used Collective Bargaining to Seek Improvements in Their Medical Training and Education.

While the negotiation of wages and benefits has been a priority for residents in collective bargaining, they have placed the improvement of their training and medical education benefits on an equal footing. Many of CIR's collective-bargaining agreements guarantee minimum levels of access to the hospital's medical library and electronic database of journals, textbooks, and other resources that are needed for both medical education and patient care. CIR-negotiated agreements also provide for leave time to attend educational conferences and Board reviews, and allow resident physicians to seek reimbursement for textbooks, journals, and electronic devices that aid residents in their patient care duties and are also used as learning tools.

For example, CIR negotiated for residents to receive funding for portable electronic medical devices at New York Methodist Hospital, a private, voluntary hospital in Brooklyn, New York. These devices enable residents not only to access medical books and journals but also the hospital's Cerner electronic medical records system.² This same agreement also provides a

² See Collective Bargaining Agreement Between New York Methodist Hospital and the Committee of Interns and Residents 20 (Nov. 1, 2013 – Oct. 31, 2016) [hereinafter *Methodist Agreement*], available at http://www.cirseiu.org/files/2014/02/NYMethodist-2013-2016_PDF.pdf.

\$3,500 Library Fund for the purchase of books and journals by residents for the medical library, and grants access to the library during hours that it is otherwise closed.³ Thus, the Methodist residents have contractual rights that will help, not hinder, their training.

The agreement between CIR and the University of New Mexico Medical Center (UNM) provides \$450 annually to each resident for educational purposes such as educational or professional software, board review programs, conference registration and travel, and work-related medical equipment, among other educational items.⁴ Prior to the UNM residents unionizing in 2007, only some departments provided an educational reimbursement. Through collective bargaining, CIR was able to ensure that all residents received this educational benefit. CIR also negotiated tuition reimbursement for UNM residents who wished to further their “medical academic education” with courses that “add to the knowledge base of any of the [Accreditation Council for Graduate Medical Education] Clinical Core Competencies (Patient Care, Medical Knowledge, Professionalism, Interpersonal Communication Skills, System Based Practice and Practice Based Learning and Improvement).”⁵ There was no tuition reimbursement prior to the negotiation of the first collective-bargaining agreement between CIR and UNM.

At Kingsbrook Jewish Hospital Center, in addition to negotiating an annual \$700 educational material allowance, the resident physicians bargained for the creation of an Education Enhancement Committee.⁶ The Committee, which is comprised of two residents and two hospital representatives chosen by the hospital administration, is charged with reviewing the educational needs of the hospital and residents, and makes written proposals on educational

³ *Id.*

⁴ See Collective Bargaining Agreement Between the University of New Mexico and the Committee of Interns and Residents 42 (Aug. 1, 2015 – Aug. 31, 2017) [hereinafter UNM Agreement], *available at* <http://www.cirseiu.org/wp-content/blogs.dir/53/files/2015/09/UNM-2015.pdf>.

⁵ *Id.* at 41.

⁶ See Collective Bargaining Agreement Between Kingsbrook Jewish Hospital Center and the Committee of Interns and Residents 31–32 (Jan. 1, 2014 – Dec. 31, 2016), *available at* http://www.cirseiu.org/wp-content/blogs.dir/53/files/2015/02/Kingsbrook-2014_optimized.pdf.

matters for consideration by the Kingsbrook administration and Board of Directors. Here, collective bargaining has enabled residents to not only negotiate for funding for additional educational resources, but it has also established a mechanism to allow those most impacted by the quality of the training program to offer suggestions that could improve the program.

In addition to the aforementioned educational and tuition reimbursement benefits that UNM residents negotiated, CIR bargained with UNM to create a Quality Improvement Fund (“QI Fund”) with an annual allocation of \$20,000. Using the QI Fund, CIR resident physician leaders at UNM each year have published the Journal of Quality Improvement in Healthcare in conjunction with the hospital’s Graduate Medical Education department. With the goal of coordinating collaboration among residents interested in quality improvement, the journal provides an overview of resident quality improvement projects at UNM and other hospitals around the country.⁷

Finally, perhaps the greatest success story among CIR’s many achievements in enhancing resident training and job performance has been the Patient Care Trust Fund (PCTF) for New York City Health and Hospitals Corporation (HHC) medical facilities. Resident physicians employed by HHC⁸ collectively bargained to have a percentage of their payroll placed in the PCTF to purchase medical equipment and educational materials, fund research projects, and sponsor holiday events for pediatric patients at HHC hospitals. A Board of Trustees comprised of HHC resident physicians governs the Fund. It is also HHC residents who develop proposals and apply for funding through the PCTF. In addition to items such as stretchers, exam tables,

⁷ See, e.g., Committee of Interns and Residents–University Of New Mexico, J. QUALITY IMPROVEMENT IN HEALTHCARE (Oct. 2015), available at <http://www.cirseiu.org/wp-content/blogs.dir/53/files/2016/01/QI-Journal-UNM-2015sm.pdf>.

