UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COLUMBIA UNIVERSITY **Employer** **and** **GRADUATE WORKERS OF COLUMBIA-GWC, UAW** **Petitioner**	**Case No. 02-RC-143012**

COLUMBIA UNIVERSITY'S STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW

Petitioner Graduate Workers of Columbia GWC, UAW does not dispute that *Brown University*, 342 NLRB 483 (2004), definitively holds that the graduate student teaching and research assistants at Columbia University covered by the petition in this case are not "employees" within the meaning of the National Labor Relations Act. Rather, it asks the Board to grant review of the Regional Director's decision dismissing the petition based on its assertion that there are "compelling reasons" for the Board to reconsider *Brown*.

Petitioner's argument, while full of passionate rhetoric, amounts to little more than disagreement with the majority decision in *Brown*, repackaging the same stale arguments made by the dissent in that case more than ten years ago. Simply stated, there are no compelling reasons to reconsider *Brown*, and even less basis for the Petitioner's extraordinary request that the Board overrule *Brown* forthwith, dispensing with the need for a factual record and any semblance of due process.

ARGUMENT

I. THERE ARE NO COMPELLING REASONS FOR THE BOARD TO RECONSIDER *BROWN.*

A. Petitioner Incorrectly States that the Board Has Issued Orders on Three Occasions to Reconsider *Brown*.

The central premise of Petitioner's Request for Review, repeated no fewer than six times,[1] is that "[o]n three occasions over the past five years, the Board has issued orders in which it stated that it had decided to reconsider the *Brown* decision." (Request for Review at 4). This is just not true.

[1] *See* Request for Review at 1, 2, 4 (twice), 5 and 15.

Columbia does not dispute that in *New York University*, 356 NLRB No. 7 (2010) ("*NYU II*"), a two to one majority expressed the view that *Brown* should be reconsidered and remanded the case so that the Regional Director could develop a record for that purpose. But that is the only Board action that can be said to support that view.

Petitioner relies inappropriately on the June 20, 2012 order granting review of the Acting Regional Director's dismissal of the petition in *NYU II*, following remand. (Request for Review at 4). That decision is of absolutely no effect, however, as it was not issued by a valid Board majority under the Supreme Court's ruling in *NLRB v. Noel Canning*, 134 S.Ct. 2550, 189 L.E.d.2d 538 (2014). The order is null and void and has no precedential value. *See, e.g.*, *Big Ridge, Inc. v. National Labor Relations Bd.,* 561 Fed.Appx. 563 (7th Cir. 2014) (vacating order issued by a Board comprised of invalid appointments under *Noel Canning*).

Petitioner also mischaracterizes the Board's Notice and Invitation to file briefs in *Northwestern University*, Case No. 13-RC-121359. (Request for Review at 4). In that case, which involves a Decision and Direction of Election in a unit of college football players that is pending before the Board upon a request for review by Northwestern, the Board issued a Notice and Invitation to File briefs on April 24, 2014. The notice included a list of eight questions that the parties and *amici* were specifically invited to address. The second question on the list is:

> Insofar as the Board's decision in *Brown University*, 342 NLRB 483 (2004), may be applicable to this case, should the Board adhere to, modify, or overrule the test of employee status applied in that case.

Thus, in *Northwestern* the Board simply requested that the parties address whether *Brown* should be adhered to, modified or overturned. Contrary to Petitioner's clam, it did not say that *Brown* should be reconsidered, and certainly did not issue an order to that effect.

In sum, the only support for Petitioner's Request for Review in a prior Board decision is the two to one decision (over a strong dissent by Member Hayes) in *NYU II.* Since that case was not decided on the merits – and Board practice is that precedent can only be reversed by a three-member majority[2] – it is of very little significance here.

B. Petitioner's Argument that *Brown* was Wrongly Decided is Not a Compelling Reason for the Board to Reconsider *Brown.*

Petitioner's belief that *Brown* was "an aberrant decision that cannot be reconciled with the language of the Act or with other decisions of the Board and of the Supreme Court" (Request for Review at 1) is not a compelling reason for the Board to grant review.

Petitioner puts forward no evidence of any changed circumstances, legal precedent, policies or any other reason why *Brown* should be reconsidered in light of present facts. In fact, Petitioner presents no basis for reconsidering *Brown* at all that was not available to the Board at the time of the *Brown* decision. In the ten years since *Brown* was decided, there have been no Board decisions contradicting its holding or court decisions questioning its correctness. Nor has Congress expressed any intention to reverse or modify the decision. Only the political composition of the Board has changed.

