UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, **Employer,** **-and-** **GRADUATE WORKERS OF COLUMBIA-GWC, UAW.** **Petitioner.**	**Case No. 02-RC-143012**

BRIEF ON REVIEW OF COLUMBIA UNIVERSITY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Trustees of Columbia University in the City of New York ("Columbia" or the "University") submit this Brief on Review of the Supplemental Decision and Order Dismissing Petition by Graduate Workers of Columbia – GWC, UAW ("GWC" or "Petitioner"). Petitioner seeks to represent graduate and undergraduate students who serve as teaching and research assistants. The Regional Director correctly found that such students have a primarily academic relationship with the University and therefore are not employees under *Brown University*, 342 NLRB 483 (2004) ("*Brown*").

The Board granted Petitioner's Request for Review and Columbia's Conditional Request for Review and asked the parties and interested *amici* to address four questions:

1. Should the Board modify or overrule *Brown*, which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act?
2. If the Board modifies or overrules *Brown*, what should be the standard for determining whether graduate student assistants engaged in research are statutory employees, including graduate student assistants engaged in research funded by external grants? *See New York Univ.*, 332 NLRB 1205, 1209 n.10 (2000) (relying on *Leland Stanford Junior Univ.*, 214 NLRB 621 (1974)).
3. If the Board concludes that graduate student assistants, terminal master's degree students and undergraduate students are statutory employees, would a unit composed of all these classifications be appropriate?
4. If the Board concludes that graduate student assistants, terminal master's degree students and undergraduate students are statutory employees, what standard should the Board apply to determine whether they constitute temporary employees?

The record below demonstrates that, as in *Brown*, the teaching and research performed by graduate student assistants at Columbia is an integral part of the academic program, and the relationship of those students with the university is primarily, if not entirely, educational. The record neither supports a change in how the Board should treat such students at the nation's

leading private universities, nor calls into question the soundness of the Board's conclusion in *Brown* that the economic and inherently adversarial model of collective bargaining under the NLRA is not appropriate in this context. Indeed, a departure from *Brown* threatens to cause grievous damage to higher education, not because there has been any new evidence or arguments to support such a change, but solely because of the changed political composition of the Board.

Columbia urges the Board not to intrude on the dealings between student and university by imposing on an inherently academic relationship the potential for conflict built into mandatory bargaining and contract administration. Columbia responds to the Board's specific questions as follows:

1. The Board should not modify or overrule *Brown* because *Brown* comports with well-settled precedent, is consistent with the purposes and policies of the NLRA, and serves to support the essential purposes and functions of the nation's premier educational and research institutions.

2. Under any standard, Columbia graduate student assistants engaged in research are not employees because their research is inseparable from as well as required to complete their doctoral dissertations.

3. Graduate student assistants, terminal master's degree students and undergraduate students would not constitute an appropriate unit because doctoral students do not share a community of interest with master's degree or undergraduate students, who are merely casual or temporary employees.

4. The Board should adhere to long-standing precedent holding that employees in short-term positions, such as Columbia's masters and undergraduate students, are temporary employees.

FACTS

A. Graduate Students Attend Columbia to Pursue an Academic Degree, Not Employment by the University.

Columbia, one of the nation's oldest private institutions of higher education,[1] has approximately 30,000 students: 8,500 undergraduates and 21,500 graduate students. (Tr. 66) The University has three main academic areas: (1) Arts and Sciences (about half of the graduate student body); (2) Health Sciences; and (3) the professional schools (*i.e.*, the Graduate School of Business, the Fu Foundation School of Engineering and Applied Science, the School of Journalism, the School of Law, the School of Architecture Planning and Preservation, the School of International and Public Affairs ("SIPA"), and the School of Social Work). Most of these schools are broken down into departments and academic programs.

Columbia offers several degrees, including: (1) undergraduate degrees; (2) professional degrees from professional schools; (3) Master's Degrees;[2] and (4) the Doctor of Philosophy ("Ph.D."). (Tr. 12; 63-65) The University offers 225 Master's degree and 61 Ph.D. degree programs. Supplemental Decision and Order Dismissing Petition ("Decision") at 4.

1. Ph.D. Degree Programs at Columbia Are Designed to Produce Scholars, and the Admission Process Is Not a Hiring Process.

Doctoral education is designed to train the next generation of scholars, academics and

[1] Facts described in this section are based on the Regional Director's Supplemental Decision, dated October 30, 2015, the transcript of the Board proceedings, exhibits, and Stipulated Facts.
[2] Unless expressly stated, references to "M.A." or "Master's" Degree are to the terminal Master's, not the M.A. degree doctoral students receive *en route* to the Ph.D. (Tr. 264)

scientists who hold the highest degree in their field. (Tr. 625; 626; 652-53; 746; 815; Empl. Exs. 2; 32) To earn a Ph.D., a student must first obtain M.A. and M.Phil. Degrees by completing coursework, an oral or written qualifying exam, and any other requirements for a particular doctorate other than the dissertation. Decision at 5. The M.Phil. is typically obtained at the end of the third or fourth year, after which the student begins full-time work on the dissertation (Tr. 275; 659-60; 820; 854; 982-83) under the direction of a sponsoring faculty member. Decision at 5. Upon completion and defense of the dissertation, the student is awarded the Ph.D. degree. (Tr. 275-76; 659-60; Empl. Ex. 28)

Columbia's Human Resources department is not involved in the admission of graduate students. (Tr. 290) Applications to Ph.D. programs are generally made to the Graduate School of Arts and Sciences ("GSAS"), (Tr. 13; 287-88; 809; Empl. Exs. 34; 35) which awards all 61 of Columbia's Ph.D. degrees (including the 31 based in other Schools). (Tr. 12; 64; 257; Empl. Ex. 27). GSAS distributes completed applications to the relevant academic departments, which evaluate each applicant's academic transcripts, statements of academic purpose, and letters of recommendation to determine the applicant's academic achievements and potential, and then submit recommendations to GSAS. (Tr. 289; 747-48) Teaching ability and experience are not considered in the admission process. (Tr. 200; 291; 653; 748; 810-11)

Admitted students receive letters from GSAS offering admission as a "candidate for the degree of Doctor of Philosophy," noting Columbia's recognition of the student's "impressive academic credentials" and promise of "future development as a scholar, pedagogue and researcher." (Tr. 293; Empl. Exs. 23; 36-38; 86-88; 99) The letter offers the student a fellowship as a Dean's Fellow, contingent on good progress towards the degree, and states that the fellowship "includes some teaching and research responsibilities" that are regarded as "a vital

part of your education." (Empl. Exs. 23; 36-39; 99; Tr. 875)

2. The Instructional Requirement Furthers and Is Integral to Academic Achievement.

Doctoral students in all thirty Ph.D. programs at GSAS must fulfill a one-year teaching requirement in their first four years or before receipt of the M.Phil. degree, whichever comes first. (Tr. 12; 257; Empl. Ex. 28) This is a "baseline requirement" that "individual departments can supplement . . . based on their own disciplinary or field requirements." (Tr. 283-84) Indeed, many programs require students to teach for two or three years, typically with escalating responsibilities and independence. (Empl. Ex. 28; Tr. 164; 202-03; 429; 448; 821-22) Failure to fulfill the instructional requirement renders a student ineligible for a Ph.D.[3] (Tr. 412-13; Empl. Ex. 52) During the past three years, 730 of 732 students receiving a Ph.D. in GSAS held an instructional appointment. (Joint Ex. 11)[4]

The pedagogical experience is essential to graduate education for several reasons. (Empl. Ex. 40, 53; Tr. 258; 423-25) To start with, it is the first time students lead rather than merely participate in the pedagogical process. (Tr. 353) The skills learned as a result are critically important to the students' education and career aspirations. For instance, teaching trains students to convey complex, technical information in a clear, cohesive manner. (Tr. 665: "[A]n important component of really earning a doctorate[] is the ability to communicate very technical, very advanced knowledge to individuals who are not as well prepared academically and be able to explain complex concepts in an easier way. And that is achieved by doctoral students both

[3] Although not all Ph.D. programs outside GSAS require doctoral students to hold an instructional appointment, those students are encouraged to do so, and the vast majority do. Indeed, 96.6% of students receiving Ph.D. degrees in the past three years in those other schools held instructional appointments (excluding the Biomedical Science Programs). (Joint Ex. 11)

[4] One student permitted to graduate without a teaching appointment had transferred to Columbia with his faculty advisor and had teaching experience at the prior school. (Tr. 412-13)

through serving as teaching assistants, but also through attending conferences and presenting at conferences.") Preparing to teach and actually teaching also solidifies the Ph.D. student's understanding of the essential principles of the discipline. (Tr. 285: [T]he pedagogical experience is formative for students as interlocutors in their particular field, in the sense that having to explain . . . the fundamentals of your field to an audience is one of the ways in which not only you prepare yourself to represent your field, but also one of the ways in which you understand your field better.") Often, teaching requires graduate students to "go beyond their specialty and teach material that's not in their field," preparing students for the real world experience that they will likely face in academia. (Tr. 173); (Empl. Ex. 57: "Having knowledge of traditions, ritual systems, or doctrines outside one's own specialization will be a powerful intellectual tool for students in developing their academic career.") Service in an instructional position enhances the student's skills as a scholar. (Tr. 166)

For these reasons, academic departments treat teaching as a central pillar of doctoral education. (Empl. Ex. 55: Physics: "[L]earning to give clear explanations and answer students' questions in introductory courses contributes substantially to your understanding of the fundamental concepts of physics."); (Empl. Ex. 54: History: "[C]lassroom teaching is an essential part of the scholarly training of doctoral candidates . . . ."); (Empl. Ex. 57: Religion: "The three-year teaching apprenticeship is an integral part of academic training. . . .")