⁸ HHC medical facilities that employ residents include Bellevue Hospital Center, Harlem Hospital Center, Metropolitan Hospital, Jacobi Medical Center, Lincoln Medical and Mental Health Center, Coney Island Hospital, Kings County Hospital Center and Woodhull Medical and Mental Health Center.

microscopes, and other medical equipment, the resident physician Trustees have allocated funds to support hospital-wide educational events as well as the attendance of residents at patient safety conferences.⁹

For example, in February 2012, the CIR PCTF co-sponsored the first ever Resident Research Day at Metropolitan Hospital Center in conjunction with New York Medical College and Metropolitan.¹⁰ PCTF funds were also used to support two CIR resident physicians' attendance at the Telluride Patient Safety Camp in Telluride, Colorado. As Paul Levy, a former hospital CEO and current health care blogger who attended the Telluride camp, noted:

In addition to traditional collective bargaining issues, CIR has a major focus on creating a better patient quality and safety environment in the hospitals in which its members work. Also, it supports education and training to improve the quality of care the members are able to provide to patients.¹¹

The Telluride Camp brings health care leaders together with resident physicians to discuss practices and policies that will lead to enhanced patient safety and quality health care.¹² Those resident physicians then bring this knowledge back to their health care facilities and ultimately become leaders on patient safety issues. To effectuate this, residents who attended, including those sponsored by CIR, were required to “implement, lead and successfully complete a safety or

⁹ *Patient Care Trust Fund for HHC Hospitals*, CIR SEIU HEALTHCARE, <http://www.cirseiu.org/pctf> (last visited Feb. 29, 2016).

¹⁰ See CIR SEIU Healthcare, *Resident Research Day at Metropolitan Hospital*, YOUTUBE (Mar. 26, 2012), <https://www.youtube.com/watch?v=VXQoqoTqZbc>; see also *Research Project Grant*, CIR SEIU HEALTHCARE, <http://www.cirseiu.org/pctf-grant/> (last visited Feb. 29, 2016).

¹¹ Paul Levy, *Jumping for Joy in Telluride*, NOT RUNNING A HOSPITAL (June 12, 2012), <http://runningahospital.blogspot.com/2012/06/jumping-for-joy-in-telluride.html>.

¹² *For Scientists—For Participants*, TELLURIDE SCIENCE RESEARCH CENTER, http://www.telluridescience.org/reg/workshop_details.php?wid=353 (last visited Feb. 29, 2016).

quality improvement project” at their hospital during the subsequent 12-month period.¹³ For these residents, none of this would have been possible without collective bargaining.¹⁴

2. Resident Physicians Have Used Collective Bargaining to Improve Patient Care.

Because resident physicians are front-line health care providers—in much the same way that graduate student employees are front-line teachers and researchers at private universities—quality improvement of patient care has been an important component of CIR’s focus in collective bargaining. Whether advocating for the creation of a patient care fund to pay for much needed medical equipment and other patient care-centered items or bargaining for a quality improvement program to enhance patient care and save the hospital money, unionized resident physicians have made both medical education and patient care a priority. They have been able to do so because they have gained a voice at the workplace through their union that has enabled them to share their experiences as health care providers with their employers in a serious forum that otherwise would not be available to them.

Resident physicians and CIR have done so because they understand that they have a personal and professional stake in the future of medicine and collective bargaining gives them an opportunity to affect their chosen profession in a positive manner. Graduate student employees, as future educators and researchers, have a similar motivation, and collective bargaining would give them an opportunity to effect similar positive change in a way that would benefit them, their universities and professional education generally.

¹³ Levy, *supra* note 11; Paul Levy, *Educate the Young, Regulate the Old*, NOT RUNNING A HOSPITAL (June 10, 2012), <http://runningahospital.blogspot.com/2012/06/educate-young-regulate-old.html>.

¹⁴ It is important to note that none of the collective-bargaining achievements cited involved bargaining over the educational content of the programs. In addition, while CIR has bargained for additional funding for equipment and materials that help resident physicians do their work better and also enhance their medical training, oftentimes the actual equipment or material sought by the residents must still be approved by a hospital program director or administrator.