The changed composition of the Board should not be a basis for granting review here. The Board has an overriding obligation to ensure stable labor relations and decisions based on a sound rational basis – rather than changing precedent with every Presidential election. For the Board to consider reversing precedent relating to graduate students for the third time in fifteen

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[2] *See, e.g., Hacienda Resort Hotel & Casino*, 355 NLRB No. 154, *5-*6 (August 27, 2010) ("it is the tradition of the Board that the power to overrule precedent will be exercised only by a three-member majority of the Board"); *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 552 (D.C. Cir. 2006) (recognizing the Board's practice of adhering to its precedent absent a three-vote majority to overrule it, and enforcing on other grounds a Board decision that followed the practice).

years would create instability and deprive universities and graduate students as well of any certainty in understanding how the Board will interpret and apply the law. In his dissent to the Board's (invalid) grant of the Request for Review following remand in *NYU II*, Member Hayes warned of just this result:

> [T]here is the distinct possibility that my colleagues will change the law in this area for the third time in twelve years. Such a course would tend to undermine both the predictability inherent in the rule of law as well as the Board's credibility. It would also impermissibly distort both labor relations and student relations stability in the higher education industry.

New York University, 2012 NLRB LEXIS 365, *3 (2012) (citations omitted); *see also Students or Employees? The Struggle Over Graduate Student Unions in America's Private Colleges and Universities*, 36 JOURNAL OF COLLEGE AND UNIVERSITY LAW 615 (2010) (noting such "[c]onstant reversals and re-reversals rob the law of predictability and undermine the Board's integrity as its decisions look inherently political.").

C. *Brown* was Correctly Decided.

Brown was correctly decided and the Petitioner has not provided any sound basis for the Board to reconsider that decision.

The Board's 2004 decision in *Brown* correctly returned to the precedent in place for the twenty-five years prior to its 2000 decision in *New York University*, 332 NLRB 1205 (2000) ("*NYU I*"), holding that graduate students who provide services to their educational institution in connection with their educational programs are not employees within the meaning of Section 2(3) of the Act. The *Brown* Board properly analyzed the underlying premise of the Act to determine that that "the Act is designed to cover economic relationships" and not primarily educational relationships. *Brown* at 488. Such a review of the Act's underlying premise is a

practice expressly deemed appropriate by the Supreme Court in *NLRB v. Bell Aerospace Co.*,416 U.S. 267 (1974).

Contrary to Petitioner's assertion, the Board did not disregard the case law that it claims supports a broad definition of "employee." (Request For Review at 5) Rather, the majority in *Brown* clearly considered that case law, and looking to the intent of the Act, concluded that those cases did not require an extension of Sec. 2(3) to the graduate assistants at Brown or other universities. In fact, the Board made it plain that it "examine[s] the underlying purposes of the Act," not just the language of statute that really is a "tautology" insofar as Sec. 2(3) simply states that "the term 'employee' shall include any employee." *Brown* at 491. Accordingly, following the relevant Supreme Court decisions, the Board looked to Congressional policies "for guidance in determining the outer limits of statutory employee status" to hold that Congress intended for the Act to cover economic relationships, not primarily educational relationships. *Brown* at 488. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

In seeking an overly broad definition of "employee' under the Act, Petitioner suggests that the Board should reconcile the purported conflict between precedents regarding medical housestaff in *Boston Medical* and graduate students in *Brown*. (Request for Review at 9). Of course, *Boston Medical* was decided five years before *Brown*. As recognized by the Board in *St. Barnabas*, 335 NLRB No. 39 (June 3, 2010), furthermore, *Boston Medical* is not controlling with respect to graduate students because the economic reality for medical housestaff is significantly different from that of graduate students at issue in *Brown*. There are substantial differences between the graduate students serving as teaching or research assistants while pursuing their doctoral research in *Brown* and the post-graduate medical housestaff in *Boston Medical* who

were seeking to enhance their credentials in a medical specialty after having completed their formal medical studies.

Similarly, contrary to the Petitioner's argument, graduate students are not equivalent to apprentices. (Request for Review at 9). Apprentices are employees because their relationship, in a traditional workplace, is predominantly economic. They have the goal of being promoted to "journeyman," or other senior positions. In essence, apprentices are akin to entry level workers who are promoted to more senior positions as soon as they gain technical competence. By contrast, graduate students spend the majority of their time in the classroom or performing research within the setting of a large educational institution. Rather than seeking promotion, graduate students are almost always seeking employment with outside employers, whether in the private sector or academia.