Carlos Alonso, Dean of the Graduate School of Arts and Sciences, described the importance of the pedagogical requirement in terms of learning to communicate one's expertise:

> [T]he pedagogical requirement is essentially a requirement that you learn how to communicate the content, and the questions and criteria of your field. . . . [W]e want to make sure that you have had the experience of having to synthesize and to present your field to an audience, before you go out into the world.

(Tr. 284; *see* Tr. 666) One cannot be considered an academic until one has taught.

Teaching is also critically important to the career aspirations of doctoral students. GSAS records show that two-thirds of Ph.D. recipients in the past five years were employed in some type of academic pursuit. (Tr. 280) The instructional requirement provides the students with "experience in teaching because once they get their degree . . . there's an expectation that our Ph.D.s have some experience and some ability to teach." (Tr. 201) Students who have teaching experience, particularly experience teaching a course independently as advanced graduate students, have a significant advantage in the academic job market. (Tr. 201; 815)

The central importance of graduate teaching at Columbia, and the educational character of the relationship between Columbia and its graduate teaching assistants, is underscored by the wealth of resources, guidance, and mentoring made available to student teachers. GSAS has a Teaching Center dedicated exclusively to graduate student teaching. The Teaching Center provides student teachers with a summer orientation and a variety of pedagogical programs throughout the year. (Tr. 484-85; 488; 500) The academic departments within GSAS provide more specific training and guidance for student teachers in the form of new teacher orientations, formal workshops, written teaching guidelines, as well as mandatory pedagogical practicums and seminars. (Tr. 315; Empl. Exs. 109; 110) Many of these courses and seminars provide academic credit to graduate students who attend them. (Tr. 321; Empl. Ex. 41 (sixteen programs in GSAS provide course credit for pedagogical training); Empl. Ex. 74 (listing training initiatives)) The seminars have practical and theoretical components, and address topics from teaching technique to teaching philosophy. (Tr. 859)

Faculty members typically observe student instructors and provide feedback. (Tr. 160-61; 210; 440-41; 617-18; 664-65; 856-57; Empl. Exs. 40; 53; 74; 102) In some departments, such as Psychology, faculty evaluate students' teaching individually at an annual meeting and

grade the students on their teaching. (Pet. Ex. 23) Undergraduate students also evaluate graduate students through online course evaluations. (Empl. Exs. 54; 65; Tr. 436; 763) Faculty review these evaluations to determine whether a student's pedagogical skills are advancing. (Tr. 440)

Notably, if a graduate student's teaching is defective, the University will intervene to provide training and resources to enable the student to teach more effectively. (Tr. 187; 314-16; 470-71; Empl. Ex. 40) Help could come from the academic department or the Teaching Center. (Tr. 315-16) By contrast, faculty members and adjuncts are expected to resolve those issues on their own, or face non-renewal of their contracts. (*Id.*) Further, faculty members are subject to discipline as determined by the Executive Vice President of Arts and Sciences, while graduate student instructors are subject to the student discipline policy. (Tr. 442-43; Empl. Ex. 66) Similarly, student grievances against a graduate student are governed by a student policy, not the faculty grievance policy. (Empl. Ex. 67; Tr. 444)

3. Original Research Is Integral to the Academic Program.

The cornerstone of the doctoral program is the advancement of academic knowledge through original research. (Tr. 269-71) Unlike undergraduate education, which focuses on the "transmission of received knowledge" to undergraduates, "the purpose and reason for graduate education is the production of new knowledge, the advancement of whatever field we may be speaking about." (Tr. 271; 769 -77; 1021). Accordingly, the final requirement for any Ph.D. degree is the creation and defense of the student's dissertation, a piece of original research and exposition. (Tr. 271; 752)

In the scientific fields, dissertation research takes place in the context of a research laboratory. (Tr. 409-11; 775) Under the tutelage of the faculty, students learn the process of

conducting research and receive the technical training necessary to become independent scientists. The skills they acquire enable them to go on to work in academia, in industry or for research organizations. (Tr. 71; 116-17; 119-20; 659-60; 979-80; Empl. Ex. 32)

Unlike employees hired to work in a particular department of an employer, graduate students accepted to laboratory science Ph.D. programs at Columbia are not accepted or assigned to a particular laboratory upon admission, except in rare instances. Rather, during the first one or two years in the program, students meet the faculty, take courses, and attend seminars and colloquia on ongoing research in order to refine their research interests and identify the faculty member with whom they want to perform their thesis research. (Tr. 656; 660-66:15; 750-53; 980-82) Typically beginning in the second year, each student selects a professor's laboratory in which to conduct dissertation research. (Tr. 981-82) Generally, the faculty member's research offers the student preliminary work upon which the student will build as the basis for a thesis. (Tr. 775) The student's research on the advisor's project typically overlaps with the student's own original research, which makes it impossible to separate the time spent on the student's dissertation from the time working on the faculty advisor's research. (Tr. 72; 116; 278; 409-10; 662; 775; 801; Empl. Ex. 2)

B. Financing Graduate Education at Columbia.

1. Financial Support for Ph.D. Students.

All doctoral students enrolled in GSAS receive a standard five-year funding package ("Fellowship Package"), subject only to their making satisfactory progress toward the doctoral degree. (Tr. 200; 297-98; 579; 749; 809; 875; Emp. Ex. 24) The Fellowship Package consists of a stipend, full tuition, payment for student health services, University facilities fees, a health insurance premium, and guaranteed access to student housing. (Tr. 299-300; Empl. Ex. 38; *see*

Empl. Exs. 22; 23; 36-37; 99) Stipend levels are typically set based on expected living expenses and to compete with the stipends offered by other Ivy League and similar institutions. (Tr. 298; 303) Each year, all students in a particular program receive an identical increase to their Fellowship Package, usually in the range of 3-4%. (Tr. 298; 460) The Fellowship Package does not include vacation leave, sick leave, personal days, long-term care insurance, or retirement benefits, all of which are available to employees of the University. (Tr. 87-88; Empl. Exs. 2; 36) The Fellowship Package is paid out of the University's financial aid budget. (Tr. 313-14)

The stipend is paid in three yearly installments in the Fall, Spring and Summer. (Tr. 308-09) Nothing changes when a student has teaching or research responsibilities except that a portion of the stipend is typically issued in the form of salary, subject to withholding of income tax pursuant to Federal tax law requirements. (Tr. 308-09; 841) Typically, one third of the stipend while teaching is paid as salary and two thirds is paid as a stipend. (Tr. 308-09; 606; Empl. Exs. 42; 45)

Doctoral students receive the same Fellowship Package each year (subject to annual increases) regardless of: (i) whether they have teaching or research responsibilities that year; (ii) the number of hours they actually spend on those responsibilities; or (iii) the quality of their performance in any instructional or research appointments. For instance, in the Humanities and Social Sciences, doctoral students typically do not hold an instructional or research appointment in their first or fifth years of study. (Tr. 301-02) Yet, these students receive the same Fellowship Package during those years as they do when they are appointed to teach. (Tr. 302) Doctoral students in the School of Engineering are fully funded for four or five years contingent on good academic standing and irrespective of whether they have an instructional or research appointment in any year. (Tr. 657; Empl. Ex. 88; *see* Empl. Exs. 86-87) Similarly, doctoral

students in the Coordinated Program in the Biomedical Sciences are fully funded throughout their entire graduate career, provided they remain in good academic standing. (Tr. 972; Empl. Ex. 115)

2. Sources of Funding For Ph.D. Researchers.

Most doctoral students working in faculty research laboratories are supported on research grants. Typically, scientific research grants are funded by government agencies such as the National Institutes of Health, the National Science Foundation, NASA or the Department of Defense. (Tr. 661-62; 768; 976) Less frequently, funding may come from private foundations. (Tr. 768) When a student works with a faculty member who has a research grant, that grant provides the student's funding. (Tr. 976; 1018-19) Graduate students supported by the grant will work on one of the research topics described in the grant, which also fulfils the requirements of the Ph.D. degree. (Tr. 455-56; Empl. Ex. 119)

Graduate students in the Biomedical Sciences can also be supported by training grants, which are awarded by the NIH for the purpose of training doctoral students, usually for one to three years, in a particular area of biological research that is "viewed as important for the future workforce . . . of the country." (Tr. 72; 985-86; 992; 996; Empl. Ex. 118) Funding under a training grant is not tied to any particular research lab or project. (Tr. 985-86) Training grants provide a stipend "as a subsistence allowance to help defray living expenses during the research training experience," which, pursuant to the terms and conditions of the NIH Grants Policy Statement, is not a salary and is not provided as a condition of employment. (Empl. Ex. 118)

Graduate students who are not supported by a research grant or a training grant will typically be supported by general funds from within schools or departments. (Tr. 663; 985; 994-95) Regardless of how the students are funded, all doctoral students in a given program receive

the same financial aid package and, after selecting a laboratory to work in, perform largely the same research duties as their peers in the laboratory who may be funded differently. (Tr. 663; 973; 995; 1019-21; 1024-25; Empl. Ex. 116)

C. Master's Degree Programs at Columbia.

In addition to doctoral degrees, Columbia offers 225 Master's degree programs. Master's programs typically take one to two years to complete and tend to be "standalone" programs that lead to specialization in a particular field. Master's programs are more focused in their areas of training, do not generally involve original research, and do not train students to pursue academic careers, which usually require a doctoral degree.