UNM provides a vivid illustration of how the unionization of resident physicians improved patient care. Despite initial reservations, academic physicians found that unionization had a positive impact on the residents at UNM. In an article published in *Academic Medicine*, the Associate Dean for Graduate Medical Education and the program directors for Internal Medicine and Pediatrics noted that the union was a “responsible partner with the ability to mobilize residents” that had “contributed to organizational culture change, resulting in the empowerment of the organized residents” in a way that had enhanced resident professionalism.¹⁵ Most compelling, these attending physicians noted, was that the presence of CIR gave the residents a stronger voice to advocate for a patient care fund that improved the quality of patient care, whereas prior to the arrival of the union, both resident and attending physicians had been frustrated in similar attempts.

[O]ur residents sought to allocate money to a patient care fund, which they control, for unmet patient care needs. This fund has been used for medical equipment, for discharge medications for patients who cannot afford them, and for transportation assistance. The assumption behind this fund is that residents have a unique perspective about the priority of patient care needs that is not represented within the current budgetary system. Before the unionization, residents and other physicians could participate in the hospital budget committee that assesses and prioritizes all requests for funding. Because of the scheduling of the meeting and the long, complex budget review process, physicians often felt that their requests did not fare well in the final budgetary decisions. Faculty physicians and residents perceived the physicians’ voices to be weak compared with those of the nurses or the administrators. *With the presence of the union, the influence of the residents’ voices regarding a portion of the budget was greatly enhanced. Because the patient care fund improved the quality of patient care, this aspect of unionization did not seem to erode professionalism . . . but may have actually enhanced it.*¹⁶

¹⁵ David Sklar, M.D. et al., *Experience With Resident Unions at One Institution and Implications for the Future of Practicing Physicians*, 86 *ACADEMIC MED.* 552, 553 (2011).

¹⁶ *Id.* at 553 (emphasis added). In an attempt to devalue the experience of public sector resident physician and graduate student employee unions, those opposed to granting them collective-bargaining rights under the Act have argued that those experiences are irrelevant because some states have limited bargaining subjects for public academic employees. *Brown Univ.*, 342 NLRB at 492. However, this is not true in New Mexico or New York, where collective bargaining for resident physicians has flourished in both the public and private sector.

The patient care fund at UNM, for which \$45,000 annually is set aside for the purchase of “medical equipment, patient materials, educational supplies and programs . . . necessary to improve patient care,” is no anomaly.¹⁷ In fact, it is a staple in both public and private CIR collective-bargaining agreements, including many negotiated since *Boston Medical Center* was decided. For example, the CIR bargaining unit at Cambridge Hospital negotiated a \$45,000 annual contribution to its patient care fund for the “purchase of equipment, services, or renovations . . . to improve the provisions of patient care.” Elected resident physician representatives make funding decisions.¹⁸

Similarly, the CIR bargaining unit at Brooklyn Hospital, which was certified in 2001, negotiated a \$10,000 annual contribution to its patient care fund for the “purchase of needed medical equipment, patient materials or educational materials that would facilitate the [Graduate Medical Education] program’s ability to provide quality patient care.”¹⁹ The collective-bargaining agreement at Boston Medical Center provides \$35,000 annually for the “purchase of equipment, supplies, educational materials and other items deemed to be of benefit to patients.”²⁰ While the hospital’s Director of Medical Affairs must approve the residents’ recommendations for expenditures, the resident physician members of CIR administer the fund. Residents at Boston Medical Center have used patient care funds to provide taxi vouchers for pregnant

¹⁷ See UNM Agreement, *supra* note 4, at 16–17.

¹⁸ See Collective Bargaining Agreement Between Cambridge Public Health Commission and the Committee of Interns and Residents 10 (July 1, 2013 – June 30, 2016), *available at* http://www.cirseiu.org/wp-content/blogs.dir/53/files/2015/04/CHA-2013-2016_optimized.pdf.

¹⁹ See Collective Bargaining Agreement Between Brooklyn Hospital Center and the Committee of Interns and Residents 32 (Jan. 1, 2013 – Oct. 31, 2016), *available at* http://www.cirseiu.org/files/2014/05/Brooklyn_optimized.pdf.