Petitioner's arguments against *Brown* rely on nothing new, essentially just echoing the dissent, which it contends was correct. There is no need to respond to those arguments at any greater length here, as they are effectively answered by the majority decision in *Brown*.

II. IF THE BOARD FINDS COMPELLING REASONS TO RECONSIDER *BROWN*, IT MUST DO SO BASED ON A FULL FACTUAL RECORD.

In the event that the Board finds compelling reasons to reconsider *Brown* are present here, the Board cannot do so in a vacuum without a factual record. Indeed, Petitioner recognized as much in its Response to the Order to Show Cause below. Although Petitioner now says, "[t]here is no need for a hearing to address what is a pure legal issue," (Request for Review at 12) its submission to the Regional Director explicitly acknowledged that the Board's decision

granting review in NYU held, "that the validity of *Brown* should be 'considered *based upon a full evidentiary record. . . .*" (Petitioner's Response at 3) (emphasis added) (quoting sl. op. at 2).

In asking the Board to reverse *Brown* without a factual record, Petitioner goes far beyond what the Board majority held in *NYU II*, a decision that Petitioner otherwise relies on in support of its contention that the Board should grant review. Indeed, as Petitioner emphasized to the Regional Director when it sought a hearing on its petition, the Board remanded that case precisely to develop a factual record on which *Brown* could be reconsidered. As the Board said in that case, "We believe the factual representations, contentions, and arguments of the parties should be considered based on a full evidentiary record addressing the questions raised above as well as any others deemed relevant by the Regional Director." *NYU II* at *2. The Board's decision in *Brown* itself was based on full factual record developed to address the issues relevant to that case as they applied to students at Brown University. (Request for Review at 12-13).

Evidently recognizing the difficulty with its suggestion that the Board dispense with a hearing, Petitioner maintains that the Board can simply look to the record developed in a case almost fifteen years ago, *Columbia University*, Case No. 2-RC-22358 (February 11, 2002). It goes so far as to attach the Regional Director's decision in that case to its Request for Review. It should be self-evident that any decision on the current petition must be based on the facts as they exist now, including how graduate teaching and research at Columbia University is currently integrated into graduate education, the degree requirements for graduate students, the graduate students' relationship with the university, and the financial aid and support they receive as part of their graduate studies. The Regional Director would also need to consider the facts as to

undergraduate students in teaching and research positions, who are covered by the petition as well.

Any action by the Board to reconsider *Brown* without a full factual record would deny Columbia a full and fair opportunity to be heard, and thus, would raise serious due process issues. Moreover, a decision unmoored from a factual record would only encourage additional litigation, a result which Petitioner ostensibly seeks to avoid. (Request for Review at 14-15).

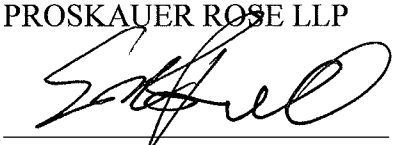
Finally, there can be no question that a decision to overrule *Brown* would have a wide-ranging impact on the future of graduate programs at Columbia and other private universities as well. Particularly considering the importance of the issue, there could be no justification for a shortcut eliminating all pretense of normal Board procedure.

CONCLUSION

Petitioner has failed to demonstrate the compelling reasons necessary for the Board to grant review of the administrative dismissal of the petition in this case. There is no sound reason for the Board to reconsider its decision in *Brown*, and certainly not to reverse *Brown* without the benefit of a factual record. The Board should deny the Request for Review and affirm the Regional Director's dismissal of the petition.

Dated: February 27, 2015

PROSKAUER ROSE LLP



Bernard M. Plum
Edward A. Brill
Eleven Times Square
New York, New York 10036
(212) 969-3000
Attorneys for Columbia University

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AFFIDAVIT OF SERVICE OF: Columbia University's Statement in Opposition to Request for Review

I hereby certify that, on the 27th day of February 2015, I served the above-entitled document(s) by the methods indicated below, upon the following persons at the following addresses:

By E-File
Karen P. Fernbach
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

By Electronic Mail
Thomas W. Meiklejohn
Livingston, Adler, Pulda
Meiklejohn & Kelly, P.C.
557 Prospect Avenue
Hartford, CT 06105-2922
twmeiklejohn@lapm.org

Respectfully submitted,

Dated: February 27, 2015

Corinne M. Osborn
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000
Attorneys for Columbia University