D. The Current Petition.

On December 17, 2014, Petitioner filed a petition seeking to represent:

> INCLUDED: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Law Associates, Preceptors, Instructors, Listening Assistants, Course Assistants, Readers and Graders); All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.
>
> EXCLUDED: All other employees, guards, and supervisors as defined in the Act.

(Bd. Ex. 1A).[5]

On February 6, 2015, the Regional Director dismissed the petition without a hearing based on *Brown*. Petitioner filed a Request for Review, which Columbia opposed. On March 13, 2015, the NLRB granted Petitioner's Request for Review, reinstated the petition, and remanded the case to the Regional Director for a hearing and issuance of a decision. The hearing

[5] By stipulation, the petition was amended to delete the classifications Law Associate, Instructor and Listening Assistant from the petitioned-for bargaining unit. (Tr. 1072)

commenced on March 31, 2015, and continued for twelve sessions. By Supplemental Decision and Order dated October 30, 2015, the Regional Director dismissed the petition based on *Brown*, and found that, in the event the Board reconsiders the status of graduate students, an appropriate bargaining unit would include undergraduate and masters students with instructional appointments, as well as students supported by training grants.

ARGUMENT

Brown rests on the inherently educational character of the relationship between a university like Columbia and its teaching and research assistants. Those students attend such universities seeking the credential necessary to pursue an academic life; they teach or assist with faculty research because teaching and research is integral to obtaining that credential and pursuing that life, and Columbia pays them to learn (regardless of whether they teach or support faculty research) in order to facilitate the achievement of the students' goals and of its own mission of training the next generation of scholars and researchers. The folly – and danger – of seizing upon aspects of this relationship that resemble employment as a basis for imposing the inherently adversarial rules that govern collective bargaining was recognized by the Board in *Brown*. Nothing has changed since, and Petitioner, which must show that it is necessary and appropriate to change this well-reasoned body of law, neither has met nor can meet that burden.

I. *BROWN* WAS CORRECTLY DECIDED AND SHOULD NOT BE OVERRULED.

The academic goals of universities like Columbia and their students have been well served by the Board's policy of not intruding upon the academic relationship. The student-university relationship is the same as it was in 1972, when the Board first held that student assistants working for a university are "primarily students." Moreover, in the eleven years since it was decided, Congress has expressed no intention to reverse or modify *Brown*. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) ("[C]ongressional failure to revise or repeal the

agency's interpretation is persuasive evidence that the interpretation is one intended by Congress."). Nor have there been any Board or judicial decisions that contradict *Brown*. The only factor that has changed is the political composition of the Board. That changed composition, however, is not a rational basis for overruling *Brown*.

Indeed, the Board has an overriding obligation to ensure stable labor relations, rather than changing well-reasoned precedent with every Presidential election. Reversing precedent relating to graduate students for the third time in fifteen years for no reason dictated by the statute or by public policy would deprive universities and graduate students of any certainty as to how the Board will interpret and apply the law.

A. *Brown* Comports with Settled Precedent Holding that Graduate Students Are Not Employees.

The Supreme Court and the NLRB have long recognized that the nature of the university "does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world," *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680 (1980) (quoting *Adelphi Univ.*, 195 NLRB 639, 648 (1972)), and that the "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" *Id.* at 681 (citation omitted). Accordingly, in *Adelphi University*, the Board excluded graduate students serving as teaching and research assistants from a unit of full-time faculty members because they were "primarily students" who were "working toward their own advanced academic degrees." 195 NLRB at 640. The Board observed that, unlike the largely autonomous nature of the work performed by regular faculty, graduate student assistants were "guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members" who supervised their work. *Id.*[6]

[6] *See C.W. Post. Univ.*, 189 NLRB 904, 908 (1971) (excluding "student assistants" from

In *Leland Stanford Junior University*, the Board relied on *Adelphi* and held that graduate students serving as research assistants were "primarily students" and "not employees within the meaning" of the Act. 214 NLRB 621, 623 (1974). The Board reasoned that stipends provided to the students were part of a package of financial aid intended to make graduate study at the university affordable to students from a wide variety of backgrounds. The amount of the stipend was "not based on the skill or function of the particular individual or the nature of the research performed," and there was "no correlation between what [was] being done and the amount received by the student. . . ." *Id.* at 621-22. Further, although the students may have participated in research that did not always fit into their ultimate thesis, it was "clear . . . that all steps lead to the thesis and [were] toward the goal of obtaining the Ph.D. degree." *Id*. at 622. To this end, the students at issue received academic credit for their externally funded research. *Id.*

In *New York University*, the Board inexplicably departed from this long-standing precedent and held that graduate students who served as teaching and research assistants were employees under the Act. 332 NLRB 1205 (2000) (*NYU I*). The Board based its decision on *Boston Medical Center Corp.*, which had held that members of a medical house staff were employees. 330 NLRB 152 (1999). Ignoring its prior focus on the primarily educational nature of the relationship between student and university, the *NYU I* Board focused instead on those aspects of the relationship that resemble employment, which led it to conclude that "graduate assistants are not within any category of workers that is excluded from the definition of 'employee' in Section 2(3)," and are in fact employees under the common law master-servant test. 332 NLRB at 1206. The Board characterized the direction teaching and research assistants

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proposed bargaining unit and including a single "research associate" in the unit because the student had already earned a doctoral degree and was eligible to receive tenure); *Coll. of Pharm. Sci.*, 197 NLRB 959, 960 (1972) (excluding graduate students from bargaining unit and noting that teaching assistants were primarily students rather than employees).

receive from faculty as an exercise of the "right of control," and described the funding provided to graduate students as compensation for services.

The shift in focus away from the fundamental nature of the relationship and towards specific indicia of "employment" was in sharp contrast with the recognition in *Adelphi* that faculty direction is part of the educational process, 195 NLRB at 640, and in *Leland Stanford* that payments to graduate students are actually financial aid, 214 NLRB at 621-22.

Brown turned away from this mechanical search for indicia of employment and shifted the focus back to the essential nature of the academic environment. Noting that the policy considerations set forth in pre-*NYU I* cases were as relevant in 2004 as they were when *Adelphi* and *Leland Stanford* were decided, the *Brown* majority applied the primary purpose test to decide whether graduate students were employees. Based on the status of graduate assistants as students, the role graduate student assistantships play in graduate education, the graduate student assistants' relationship with faculty, and the financial support received for learning, the Board concluded that the relationship between graduate student assistant and university is "primarily an educational one, rather than an economic one," and that graduate student assistants are thus "primarily students" and not statutory employees. *Brown*, 342 NLRB at 483, 489.

B. *Brown* Is Consistent with the Policies and Purposes of the Act.

Section 2(3) of the NLRA provides that "[t]he term 'employee' shall include 'any employee.'" 29 U.S.C. § 152(3). It does not further define the term, nor is "employee" defined elsewhere in the Act. As the Supreme Court and the Board have recognized, application of the NLRA cannot be determined by a simplistic application of the common law agency definition of "employee." "In doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) with meaning." *Allied Chem. & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971); *see WBAI Pacifica Found.*, 328 NLRB 1273, 1275

(1999) ("At the heart of each of the Court's decisions is the principle that employee status must be determined against the background of the policies and purposes of the Act.").

The Board and reviewing courts have thus held that persons who might otherwise fall within the Act's definition of "employee" may nonetheless be denied collective bargaining rights where there are policy reasons for doing so. In *NLRB v. Bell Aerospace Corp.*, 416 U.S. 267 (1974), the Court held that managerial employees are not covered by the Act, even though they are not specifically excluded under Section 2(3). Similarly, in *Pittsburgh Plate Glass Co.*, the Court excluded retirees from the Act's coverage, reasoning that inclusion of retirees would not further the Act's policy of preventing disruption to commerce caused by interference with the organization of active "workers." 404 U.S. at 166. In *Goodwill Industries of Tidewater, Inc.*, the Board refused to include workers at a rehabilitative facility within the definition of "employee" because the employment relationship was not based on typical economic factors. 304 NLRB 767, 768 (1991). *See also Retail Clerks Int'l Ass'n v. NLRB*, 366 F.2d 642, 644 (D.C. Cir. 1966) (collecting cases where the Board refused to include individuals within the definition of employee where doing so might create a potential conflict of interest with the employees' job responsibilities); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 495-96, 499 (1979) (declining to exercise jurisdiction over teachers at church-operated schools because doing so would necessarily entangle the Board in matters of religious education and run afoul of the First Amendment).[7] Most recently, in *Northwestern University*, 362 NLRB No. 167 (Aug. 27, 2015), the Board declined jurisdiction over the representation case involving student football players,

[7] The appropriateness of considering policy reasons in construing the scope of the NLRA was not affected by the decision in *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995), which considered whether the Board *could* apply the common law agency definition of employee as a means for determining whether paid union organizers were protected by the Act.

explaining that "it would not promote stability in labor relations to assert jurisdiction" even if scholarship players were found to be statutory employees.

As the Board has recognized:

> The damage caused to the nation's commerce by the inequality of bargaining power between employees and their employers was one of the central problems addressed by the Act. A central policy of the Act is that the protection of the right of employees to organize and bargain collectively restores equality of bargaining power between employers and employees and safeguards commerce from the harm caused by labor disputes. The vision of a *fundamentally economic relationship* between employers and employees is inescapable.

WBAI Pacifica Found., 328 NLRB at 1275 (emphasis added).