²⁰ See Collective Bargaining Agreement Between Boston Medical Center and the Committee of Interns and Residents 35 (Oct. 1, 2013 – Sept. 30, 2016), *available at* http://www.cirseiu.org/files/2014/05/BMC_optimized.pdf.

women with limited means and for a prosthetic electronic speech device loan program for patients who have had their voice boxes removed due to cancer.²¹

Resident physicians have also used collective bargaining as a vehicle to jointly develop a ground-breaking quality improvement program at Maimonides Medical Center that includes an incentive bonus program for residents should the hospital reach certain efficiency and patient care goals. Specifically, the collective-bargaining agreement states:

The parties recognize that they have shared interests in ensuring effectiveness and efficiency in the delivery of patient care and in improving clinical outcomes and patient satisfaction. The parties also recognize the important role that residents play in many of the processes that contribute to these shared interests.²²

The contract calls for an incentive bonus program to be designed by a committee of faculty, residents, a CIR staff person, and the hospital's Executive Vice President of Clinical Affairs and Affiliations with the goal of improving clinical outcomes and patient satisfaction. In the same agreement, CIR also bargained for the creation of a quality improvement fellowship position—the Maimonides/CIR Fellow for Quality Improvement and Patient Safety—to help the hospital achieve improvements in patient care on a system-wide basis.²³ Maimonides CEO Pamela Brier recognized the value that collective bargaining with the residents brought to the hospital.

“The [Quality Improvement] program that we developed together will reward house staff when they directly contribute to better health outcomes and costs savings,” says Pam Brier, the Brooklyn hospital's chief executive. “It's a ‘win-win’ strategy to improve patient care, bend the cost curve and position Maimonides for health reform.”²⁴

²¹ *Through Negotiated Patient Care Funds, Residents Translate Needs into Action*, CIR VITALS (Jan. 26, 2012), <http://www.cirvitals.org/2012/01/26/through-negotiated-patient-care-funds-residents-translate-needs-into-action>.

²² See Collective Bargaining Agreement Between Maimonides Medical Center and the Committee of Interns and Residents 3 (Nov. 1, 2013 – Oct. 31, 2016), available at <http://www.cirseiu.org/files/2013/12/Maimo-contract-2013-2016-website.pdf>.

²³ *Id.*

²⁴ Daniel Massey, *Maimonides Residents Negotiate Efficiency Bonuses*, CRAIN'S NEW YORK BUSINESS, Nov. 9, 2010, <http://www.crainsnewyork.com/article/20101109/FREE/101109854/maimonides-residents-negotiate-efficiency-bonuses>. CIR also negotiated for a funded fellowship position in its collective-bargaining agreement with New York Methodist Hospital. The focus of the fellow's work is “hospital based clinical and administrative issues, systems based practice, and performance improvement.” See *Methodist Agreement*, *supra* note 2, at 35.

This collaboration resulted in substantial patient safety improvements in the project's first year.²⁵ Similar programs achieved through collective bargaining with Bronx Lebanon Hospital Center and New York Methodist Hospital have benefitted both the hospitals and residents. At Bronx Lebanon, residents earned bonuses from a collectively bargained performance incentive program after they helped shorten lengths of stay at the hospital. Methodist Hospital residents also received bonuses after patient satisfaction scores jumped.²⁶ The existence of these programs is not only evidence of the value of collective bargaining with employees who carry certain indicia of student status, but it also underscores the important role that residents play in the provision of patient care and the success of the hospital.

The resident physicians in CIR have not only negotiated for quality improvement programs at individual hospitals but have also used collective bargaining to affect positive change in patient care and medical education more broadly. Specifically, CIR formed the CIR Joint Quality Improvement Association (JQIA), a multi-employer, not-for-profit organization created for the purpose of developing safety and quality health care best practices and methodologies to be shared with other CIR members and participating hospitals.

Funded with employer contributions that CIR negotiated for in its collective-bargaining agreements with Methodist Hospital, Kingsbrook Jewish Medical Center, Maimonides Medical Center, Bronx Lebanon Hospital Center, Brookdale Hospital, Flushing Hospital, and Jamaica Hospital Medical Center, JQIA acts as a joint labor-management committee whose focus is to improve patient care and training at participating hospitals through collaborative projects with

²⁵ Sedipeh Sedgh et al., *Resident-Driven Quality Improvement to Inpatient Medication Reconciliation in an Academic Setting*, 28 AM. J. MED. QUALITY 357 (2013).

²⁶ Joe Carlson, *Rewards and Their Risks*, MODERN HEALTHCARE Apr. 28, 2012, available at <http://www.modernhealthcare.com/article/20120428/MAGAZINE/304289860>.

CIR.²⁷ It is important to note that at these hospitals, funding for the JQIA program has been negotiated as an addition to the aforementioned individual medical education and conference reimbursements as well as the quality improvement incentive bonus programs.²⁸

As CIR's experience makes clear, the Board's rationale in *Boston Medical Center* for rejecting the argument that collective bargaining and graduate medical education could not co-exist have proven prescient—and correct. There is no reason to believe that the result will be different if the Board recognizes the collective-bargaining rights of the students at Columbia University.