This "fundamentally economic relationship" is missing in the dealings between a university and its graduate student assistants. As the Board observed in *Brown*, "[t]he testimony of nearly 20 department heads, and the contents of numerous departmental brochures and other Brown brochures, all point to graduate programs steeped in the education of graduate students through research and training." *Brown*, 342 NLRB at 484. At Brown, graduate student status was synonymous with graduate student assistant status because the assistantship and research positions were an integral and inseparable part of educational programs designed to develop graduate students into scholars. *See id.* at 489 ("The relationship between being a graduate student assistant and the pursuit of the Ph.D. is inextricably linked . . . .").

The "fundamentally economic relationship" is similarly absent in dealings between Columbia and its graduate students. The teaching and research performed by Columbia's graduate student assistants is an integral component of their doctoral education. In assisting professors with teaching, graduate students perform tasks designed to further their own education and development. Students develop as communicators, broaden their educational background, deepen their understanding of their field, build relationships with faculty members, and learn various critical skills that will serve them in their future careers. Likewise, in conducting

research, students develop skills needed to become first-rate researchers, and perform research that forms the basis of their doctoral dissertation. Indeed, their duties are so intertwined with their doctoral research as to be wholly indistinguishable from their academic study. While there are of course aspects of these appointments that resemble employment, the purpose of the instructional and research positions is to serve the academic and future professional needs of graduate students by offering them positions that provide both financial aid as well as the opportunity to further the students' course of study and career goals. As *Brown* correctly held, the fundamental nature of the relationship is educational, and it simply cannot be forced into a traditional employer-employee framework.

Notably, well-established case law under closely analogous provisions of the Fair Labor Standards Act ("FLSA") provides strong support for the "primary relationship" test adopted in *Brown*. Like the NLRA, the FLSA broadly defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e).[8] Nonetheless, in determining whether students or trainees are employees under that statute, courts developed a "primary benefit" test similar to the analysis in *Brown*. Courts have found that the dispositive question under the FLSA is whether the student/trainee or the putative employer is the primary beneficiary of the relationship. *See, e.g.*, *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 526 (6th Cir. 2011) (students at a vocational boarding school are not employees; "identifying the primary beneficiary of a relationship provides the appropriate framework for determining employee status in the educational context"). Most recently, an appellate court held that student interns were not "employees" even though they possessed certain employee characteristics. *See Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015), *amended*, Nos. 13-4478-cv, 13-4481-cv,

[8] *See Patel v. Quality Inn S.*, 846 F.2d 700, 702-03 (11th Cir. 1988) (finding the statutory definitions of "employee" in the NLRA and FLSA to be analogous).

2016 WL 284811 (2d Cir. Jan. 25, 2016). The court rejected the interns' argument that the proper test in determining employee status is whether the employer receives an immediate advantage from the interns' services in favor of a more nuanced and flexible primary beneficiary standard. The court set forth a list of non-exhaustive factors to be considered in ascertaining the primary beneficiary, among them "[t]he extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit" and "[t]he extent to which the internship provides training that would be similar to that which would be given in an educational environment." *Id.*

By participating in the internship programs established by their colleges and universities, the interns in *Glatt* received tangible benefits such as hands-on training, a competitive advantage in future employment, skills training, course credit, and leadership and teamwork skills. An employer's paid personnel supervised the interns, offering them knowledge and expertise, at the expense of engaging in productive work. In return, the employer got the services performed by interns. Likewise, graduate student assistants in private higher education receive significant educational benefits that enhance and complement their educational experience. They acquire the skills they need to become first-rate academics and researchers, as well as the credentials necessary to pursue an academic life. The benefits they receive far outweigh any advantage the University receives from student-performed teaching or research.

Petitioner contends that *Brown* disregarded the plain language of the Act because graduate students are not specifically excluded by Section 2(3). That argument cannot be reconciled with decisions like *Bell Aerospace*, which held that managerial employees are not employees under the Act even though they are not specifically excluded from the reach of Section 2(3). Moreover, the Board correctly observed that the plain language of the statute is a

"tautology" insofar as Section 2(3) simply states that "the term 'employee' shall include any employee," *Brown*, 342 NLRB at 491, and that the Board "should not confine itself to examining a particular statutory provision in isolation," *id.* at 488. Accordingly, consistent with Supreme Court and Board precedent, the Board proceeded to analyze "the underlying fundamental premise of the Act," specifically that the Act is designed to cover economic relationships. *Id.* at 488; *see Pittsburgh Plate Glass Co.*, 404 U.S. at 168 (coverage under the Act cannot be determined solely by a mechanical application of the common law definition of "employee"); *WBAI Pacifica Found.*, 328 NLRB at 1275.

As the *Brown* Board recognized (and as the *NYU I* Board failed to recognize), there are substantial and persuasive policy reasons for treating graduate assistants as students rather than as employees. Imposing collective bargaining on the academic relationship between universities and their graduate students would have a "deleterious impact" on the educational decisions made by faculty and administrators. *Brown*, 342 NLRB at 490; *see id.* at 492 ("[T]he broad power to bargain over all Section 8(d) subjects would, in the case of graduate student assistants, carry with it the power to intrude into areas that are at the heart of the educational process."). This is because an employer's duty to bargain over terms and conditions of employment is very broad, *see Prod. Plated Plastics, Inc.*, 254 NLRB 560, 563 (1981), and the duty would be no less broad in the educational context. *Kendall Coll.*, 228 NLRB 1083, 1088 (1977) (rejecting argument that the "law requiring bargaining on mandatory subjects requires a different interpretation in the halls of academia than it does in an industrial shop"), *enfd.*, 570 F.2d 216 (7th Cir. 1978); *see also Catholic Bishop of Chi.*, 440 U.S. at 503 (noting that "nearly everything that goes on in the

schools affects teachers and is therefore arguably a 'condition of employment'") (citation and quotation omitted).[9]

Literally any identifiable "term" or "condition" of employment of graduate students serving as teaching and research assistants could be subject to bargaining. Specifically, "collective bargaining would intrude upon decisions over who, what, and where to teach or research – the principal prerogatives of an educational institution . . . ." *Brown*, 342 NLRB at 490. Moreover, it would interfere with "broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends." *Id.* For instance, because stipends are a part of graduate students' financial package, bargaining over "wages" would necessarily have a major impact on financial aid policies and tuition rates. Similarly, bargaining over performance evaluations would mean bargaining over student grades.

Treating graduate students as employees would also mean Board entanglement in academic policy making. Because a student's work as an assistant is an integral part of his or her course of study, the quality and results of that work is part of his or her academic record, making it impossible to separate "academic" from "employment" issues. For instance, faced with a graduate assistant claim that he or she received a poor grade on an exam in retaliation for union activities, the Board would have to evaluate whether the aggrieved student's exam was graded fairly as compared to other students' exams. At this level of advanced study, any such evaluation would be beyond the technical competency of the Board. Not only does the Board

[9] Indeed, issues such as teacher hiring requirements, teacher evaluations, class schedules, whether teachers may end class early, the academic calendar, semester length, the assignment of courses, the assignment of advising responsibilities, the assignment of office hours, whether non-faculty can teach classes, the reorganization of academic departments, and the changing from a certificate program to a bachelor of arts program, all have been held to be mandatory subjects of bargaining. *See Bryant & Stratton Bus. Inst.*, 321 NLRB 1007, 1009, 1023-27 (1996); *David Wolcott Kendall Mem'l Sch.*, 288 NLRB 1205, 1209-12 (1988).

have no experience or expertise in making such educational evaluations, but doing so would require the Board to second-guess the academic standards and subjective academic decisions of the University – a role never contemplated by the NLRA and contrary to the academic freedoms implied in the First Amendment. *See, e.g.*, *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also . . . on autonomous decisionmaking by the academy itself.") (citations omitted); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

Furthermore, "the presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized," *see NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 489 (1960); the current unavailability of such economic weapons underscores the absence of an employee-employer type relationship, and supports the relationship that actually exists between Columbia and its graduate students. The use of economic weapons as a necessary component of the statutory scheme for resolving bargaining disputes would make no sense in the context of graduate students. Because service as a teaching or research assistant is required in most departments at Columbia, students would jeopardize their academic standing if they engaged in a strike against Columbia and withheld work on their own research or their service as a teacher. Similarly, any lockout would serve only to prevent the students from performing the work required for their academic programs. Nor would Columbia have any ability, or need, to hire "replacements" for students who are, by definition, engaged in work designed to fulfill their individual academic requirements. Accordingly, a failure in bargaining would result not in the typical forms of economic pressure but instead in the inability of students to make academic progress – perhaps

for an extended period.

In sum, the Board properly recognized that collective bargaining is inappropriate in this aspect of higher education, which is characterized by individualized, educational decision-making necessary to educate, mentor, guide, and evaluate graduate students, and not by employment-related actions and concepts. The adversarial nature of collective bargaining would undermine the fundamentally academic relationship between faculty and their students. It would also impinge on academic freedom by interfering with each department's right to establish degree requirements, determine eligibility for financial aid, evaluate students, and determine program curriculum.

C. No Material Change in Circumstance Justifies Changing Settled Law.

The Board may change its interpretation of the Act if such a disruption is "necessary and appropriate." *See SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 442 (2d Cir. 2011) ("Where the Board 'departs from prior interpretations of the Act without explaining why that departure is necessary or appropriate,' the Board will have exceeded the bounds of its discretion.") (citation omitted). A revised interpretation may be justified by a change in the circumstances underlying the original rationale. *See In re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Boston Med. Ctr. Corp.*, 330 NLRB at 169 (Hurtgen, M. dissenting). In the forty-four years since *Adelphi* and *Leland Stanford,* and in the twelve years since *Brown,* no such change has occurred.

The relationship between graduate students and the University is the same today as it was forty-four years ago. Graduate students apply to the University for the purpose of obtaining an advanced degree, which they get by completing an academic curriculum that includes teaching and research. The policy considerations underlying *Adelphi*, *Leland Stanford*, and *Brown* make

it as inappropriate now as ever for Columbia graduate students to be treated as employees; their "work" remains essentially inseparable from their educational goals.

Petitioner offered no evidence that *Brown* was wrong about how ill-suited collective bargaining is to the relationship between a private university and its students. There continues to be no reason to "take [such] . . . risks with our nation's excellent private educational system." *Brown*, 342 NLRB at 493.

1. The Experience at NYU and at Public Universities Has No Bearing on Whether Collective Bargaining with Graduate Students Is Detrimental to Academic Freedom.

Contrary to Petitioner's assertions, the experience at NYU under the Graduate Assistant Collective Bargaining Agreement confirmed the concern in *Brown* about the impact of collective bargaining on academic freedom and student/faculty relations. Although that Agreement gave NYU broad authority over academic decision-making, (Empl. Ex. 21 at 12) the union filed numerous grievances and arbitrations challenging the academic autonomy of the university. (*Id.*) That NYU succeeded in defending its decisions despite these repeated assaults on academic freedom does not diminish the very real threat posed by being required to engage in collective bargaining with graduate students.

Three separate NYU committees that studied the school's experience with graduate assistant collective bargaining all agreed that the threat posed by continued UAW representation was an unacceptable risk to the university, and recommended withdrawal of recognition to safeguard the university's academic freedom. The Faculty Advisory Committee on Academic Priorities (consisting of senior faculty members who advise the Provost) expressed "concern" that grievances filed under the Graduate Assistant CBA "threatened to impede the academic decision-making authority of the faculty" over issues such as staffing the undergraduate curriculum, the appropriate measure of academic progress, and terms and conditions of

fellowships that do not involve assistantships. (Empl. Ex. 20 at 2) Specifically, the Faculty Advisory Committee noted the union's willingness to arbitrate such grievances, as well as the possibility that an arbitrator not familiar with the workings of a University would severely restrict academic freedom. (*Id.*) As the Committee stated:

> The readiness of the United Auto Workers to grieve issues of academic decisionmaking and the nature of the arbitration process leads the Committee to conclude that it is too risky to the future academic progress of NYU for it to have graduate assistants represented by a union that has exhibited little sensitivity to academic values and traditions . . . .

(*Id.*)

Similarly, the Senate Academic Affairs and Executive Committees (each comprised of students, faculty and administrators) jointly reported that notwithstanding some benefits from collective bargaining, "it became obvious that there have also been substantial disadvantages from union representation by the UAW." (Empl. Ex. 21 at 8) Specifically, the Senate Committees worried that "[o]ver time, a number of these grievances, if successful, have the potential to impair or eviscerate the management rights and academic judgment of the University faculty to determine who will teach, what is taught, and how it is taught." (*Id.*)[10]

[10] The decision by NYU to recognize the UAW and enter into a collective bargaining agreement covering certain graduate students in in 2015, as part of a resolution of *New York University* (Case No. 02-RC-023481) (*NYU II*) is irrelevant for at least two reasons. First, subsequent to the 2004 Committee reports expressing concerns over the adverse impact of graduate student unionization, NYU adopted a sweeping overhaul of graduate student financial aid in 2009, as a result of which teaching was no longer linked to financial aid or required for the Ph.D. degree. *NYU II*, Regional Director Decision and Order Dismissing Petition, at 9-10. Instead, doctoral students who chose to teach were appointed and compensated as adjunct faculty, pursuant to the terms of the adjunct faculty CBA, and treated as employees for the periods that they taught. Indeed, the classification of teaching assistant was eliminated, and the employee status of graduate students who received adjunct teaching appointments was not at issue in *NYU II*. Thus, the current NYU model differs dramatically from that addressed in *Brown*, and existing at Columbia.

Second, as long as the law is not changed, the NYU Agreement will remain outside the scope of the NLRA, which means NYU will be under no obligation to renew it if the experience

Petitioner's reliance on the experience of public universities required to bargain under state law is also misplaced because state law is significantly different from the NLRA. *See Brown*, 342 NLRB at 493. For instance, state law typically prohibits or significantly restricts the right to strike, which is central to the NLRA scheme. *See, e.g.*, *Lamphere Schs. v Lamphere Fed'n of Teachers*, 252 N.W.2d 818, 821 (Mich. 1977). State laws may also constrain the scope of bargaining. *See, e.g., Sch. Comm. of Boston v. Boston Teachers Union, Local 66*, 389 N.E.2d 970, 973 (Mass. 1979) ("It is by now well recognized that the subjects of public sector collective bargaining are more restricted than those in private sector labor relations."). Under state laws, the risks that concerned the Board in *Brown* are thus significantly mitigated.

2. The Rogers Study Is Flawed.

Petitioner also contends that the Rogers, Eaton and Voos study "contradicts the assumptions made by the majority in *Brown*" as to how collective bargaining interferes with academic decision-making and negatively impacts student-faculty relations. That study, which compared survey responses of graduate students at four unionized *public* universities with responses from graduate students at four similar nonunion *public* universities, neither addresses the situation at issue nor provides evidentiary support for overruling *Brown*.

Indeed, the study does not purport to address the concern in *Brown* that graduate student unionization would restrict or eliminate the freedom of faculty and administration to make academic and educational decisions. *See Brown*, 342 NLRB at 490. Rather, by its own terms, the study explored only the impact of unionization on the students themselves, and on *their* perception of academic freedom. (Empl. Ex. 81 at 495: "In this study we will explore the impact on the academic freedom of graduate students themselves, and on their perception of

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of administering the Agreement turns out to be inconsistent with the University's academic goals.

overall academic freedom in the institution but not specifically on the academic freedom of faculty who work with them or the institution in which they work.") Thus, the study did not address *Brown's* central concern at all.

Nor does the study disprove *Brown*'s other concern that collective bargaining would harm student-faculty relations. As Dr. Henry Farber, Princeton Professor of Economics, explained, while the study did "not find evidence that [suggests] that representation would harm faculty/student relationships" (Tr. 543), it also found no evidence that those relations were not worse in the context of graduate student representation.[11]

Finally, the study merely tested whether there was a difference in the attitudes of graduate students at public universities with and without unions; it did not and could not analyze the underlying causation of any such differences. (Tr. 551; 560) Accordingly, its results are irrelevant to whether unionization of graduate students at private universities would cause a change in those students' attitudes or to existing student-faculty relations.

As Dr. Farber explained, one cannot "learn anything at all from this study[,] one way or the other – good or bad – about what would happen at Columbia were graduate students to unionize." (Tr. 565); (Tr. 543: "I don't think the study provides evidence at all that could rule out harm or benefit for that matter – but harm, certainly, to the faculty/student relationship."); 544: "[I]n their study, it's reasonably likely that [collective bargaining] could have harmed the relationship; and it's reasonably likely that [it] could help the relationship. The study just can't distinguish.")[12]

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[11] As Dr. Farber explained, the study is flawed statistically as it was based on a small sample size with numerous variables. (Tr. 544-45)

[12] Dr. Farber also explained why the study by Gordon Hewitt of faculty attitudes at unionized universities provided no basis for drawing conclusions about the effect of unionization of graduate students. (Tr. 566-67); Gordon Hewitt, *Graduate Student Employee Collective*

D. Graduate Students Are Not Apprentices.

Petitioner argues, based on *Boston Medical*, that graduate assistants are "apprentice" faculty members, and thus should be considered employees. *See* 330 NLRB at 161. Neither the ruling concerning hospital house staff nor the apprentice analogy are applicable to Columbia graduate students.

In *Boston Medical*, the Board noted that "while house staff possesses certain attributes of student status, they are *unlike many others in the traditional academic setting*." 330 NLRB at 161 (emphasis added); *see St. Barnabas Hosp.*, 335 NLRB 233, 233 (2010) (refusing to apply *Brown* to overrule *Boston Medical*, holding "[i]t is apparent that the role[s] of TAs and RAs at universities is different from that of house staff at medical centers").

Brown itself distinguished *Boston Medical* on the grounds that hospital house staff are not akin to graduate assistants who have yet to receive their graduate academic degrees. Indeed, substantial differences exist between graduate students serving as teaching or research assistants while pursuing doctoral research and post-graduate medical house staff seeking to enhance their credentials in a medical specialty after having completed formal medical studies. Graduate assistants pay tuition and student fees and are enrolled as full-time students; they spend most of their time attending classes, taking tests and being graded and working on their dissertations. House staff spent eighty percent of their time in direct patient care with the intention of gaining sufficient experience and knowledge to become Board-certified in a specialty. *Boston Med.*, 330 NLRB at 160-161. Unlike graduate students, residents are "junior professional associates" of regular physicians who "possess the types of skills and are required to perform the types of job

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Bargaining and the Educational Relationship Between Faculty and Graduate Students, 29 J. Collective Negotiations in the Public Sector 153 (2000). Hewitt's study, in any event, was available when *Brown* was decided, and was cited by the dissent in *Brown*. It therefore does not represent any changed circumstance that would justify modifying or overruling that decision.

duties common to other physicians, at similar, albeit not identical, skill levels." *Id.* at 161, 167. In contrast, graduate assistants typically work under close supervision of faculty members who are ultimately responsible for the students' teaching or research. These students also do not have their professional degree, the Ph.D.; they serve as teaching and research assistants to fulfill the requirements of getting that degree.