III. The Board's Determination in *Brown* Ignores The Realities Of The Modern Higher Education Landscape.

The majority in *Brown* found that student assistants are not employees in part because they “have a primarily educational, not economic, relationship” with a university. *Brown Univ.*, 342 NLRB at 487. The Board went further to state that “the ‘academic reality’ for graduate student assistants has not changed, in relevant respects, since [its] decisions over 25 years ago.” *Id.* at 492. However, SEIU's experiences in organizing faculty indicate a dramatic shift in higher education. What once may have been an educational model has become a corporate model, resulting in a distinctly economic relationship between student assistants and universities.

A. Higher Education Institutions Have Become More Corporate in Function and Structure Over The Last Three Decades.

Beginning in the early-to-mid 1970s, colleges and universities began to become more corporate in structure. The shift was largely dictated by declining government appropriations for higher education.²⁹ As public funds became scarcer, nonprofit colleges and universities began

²⁷ For an example of the JQIA contract language, see Methodist Agreement, *supra* note 2, at 36.

²⁸ JQIA also sponsored two residents, one from Bronx Lebanon Hospital Center and one from New York Methodist Hospital, to attend the 2012 Telluride Patient Safety Camp.

²⁹ JOE BERRY, RECLAIMING THE IVORY TOWER: ORGANIZING ADJUNCTS TO CHANGE HIGHER EDUCATION 24 (2005).

courting private donors, corporations, and foundations to bolster their endowments.³⁰ In the ensuing four decades, institutions of higher learning have transformed knowledge into a revenue-generating commodity—capitalizing on patentable research and copyrightable teaching materials.³¹ Indeed, “today’s educational institutions are busily striving to profit from teaching, research and all the other activities on campus—offering corporations the right to endow professorships, sponsor courses, bring the university’s scientific discoveries to market, [and] even advertise in campus bathrooms.”³²

As institutions of higher learning have become more entrepreneurial, corporate influences have also influenced the way they are structured. Because instructional costs consume a significant proportion of academic budgets, educational institutions prioritize low labor costs. “Recent surveys of presidents and chief financial officers within higher education show declining support for tenure and a desire for greater institutional flexibility around employment: 17% of presidents said they would eliminate tenure, 11% would hire more adjuncts, 38% would increase teaching loads, and 66% preferred long-term contracts over tenure appointments.”³³ The

³⁰ JACK H. SCHUSTER & MARTIN J. FINKELSTEIN, *THE AMERICAN FACULTY: THE RESTRUCTURING OF ACADEMIC WORK AND CAREERS* 278 (2006).

³¹ Gary Rhoades & Sheila Slaughter, *Academic Capitalism in the New Economy: Challenges and Choices*, 1 *AMERICAN ACADEMIC* 37, 38-39 (2004), available at <http://firgoa.usc.es/drupal/files/Rhoades.qxp.pdf>.

³² Rebecca Clay, *The Corporatization of Higher Education*, 39 *MONITOR ON PSYCHOLOGY* 50 (2008), available at <http://www.apa.org/monitor/2008/12/higher-ed.aspx>.

³³ ADRIANNA KEZAR, TIAA-CREF INSTITUTE, *CHANGING FACULTY WORKFORCE MODELS* 4 (2013) (parenthetical omitted), available at <https://www.tiaa-crefinstitute.org/public/pdf/changing-faculty-workforce-models.pdf>.

contingent faculty model satisfies nearly all of these objectives by providing a cheap, relatively expendable source of labor.

B. Contingent Faculty Appointments Have Increased Exponentially At Higher Education Institutions.

In what is often referred to as the “Wal-Martization” of higher education, universities and colleges have widely adopted a contingent faculty model.³⁴ This model increases the appointment of non-tenure-track “faculty members working on a continuing basis—full-time or part-time, in ‘per-course’ or contractually limited appointments—without job security or the prospect of advancement to tenure.”³⁵

During the mid-1970s, tenured or tenure-track faculty comprised almost 80 percent of instructional staff at nonprofit colleges and universities in the United States.³⁶ The precise opposite is true of today’s colleges and universities: such stable positions now account for just 20 percent of faculty appointments.³⁷ As the proportion of tenured and tenure-track faculty positions has declined, the number of part-time and full-time contingent faculty has mushroomed. Non-tenure-track and contingent faculty, including graduate student assistants, now account for more than 75 percent of instructional staff in higher education.³⁸ Almost half of instructional faculty

³⁴ KEITH HOELLER, *EQUALITY FOR CONTINGENT FACULTY: OVERCOMING THE TWO-TIER SYSTEM* 60 (2014).