Unlike graduate students, apprentices are employees because they typically function in a traditional workplace where the relationships are predominantly economic. They may sometimes participate in limited classroom training, but the ultimate goal is promotion to "journeyman," or another, more senior position. By contrast, graduate students spend their time in a classroom or performing research within the setting of a large educational institution. The tasks they perform enhance their classroom training and are a necessary, integral part of their education. Rather than seeking promotion, graduate students almost always search for another institution to employ them, whether in the private sector or in academia.

E. The Common Law Test Endorsed in *NYU I* Should Not Be Applied to Graduate Students.

Under the common law "master-servant" test, the focus is on "right to control;" if that is present, an employment relationship exists. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). Applying this test to universities and graduate students has the effect of forcing a round peg into a square hole. In academia, the "master" controls educational standards and requirements rather than terms and conditions of employment; the university exercises control for entirely pedagogical purposes. Faculty members are not "bosses" or managers of students; they exercise "control" as educators, role models, mentors and counselors, in order to advance their students' academic and professional development.

The record shows that the relationship between student and faculty is a critical aspect of

graduate education. (Tr. 115-17) Doctoral students typically meet with their faculty advisor at least weekly to discuss the direction and progress of their original research. (Tr. 767) Through these meetings, and through working together on the faculty advisor's research, a mentorship develops. (Tr. 767-68) The mentor assumes responsibility for ensuring that the student's research project is well designed and that he or she is making appropriate progress toward the Ph.D. degree. (Tr. 984-85) Often, the mentor-mentee relationship endures long after the student receives the degree. (Tr. 765-66) A relationship of this type hardly fits within the employer-employee framework.

The difference between this type of relationship and employment is also demonstrated by the treatment of graduate students whose teaching is wanting. Rather than disciplining, terminating or docking the student's pay, the University provides additional training and resources so that the student can learn to teach effectively.[13] This happens because, in contrast to the traditional employment context, which contains inherently conflicting and potentially adversarial aspects recognized by and built into the NLRA, the interests of a university and its graduate students are fundamentally aligned; when there is disagreement, the focus is on a resolution that is best for the student's education and development. The nature of this relationship is completely at odds with a simple minded, one-dimensional application of a common law test that, in this context, cannot serve either the best interests of higher education or the purposes of the Act.

[13] In its Petition for Review, Petitioner made much of the dismissal of Longzi Zhao from his TA position. Mr. Zhao, however, was removed as a TA not because of problems with his teaching, but rather because of willful dereliction of his TA responsibilities – behavior which called into question his admission to the program in the first instance. (Tr. 884-85). Although the School of Engineering decided to stop payment of Mr. Zhao's stipend for the balance of the semester, it did not then terminate his enrollment in the program, and elected to continue paying his tuition through the end of the semester. This unfortunate incident raised behavioral rather than academic concern and has no bearing on the issues in this case.

II. UNDER ANY STANDARD, GRADUATE RESEARCH ASSISTANTS AT COLUMBIA ARE NOT EMPLOYEES UNDER THE ACT.

A. Pre-*Brown* Precedent Mandates Dismissal of The Petition as to Graduate Research Assistants.

Based on the evidence and arguments already presented, there is no basis upon which the Board should treat any Columbia graduate assistant as an employee under the Act. This brief addresses research assistants separately at the Board's request.

Leland Stanford held that research assistants who perform research in connection with their doctoral programs are not employees because: (i) their stipends were a form of financial aid "not based on the skill or function of the particular individual or the nature of the research performed," with "no correlation between what [was] being done and the amount received," 214 NLRB at 621-22; (ii) although students participated in some research that did not fit into their dissertation, "all steps [led] to the thesis and [were] toward the goal of obtaining the Ph.D. degree," *id.* at 622, and (iii) "the same research [was] required whether they receive financial aid as RA's or no financial assistance at all." *Id.* This precedent has remained undisturbed for four decades despite the Board's changing composition and attitudes toward graduate teaching assistants.

Thus, notwithstanding the decision in *NYU I* concerning other graduate student assistants, the Board affirmed the Regional Director's decision excluding science department research assistants funded by external grants. The Regional Director found that "students classified as RAs . . . are performing the research required for their dissertations, which is the same research for which the professor has obtained an outside grant." *NYU I*, 332 NLRB at 1214. The Regional Director also noted that "[n]o specific services are required of these RAs – the students are simply expected to progress towards their dissertations." *Id.* In concluding that these

research assistants were like the research assistants in *Leland Stanford*, the Regional Director explained:

> These . . . RAs have no expectations placed upon them other than their academic advancement, which involves research. They receive stipends and tuition remission as do other GAs, RAs, and TAs, but are not required to commit a set number of hours performing specific tasks for NYU. The research they perform is the same research they would perform as part of their studies in order to complete their dissertation, regardless of whether they received funding. The funding for the Sackler GAs[14] and the science RAs, therefore, is more akin to a scholarship.

Id. at 1220.

The Regional Director also rejected the assertion that research assistants performed services for NYU by helping to fulfill its obligations under research grants, or helping to increase the stature of the University and faculty, holding that the fact that the University derived such benefits was "not directly relevant to the inquiry of whether an individual is providing services to the Employer under its control in exchange for compensation." *Id.* at 1220 n.50, 1221.

This long-standing precedent is and should remain controlling, and Petitioner has made no showing that would render it inapplicable here. As in *NYU I* and *Leland Stanford,* the compensation received by Columbia's research assistants is a form of financial aid that does not vary based on the number of hours a student spends on research. Research assistants at Columbia perform the same duties in the laboratory as any other students; they are funded solely to enable them to complete their doctoral degrees, as they would be if they were receiving a scholarship. *See NYU I*, 332 NLRB at 1220.

Even if the Board applies a common law test, graduate research assistants simply are not employees because the research they perform for the University is inseparable from the research

[14] The Sackler GAs were students in the Sackler Institute of Biomedical Sciences who were performing research on externally funded research grants.

necessary to acquire their advanced degree. If the relationship between graduate teaching assistants and the University is *overwhelmingly* educational, the relationship between graduate research assistants and the University is *entirely* educational.

The record demonstrates that the ultimate purpose and day-to-day work involved in a research assistantship is nothing more than the research that is the basis for the student's own dissertation. (Decision at 13: "All doctoral students who are Research Officers are working on research leading to their dissertations.") (Decision at 28: "Research performed by students . . . was presented as mostly, if not entirely, in the service of the students' own academic achievement. In many cases it is indistinguishable from the research underpinning doctoral dissertations or equivalent final projects.") (Tr. 72; 116; 278; 409-10; 775; Empl. Ex. 2) The student's research typically occurs within the context of a larger research effort, under the tutelage of a faculty member who serves as the sponsor or mentor to graduate students working in his or her laboratory. (Tr. 71; 409-11) Generally, the faculty member's research offers the student preliminary work upon which to base his or her thesis. (Tr. 775) The student's original research builds on the faculty member's research, simultaneously contributing to the faculty member's research program and advancing the student's own work on his or her dissertation required to obtain the Ph.D. degree. Significantly, because the student's research on the advisor's project overlaps with his or her original research, it is impossible to separate the time spent on the student's dissertation work from his/her time working on the faculty advisor's research. (Tr. 801-02: "It's all the same."); (Tr. 662) In other words, the research assistants' study and work are identical.

The inextricable relationship between the student's research assistant work and his or her dissertation research is identical for doctoral students performing research under grants in

laboratories at the Engineering School and the Biomedical Sciences campus. (Tr. 662: "It's one and the same. They align. So the research that the student conducts aligns with the research of the grant. And so as they are working on the grant, they are developing knowledge that will make it into the papers and the dissertation they would write.") (Tr. 983: "They're the same thing. Their dissertation, their written dissertation is going to be a record of the research that they conducted in the laboratory during their Doctoral training.")

Furthermore, there is no difference between what research assistants do and what Ph.D. students without research appointments do. They all pursue their thesis work, and they all receive the same financial support, regardless of whether they hold research appointments. (Tr. 972-73; 1019-20; 1024-25; Empl. Ex. 116) In this respect, the financial support provided to research assistants is not "compensation" for work, but rather stipends provided to all students to facilitate the students' goals and the University's mission of training the next generation of researchers.

In sum, while research assistants provide faculty with valuable assistance, the purpose of appointing research assistants is to educate and train graduate students to become efficient and competent researchers in an area of their choice that ultimately leads to a dissertation. These positions allow students to complete a doctoral dissertation and provide them with the skills needed to become first-rate researchers. This is not a "master–servant" relationship. Rather, students perform work as their own "masters" in pursuit of their own advanced doctoral degree. The direction exercised by the faculty members is more properly characterized as mentorship and guidance provided as part of the academic program. The "compensation" the students receive is in essence financial aid, not "compensation" for services. Under any conceivable test, Columbia's research assistants are not employees.

Even if Columbia's research assistants supported on external grants could be considered employees, the same conclusion could not apply to students whose research is supported by a training grant.[15] According to the NIH, the purpose of a training grant is to "develop or enhance research training opportunities for individuals, selected by the institution, who are training for careers in specified areas of biomedical, behavioral, and clinical research" in order to "ensure that a diverse and highly trained workforce is available in adequate numbers and in appropriate research areas and fields to carry out the nation's biomedical and behavioral research agenda." (Tr. 989; Empl. Ex. 118; Decision at 14) Departments seeking these grants are required to create a training program for students under the grant which has a curricular element, i.e., coursework in the training area, and also networking and teambuilding activities in which the students interact with faculty members assigned to the program. (Tr. 989-91) In contrast to a Graduate Research Assistant who is supported by a research grant directly tied to a particular research project, a training grant is intended simply to provide for the training of the student. (Tr. 985-86) Moreover, as explained by NIH's policy statement, trainees under training grants "receive a stipend as a subsistence allowance to help defray living expenses during the research training experience," and "[t]he stipend is not 'salary' and is not provided as a condition of employment." (Empl. Ex. 118; Tr. 996) There is simply no aspect of this relationship with Columbia that could be viewed as employment under any possible definition, and these students should, therefore, be excluded from any bargaining unit.

B. Collective Bargaining with Research Assistants Would Necessarily Intrude on Academic Issues.

Because the relationship between the University and all of its research assistants is entirely educational, bargaining over the research they perform would intrude on academic issues

[15] Biomedical Sciences Ph.D. students supported by training grants do not receive an academic appointment. (Decision at 14; Tr. 995)

to an even greater extent than in the case of graduate teaching assistants. First, as the research performed is so completely intertwined with the student's dissertation, it would be impossible to separate hours spent as a research assistant from hours spent advancing the dissertation. Accordingly, bargaining over hours of work would necessarily interfere with academic requirements with respect to how much time a student spends pursuing his or her academic degree. Second, as research assistants receive the same financial support as graduate students who are not research assistants, bargaining over "wages" would interfere with the level of financial aid the University provides to *all* students. Third, as the research is the same, any evaluation of the quality of work performed as an assistant should be the same as the evaluation of the student's progress as a degree candidate, which means that bargaining over performance standards for and evaluations of research assistants necessarily equates to bargaining over academic standards and grades. Fourth, if students strike and perform no research, their academic standing could be jeopardized absent bargaining over changed academic standards. Finally, collective bargaining would interfere with the student/faculty relationship. The prospect of students and the faculty members who serve as their mentors and thesis advisors opposing each other in bargaining, in grievances and arbitrations and perhaps in a strike would certainly strain, if not irreparably damage, those relationships.

III. MASTER'S DEGREE AND UNDERGRADUATE STUDENTS SHOULD BE EXCLUDED FROM ANY BARGAINING UNIT.

A. Undergraduate Students Are Not Employees.

A reconsideration of *Brown* should have no effect on the status of undergraduate students because *Brown* (and *NYU I*) dealt exclusively with graduate students. Regardless of *Brown*'s fate, undergraduate students at Columbia should still be excluded from the bargaining unit. Extending the Act into the much broader universe of millions of undergraduate students at

private colleges and universities, including students on work-study assignments, is both unwise and unwarranted in light of the long line of Board decisions holding that undergraduates working for the universities they attend should be excluded from bargaining units of regular employees. *See, e.g., San Francisco Art Inst.*, 226 NLRB 1251, 1251-52 (1976); *Saga Food Serv. of CA*, 212 NLRB 786, 787 (1974); *see also NLRB v. Certified Testing Labs., Inc.*, 387 F.2d 275, 277 (3d Cir. 1967). Declaring undergraduate students to be employees would have far-reaching, destructive consequences, including isolating student-employees, marginalizing the importance of academic programs, and altering the developmental and educational opportunities provided by these positions. Financial-aid-based work-study assignments, for instance, might be eliminated, to the detriment of students. Nothing in the record of this case, and nothing in *Brown*, supports such a profound change.

In *San Francisco Art Institute*, the Board held that a unit composed of undergraduate student janitors was inappropriate and would "not effectuate the policies of the Act" because the students did not manifest a sufficient interest in the terms and conditions of their employment to warrant representation. 226 NLRB at 1252. The Board relied upon "the brief nature of the students' employment tenure, . . . the nature of compensation for some of the students, and . . . the fact that students are concerned primarily with their studies rather than with their part-time employment." *Id.* According to the Board, "[t]he fact that the student janitors who presently seek representation attend the institution for which they work brings into sharp and special focus the very tenuous secondary interest that these students have in their part-time employment." *Id.*

Similarly, in *Saga Food Service of California*, the Board excluded students from a bargaining unit of food service employees, pointing out that "[i]n view of the nature of [the students'] employment tenure and our conclusion that their primary concern is their studies

rather than part-time employment, we find that it would not effectuate the policies of the Act to direct an election among them. . . ." 212 NLRB at 787 n.9; *see Macke Co.*, 211 NLRB 90, 91 (1974) ("It is evident that the primary concern of the students is the completion of their studies, which prepare them for different occupations or fields of endeavor, and that their present employment is only incidental to their academic objectives.").

B. Masters and Undergraduate Students Are Temporary Employees, If They Are Employees at All.

Masters and undergraduate students are not employees because their relationship with the University is primarily educational rather than economic. Even if Masters and undergraduate students could be considered "employees," the nature of their "employment" is purely temporary, which means they should not be entitled to engage in collective bargaining under the Act. As a general matter, the Board's determination as to which employees are eligible to participate in an election is intended "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment. . . ." *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (2002). To this end, the Board has repeatedly held that "[w]here employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment, such employees are excluded as temporary." *NYU I*, 332 NLRB at 1221 (Hurtgen M., concurring) (citations omitted); *see Goddard Coll.*, 216 NLRB 457, 458 (1975) (visiting faculty hired for set terms of one semester or one year); *Trs. of the Stevens Inst. Of Tech,*, 222 NLRB 16, 16 (1976) (visiting faculty member serving under one-year contract with no expectation of future employment); *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992) (employee hired for specific project of several months' duration). This is because temporary employees do not have a sufficient interest

in the outcome of collective bargaining to participate. *Columbus Symphony Orchestra, Inc.*, 350 NLRB 523, 524 (2007).

According to the Regional Director, "[t]he evidence is clear in this record that, on average, undergraduates and Master's Degree instructional assistants serve in the classifications included in the petitioned-for unit for a far shorter duration than do doctoral students." (Decision at 29-30) "While doctoral students, on average, are appointed for just over nine semesters, undergraduates are appointed for an average of just over two semesters and Master's and 'First Professional' students for an average of just under two semesters." (*Id.*) Board precedent is clear that employment for such a limited duration is insufficient to confer collective bargaining rights. *See Saga Food Serv.*, 212 NLRB at 786, 787 n.9; *San Francisco Art Inst.*, 226 NLRB at 1252.[16]

Even in *NYU I*, graduate students working as graders and tutors were excluded from the unit as temporary because they worked for a brief period up to one semester and had no substantial expectancy of continued employment:

> [Graders and tutors'] employment is sporadic and irregular. The varying assignments (from 1 week to one semester) are for relatively small, finite periods of time, and there was no evidence that graders and tutors can anticipate a string of assignments or the same assignment one semester after another. Thus, graders and tutors are temporary employees. Where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment, such employees are excluded as temporary.

332 NLRB at 1221.

[16] In *University of West Los Angeles*, 321 NLRB 61 (1996), the Board distinguished these cases and found that students working as clerks in a university library were properly included in a non-student bargaining unit because they often continued in the same positions after graduation. They were not temporary employees because the prospect of "termination is not so definite as to dispel a reasonable contemplation of continued employment." *Id.*

More recently, in *Columbia University*, 2-RC-22358 (DDE Feb. 11, 2002) ("*Columbia I*"),[17] the Regional Director relied on *NYU I* and excluded as temporary a number of student positions based on their limited duration. (*Id.* at 36) Specifically, the Regional Director excluded SIPA Teaching Assistants and Course Assistants – some of the very same positions at issue here:

> As masters' degree students, SIPA's TA's and Course Assistants generally are students for only two years. As noted, about half of SIPA's TA's and Course Assistants are appointed in their position for one semester, and the rest are appointed for only one additional semester. SIPA's TA's and Course Assistants are thus similar to the graders and tutors in *NYU* [*I*], with little expectation of serving for more than a finite period of time, and accordingly, I find that they are properly excluded from the unit.

(*Id.*) The Regional Director reached this conclusion notwithstanding her finding that SIPA teaching assistants and Course Assistants "perform many of the same duties as the University's TA's as a whole." (*Id.*) The Regional Director also applied this rationale to exclude Program Assistants in SIPA (half appointed for one semester and half appointed for an additional semester), positions that are again at issue in this case. (*Id.* at 36, 45-46) The Regional Director also excluded from the bargaining unit: Departmental Research Assistants in the Film division of the School of the Arts (generally appointed for one semester only); Teaching Fellows in the Law School (generally serve for one semester); Research Assistants in the Law School (most do not serve more than one semester); and Service Fellows in the School of the Arts (appointed for one semester or one year at a time). (*Id.* at 45-46)

The evidence regarding Masters and undergraduate students at Columbia is consistent with *Saga Food Service, San Francisco Art Institute,* and *Columbia I*. Indeed, the temporary nature of the Masters and undergraduate student positions at Columbia is similar to the grader

[17] The Regional Director's decision in *Columbia I* was vacated in light of *Brown*.

and tutor positions in *NYU I*. 332 NLRB at 1221. There is no dispute that Masters and undergraduate student positions almost all last for only one – or at most two – semesters. Dr. Stephen Rittenberg, Vice Provost for Academic Administration at Columbia, conducted a study analyzing the average length of appointment for doctoral, Masters and undergraduate students who graduated from 2012 through 2015, and who held an instructional or research appointment. (Decision at 15; Empl. Ex. 4) He found that while doctoral students were appointed for an average of 9.19 terms during their academic studies, Masters students were appointed for only 1.88 terms, and undergraduates for 2.37 terms.[18] (*Id.*)

The Regional Director's attempt to distinguish *Saga Food Service* was unavailing; nothing in that case supports the notion that, "While the Board references the fewer hours worked by students and their temporary status as employees in that case, this factor is a minor one among several considered." (Decision at 30) Likewise, the Regional Director sidestepped the significance in this context of *San Francisco Art Institute* by claiming that it is "a case involving inclusion of temporary part-time student employees in a unit with permanent full-time non-student employees, not whether students are properly excluded from a unit of other students based on differences in their duration in position." (*Id.*) To the contrary, the Board's refusal in both of these cases to certify a separate unit of students was based on a direct holding that a bargaining unit of students in positions of limited duration at the school in which they are enrolled is inappropriate under the Act. As stated in both decisions, the students cannot comprise a bargaining unit because "of the nature of their employment tenure and our conclusion that their primary concern is their studies rather than their part-time employment." *Saga Food*

[18] Dr. Rittenberg's study used "terms" as the measure of appointments, rather than years, because there are three academic terms each year at Columbia: Fall, Spring and Summer. Thus, a student could theoretically be appointed for three terms in a single academic year. (Tr. 72-73)

Serv., 212 NLRB at 787 n.9, *San Francisco Art Inst.* 226 NLRB at 1251-52.