³⁵ COMM. ON CONTINGENT LABOR IN THE PROFESSION, MODERN LANGUAGE ASS’N, *PROFESSIONAL EMPLOYMENT PRACTICES FOR NON-TENURE TRACK FACULTY MEMBERS: RECOMMENDATIONS AND EVALUATIVE QUESTIONS 1* (2011), *available at* http://www.mla.org/pdf/clip_stmt_final_may11.pdf.

³⁶ PULLIAS CENTER FOR HIGHER EDUCATION, USC ROSSIER SCH. OF EDUC., *THE CHANGING FACULTY AND STUDENT SUCCESS: NATIONAL TRENDS FOR FACULTY COMPOSITION OVER TIME 1* (2012), *available at* http://www.uscrossier.org/pullias/wp-content/uploads/2012/05/Delphi-NTTF_National-Trends-for-Faculty-Composition_WebPDF.pdf.

³⁷ JOHN W. CURTIS, AM. ASS’N OF UNIV. PROF., *THE EMPLOYMENT STATUS OF INSTRUCTIONAL STAFF MEMBERS IN HIGHER EDUCATION, FALL 2011* 8 (2014), *available at* <http://www.aaup.org/sites/default/files/files/AAUP-InstrStaff2011-April2014.pdf>.

³⁸ *Background Facts on Contingent Faculty*, AM. ASS’N OF UNIV. PROFS., <http://www.aaup.org/issues/contingency/background-facts> (last visited Feb. 29, 2016).

are part-time.³⁹ In short, the contingent faculty workforce is now the face of the academic profession.

Unlike a tenured or tenure-track appointment, a contingent faculty position is not a secure, middle-class job. To the contrary, the central hallmarks of this new workforce are low pay, job instability and immobility, and second-tier faculty working conditions.⁴⁰ These working conditions include, “lower pay, less-skilled jobs, poor chances of promotion, less job security, inferior benefits, and lower status overall.”⁴¹ For example, although the annual pay of a tenured professor at a private research university is well over \$100,000,⁴² the 2010 median salary of a full-time, non-tenure-track professor was \$47,500.⁴³

Part-time contingent faculty members fare much worse. Unlike salaried educators, part-time “contingent faculty usually are paid a piece rate, a fixed amount of compensation for each unit produced, regardless of how much time it takes to produce.”⁴⁴ In 2010, the average rate of pay per three-credit course was \$2,700.⁴⁵ An estimated 79 percent of adjunct faculty members do not receive any health care benefits through the university, and an estimated 86 percent do not receive retirement benefits.⁴⁶ As a result, approximately a third of adjunct professors earn

³⁹ PULLIAS CENTER FOR HIGHER EDUCATION, *supra* note 36, at 1.

⁴⁰ Gregory M. Saltzman, *Union Organizing and the Law: Part-Time Faculty and Graduate Teaching Assistants*, 2000 NEA ALMANAC OF HIGHER EDUC. 43, 44 (2000), available at http://www.nea.org/assets/img/PubAlmanac/ALM_00_05.pdf.

⁴¹ *Id.*

⁴² ADJUNCT ACTION, SEIU, THE HIGH COST OF ADJUNCT LIVING: BOSTON 5 (2013), available at <http://www.seiu509.org/files/2013/12/The-High-Cost-of-Adjunct-Living-in-Boston-12113.pdf>.

⁴³ John W. Curtis & Saranna Thornton, *Here's the News: The Annual Report on the Economic Status of the Profession 2012-13*, ACADEME 10 (2013), available at <http://www.aaup.org/sites/default/files/files/2013%20Salary%20Survey%20Tables%20and%20Figures/report.pdf>.

⁴⁴ HOUSE COMM. ON EDUC. AND THE WORKFORCE DEMOCRATIC STAFF, THE JUST-IN-TIME PROFESSOR: REPORT SUMMARIZING eFORM RESPONSES ON THE WORKING CONDITIONS OF CONTINGENT FACULTY IN HIGHER EDUCATION 5 (2014), available at <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/1.24.14-AdjunctEforumReport.pdf>.

⁴⁵ COAL. ON ACAD. WORKFORCE, A PORTRAIT OF PART-TIME FACULTY MEMBERS 10 (2012), available at http://www.academicworkforce.org/CAW_portrait_2012.pdf.

⁴⁶ Audrey Williams June & Jonah Newman, *Adjunct Project Reveals Wide Range in Pay*, CHRONICLE OF HIGHER EDUC. (Jan. 4, 2013), <http://chronicle.com/article/Adjunct-Project-Shows-Wide/136439>.

incomes less than 150 percent of the federal poverty level,⁴⁷ and one in four adjuncts is enrolled in at least one public assistance program.⁴⁸

C. The Increased Reliance of Higher Education Institutions on Contingent Labor Has Led To A Shift of Instructional Duties To Student Assistants.

The relationship between universities and student assistants is primarily an economic relationship driven by universities' pursuit of "maximum flexibility over the cheapest possible workforce."⁴⁹ Among the 75 percent of faculty that are non-tenure track, approximately 25 percent are graduate students.⁵⁰ Some universities may even hire fewer adjuncts in favor of increasing the number of teaching assistants.⁵¹ As a result, "graduate assistants' working conditions are no different from those of the [contingent faculty] [a]nd, certainly their working relationship with the Employer more closely parallels the traditional economic relationship between faculty and university." *NYU*, 332 NLRB at 1208.

Although they may spend a relatively smaller portion of their time working than, for example, the house staff at issue in *Boston Medical Center*, student assistants are "no less 'employees' than part-time or other employees of limited tenure or status." *Id.* at 1206 (citing *University of San Francisco*, 265 NLRB 1221 (1982)). Graduate teaching assistants, like other adjunct faculty, are required to perform teaching services, oftentimes as completely "autonomous instructors," at the direction and control of the university.⁵² At some institutions, graduate teaching assistants must teach two course sections per semester, equivalent to the full-time load

⁴⁷ Seth Freed Wessler, *Your College Professor Could Be On Public Assistance*, NBC (Apr. 2, 2014), <http://www.nbcnews.com/feature/in-plain-sight/poverty-u-many-adjunct-professors-food-stamps-n336596>.

⁴⁸ KEN JACOBS, IAN PERRY & JENNIFER MACGILLVARY, UC BERKELEY CTR. FOR LABOR RESEARCH & EDUC., *THE HIGH PUBLIC COST OF LOW WAGES 3* (2015), available at <http://laborcenter.berkeley.edu/pdf/2015/the-high-public-cost-of-low-wages.pdf>.

⁴⁹ HOELLER, *supra* note 34.

⁵⁰ CURTIS, *supra* note 37, at 8.

⁵¹ Saltzman, *supra* note 40, at 44 (stating that large research universities such as Yale had nearly tripled their number of teaching assistants from the 1970s to 1990s).

⁵² AM. ASS'N OF UNIV. PROFS., *AAUP CONTINGENT FACULTY INDEX 10* (2006), available at <http://www.aaup.org/sites/default/files/files/AAUPContingentFacultyIndex2006.pdf>.

of a tenure-track faculty member.⁵³ Regardless, student assistants typically work under terms and conditions, such as hours and curriculum guidelines, set by the university employer. *See NYU*, 332 NLRB at 1207. Graduate students perform this work for pay, whether in the form of stipend, or per-course payment when teaching beyond their stipend. *Id.* (stating that “[t]hat this is work in exchange for pay and not solely the pursuit of education, is highlighted by the absence of any academic credit for virtually all graduate assistant work.”). Thus, graduate teaching assistants are undoubtedly employees of their universities within the common law definition. *Id.* at 1205–06.

D. Recent Structural Changes in Higher Education Demonstrate A Significant Economic Relationship Between Student Assistants and University Administrators.

Although there may be an educational component to student assistants’ professional duties, there also exists a clear economic relationship, which sometimes negatively impacts the educational relationship. For example, a study conducted at George Mason University found that teaching obligations for graduate students prolonged their courses of study and extended their timelines for graduation.⁵⁴ Over half of the adjunct faculty members who were also graduate students reported that their work as contingent faculty increased the time it took to get their degrees.⁵⁵ They also expressed that their work as contingent faculty “ensure[d] that much of the compensation they [received] from working as contingent faculty [was] used to finance extra semesters that they would not have had to finance had they not had to teach in the first place.”⁵⁶

⁵³ *Id.*

⁵⁴ MARISA ALLISON, RANDY LYNN, & VICTORIA HOVERMAN, *INDISPENSABLE BUT INVISIBLE: A REPORT ON THE WORKING CLIMATE OF NON-TENURE TRACK FACULTY AT GEORGE MASON UNIVERSITY* 30–31 (2014), *available at* <https://contingentfacultystudy.files.wordpress.com/2013/08/gmu-contingent-faculty-study.pdf>.

⁵⁵ *Id.*

⁵⁶ *Id.* at 31.

Similar to their contingent faculty counterparts, graduate students receive lower pay and little-to-no benefits such as tuition remission, stipends, or health insurance.⁵⁷ In 2010, 360,000 individuals with graduate degrees were receiving some form of public assistance.⁵⁸ Additionally, many graduate assistants have to pay much of their salaries back to the university for additional courses needed because of the heavy workload of teaching courses.⁵⁹ Because “living on graduate-student stipends is largely impossible,” many students take out loans to supplement below-poverty wages.⁶⁰ Furthermore, with the high costs of tuition, students are often left with six-figure debt.⁶¹ The picture is even bleaker for students with families, medical problems, or other economic challenges.⁶²

In addition to benefiting from low-cost labor while students are enrolled, universities can then draw from a pool of well-trained, familiar candidates for adjunct faculty hiring.⁶³ Many teaching assistants endure poor working conditions “believing their jobs [are] brief apprenticeships leading to full-time, tenure-track positions. But years spent as TAs and poor prospects for tenure track jobs . . . undermine[] this perception.”⁶⁴ Ultimately, the shifting of instructional roles to contingent faculty, including students, has led to a blurring of the distinction between faculty and student assistants. In fact, some of SEIU’s faculty units already

⁵⁷ *See id.* at 30.

⁵⁸ Stacey Patton, *The Ph.D. Now Comes With Food Stamps*, CHRONICLE OF HIGHER EDUC. (May 6, 2012), <http://chronicle.com/article/From-Graduate-School-to/131795>.

⁵⁹ ALLISON ET AL., *supra* note 54, at 4.

⁶⁰ Audrey Williams June, *The Cost of a Ph.D.: Students Report Hefty Debt Across Many Fields*, CHRONICLE OF HIGHER EDUC. (Jan. 16, 2014), <http://chronicle.com/article/The-Cost-of-a-PhD-Students/144049>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Saltzman, *supra* note 40, at 44.

include a number of adjunct professors who also happen to be current graduate students teaching beyond their stipend.⁶⁵

The Board in *Brown* distinguished “the student-teacher relationship . . . based on the ‘mutual interest in the advancement of the student’s education,’” from “the employer-employee relationship . . . ‘largely predicated on the often conflicting interests’ over economic issues.” *Brown Univ.*, 342 NLRB at 489 (quoting *St. Clare’s Hospital*, 229 NLRB 1000 (1977)). Nonetheless, the realities of higher education are such that the “increased dependence on graduate assistants has created a group of workers who demand more economic benefits and workplace rights.” *Id.* at 498 (Liebman, W., Walsh, D., dissenting). The extreme financial hardships that student assistants face, both as students and after graduation as adjuncts, highlights the economics behind universities’ relationships to their students. The Board should thus consider these realities and find that student assistants are employees under the Act.

CONCLUSION

SEIU and CIR urge the Board to overrule *Brown* and find that student assistants are employees, and not temporary, under Section 2(3) of the Act. This interpretation is consistent with the Act and accommodates the realities of the modern higher education landscape. As indicated by CIR’s experiences representing medical interns and residents, collective bargaining enhances the educational process and gives students greater control over improving their working and learning conditions. Overruling *Brown* is also necessary given the vast changes in higher education institutions and growth of contingent appointments. In conclusion, there are no legal or policy reasons warranting the deprivation of student assistants of the right to collectively bargain under the Act.

⁶⁵ See, e.g., Brandeis University (01-RC-163352) that includes graduate and undergraduate non-tenure-track faculty and graduate students who teach courses beyond their stipend.

Respectfully Submitted,

/s/Judith A. Scott

Judith A. Scott

General Counsel

Johnda Bentley

Assistant General Counsel

Trisha Pande

Law Fellow

Service Employees International Union

1800 Massachusetts Ave, NW

Washington, DC 20036

Ralph DeRosa

Deputy General Counsel

Committee of Interns and Residents

SEIU Healthcare

520 8th Avenue, Suite 1200

New York, NY 10018

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of February, 2016, an electronic copy of the foregoing was filed on the NLRB e-filing website and served by electronic mail on:

Petitioner

(Legal Representative)
Nicole Rothgeb
Thomas W. Meiklejohn
Livingston, Adler, Pulda,
Meiklejohn & Kelly PC
557 Prospect Ave
Hartford, CT 06105-5922
nmrothgeb@lapm.org
twmieklejohn@lapm.org

Counsel for the General Counsel, NLRB

Karen P. Fernbach
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, NY 10278
karen.fernbach@nlrb.gov

Respondent

(Legal Representative)
Edward A. Brill
Bernard M. Plum
Proskauer Rose LLP
11 Times Square
New York, NY 10036-8299
ebrill@proskauer.com
bplum@proskauer.com

/s/ Trisha Pande

Trisha Pande