The Regional Director also ignored clear similarities between the instant case and *Columbia I*, "distinguishing" that decision – without further explanation – solely on the basis that *Columbia I* was a 2002 case. The evidence here with respect to Masters students is on all fours with that case. And although the Regional Director correctly noted that *Columbia I* included undergraduate teaching assistants in the bargaining unit, she failed to recognize that the evidentiary basis that existed for that finding is no longer present. Specifically, that finding was based on evidence that 70 undergraduates had served as teaching assistants in the Computer Science department for up to 5 semesters. Those facts have changed significantly since 2001. The vast majority of undergraduates currently appointed to TA III positions, including approximately 155 undergraduates appointed to such positions in GSAS during the Fall of 2014, served for only two semesters. (Tr. 222; Empl. Exs. 3; 4) Most significantly, there are now fewer than 30 undergraduate TA IIIs in Computer Science who serve for one to three years. (Decision at 23; Tr. 669-70, 672-74) As explained by Soulaymane Kachani, the Vice Dean of the School of Engineering, these are outstanding undergraduate students who are being groomed by faculty to go to graduate school while they are serving as a TA III. (Decision at 23; Tr. 669-70) Thus, the experience of undergraduates in Computer Sciences is not typical of TAs generally, and should not determine the status of all other TAs..

Simply put, *Saga Food Services* and *San Francisco Art Institute* govern students employed by schools in which they are enrolled and whose positions are of limited duration; the Regional Director erred by failing to follow those decisions.[19]

[19] *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28 (2010), which was not addressed by the Regional Director, does not support inclusion of the Masters and undergraduate students in a bargaining unit. In that case, the Board held that a bargaining unit consisting entirely of

IV. A UNIT OF GRADUATE STUDENT ASSISTANTS, MASTER'S DEGREE STUDENTS AND UNDERGRADUATES WOULD NOT BE APPROPRIATE BECAUSE DOCTORAL STUDENTS DO NOT SHARE A COMMUNITY OF INTEREST WITH MASTERS AND UNDERGRADUATE STUDENTS.

In determining whether a community of interest exists, the Board analyzes factors such as similarity of skills, job overlap between classifications, terms and conditions of employment, employee interchange, integration with the Employer's other employees, separate supervision, the collective bargaining history, and whether employees are organized into a separate department. *See Wheeling Island Gaming, Inc.*, 355 NLRB 637, 641 (2010).

Rather than conduct that analysis to determine whether a community of interest exists among doctoral student assistants, and Masters and undergraduate students, the Regional Director stated only that Masters and undergraduate students "may share a community of interest with doctoral candidates because they are all performing essentially the same work." (Decision at 30) The result is a putative bargaining unit of students with vastly different career aspirations, academic pursuits, duties, responsibilities, and terms and conditions of service. A proper application of the community of interest test demonstrates that – even if they were not considered temporary – Master's degree and undergraduate students should not be in the same bargaining unit as doctoral students.

The record demonstrates that undergraduate and Masters student assistants perform largely different functions than Ph.D. student assistants. Undergraduate and Masters assistants typically grade homework assignments or assist professors with the administrative tasks of running a large lecture class. (Tr. 220; 414) For example, undergraduates who serve as TA IIIs

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musicians who worked intermittently was appropriate. The decision was premised on unique conditions in the entertainment industry and utilized specific eligibility formula for that industry. Furthermore, there was evidence that some employees had "an expectancy of future employment." *Id.* at 1, n.4.

in the Mathematics department typically assist in computer labs, grade homework, lead problem sections or staff the help room. (Decision at 10, 16; Tr. 69-70; 222) Undergraduate assistants are prohibited from grading exams. (Tr. 222)

M.A. students who serve as Teaching Assistants and Readers grade exams, papers or homework. (Decision at 10; Tr. 70; 220; 414) Those who hold positions as Course Assistants, Graders, and Lab Assistants help with the administration of a course, which involves printing homework assignments, collecting homework, assisting with the grading of homework, proctoring exams, and assisting students in labs to perform the experiments that are assigned. (Decision at 13; Tr. 667-69; 695-96) M.A. students who hold positions as Service Fellows and Program Assistants also perform administrative and support functions that do not involve teaching. (Decision at 24; Empl. Ex. 90; Tr. 376)

Although doctoral teaching assistants may at times perform administrative tasks, their core functions all relate to teaching or training to teach, and are thus more advanced and varied. (Decision at 10, 16; Tr. 69-70; 222; 664-65; 889) Doctoral teaching assistants in GSAS, for instance, may read and grade assignments or exams, lead exam review sessions, run discussion sections or labs, teach sections of select undergraduate courses, attend lectures, hold office hours, and/or assist an instructor with the preparation of materials. (Decision at 10-11; Tr. 68-69; 203-04; Empl. Exs. 39, 76) The nature of their responsibilities varies significantly based on the nature and requirements of the academic program and the training that they need in their specific field. (Decision at 10; Tr. 307-08) Students typically begin with simpler responsibilities in their first year, taking on functions with increasing responsibility and independence in their later years to gradually prepare them for independent teaching. (Decision at 10; Empl. Ex. 40; Tr. 812-15) Because doctoral teaching assistants have more teaching responsibilities than Masters student

assistants, they receive mandatory orientation and extensive training on a wide range of issues involved in preparing for a teaching career, as well as the specific technical aspects such as preparing and presenting a lecture and a syllabus. (Decision at 9-10; Tr. 206-07; 312; 315-16; 321-23; 631-32; 824-27; 858-59; Empl. Ex. 40, 41; 74) Masters and undergraduate student assistants do not independently teach classes on their own, and receive no such training.

Preceptors are advanced GSAS doctoral students who teach a section of Contemporary Civilization or Literature Humanities, which are full-year courses in the undergraduate Core Curriculum that meet twice a week for two hours each time. (Decision at 11-12) Preceptor duties include all of the responsibilities of teaching a course, such as lecturing, administering and grading exams and papers, submitting final grades for the course, and holding office hours. (Tr. 164-65)

Thus, while a student seeking assistance in a Help Room may not differentiate between an undergraduate TA III who is helping him and a doctoral student in that limited circumstance, the record is clear that doctoral students perform far more sophisticated tasks and have greater responsibilities than Masters and undergraduate students.

Even assuming *arguendo* that the groups performed the same work (which they do not), such a "single element of common interest does not . . . supply a sufficient bond to overcome the diversity of interests among employees in this otherwise random group of heterogeneous classifications." *The Grand*, 197 NLRB 1105, 1106 (1972); *San Francisco Art Inst.*, 226 NLRB at 1252 (no community of interest even though part-time student janitors performed the same job functions as the full-time janitor). Indeed, the record establishes that undergraduate and Masters students lack a community of interest with Ph.D. students in a myriad of ways.

First, these different types of student have entirely different interests and objectives, only part of which is reflected in the fact that undergraduate and Masters students spend a much shorter period as assistants than doctoral students. Doctoral students pursue the highest degree in their field so that they may become the next generation of scholars, academics and scientists. (Tr. 625-26; 652-53; 746; 815; Empl. Exs. 2; 22; 25; 32) Undergraduate and Masters students are in a completely different situation: they are not preparing for a career in academia, and the limited role they play as an assistant reflects that fact. Moreover, whereas "the purpose and reason for graduate education is the production of new knowledge, the advancement of whatever field we may be speaking about," undergraduate education focuses on the "transmission of received knowledge" to undergraduates. (Tr. 271; 769-70; 1021)

Doctoral students also commit far more time to earning their degree than Masters or undergraduate students. While the time it takes to obtain a Ph.D. degree varies from five to nine years, (Decision at 5), M.A. programs typically take one year or slightly longer. (Tr. 413-14; 832; Empl. Ex. 25) While undergraduate programs typically last four years, the goals and character of the undergraduate experience stand in stark contrast to the experience of obtaining a Ph.D. degree.

Second, unlike doctoral students, undergraduate and Masters students are not required to hold instructional or research positions. Indeed, only a limited number of these positions are available to them as an optional means of receiving financial aid from Columbia. Undergraduate and Masters students who wish to focus solely on their classes may do so. To the contrary, Ph.D. students are required to hold instructional and research positions, because the teaching and research they perform is an integral (and thus mandatory) component of the training they receive in their programs.

Third, as the Regional Director recognized, undergraduate and Masters students are compensated in an entirely different manner than Ph.D. students, and are required to pay substantial tuition to attend school, unlike Ph.D. students, who are fully funded and do not pay tuition for their studies. (Decision at 30) Tuition for M.A. students is nearly $50,000 per year. (Decision at 7; Tr. 299-300; 414; 832) Those students can cover only a relatively small amount of that by serving as a TA. (Decision at 7; Tr. 414; Empl. Ex. 3) For example, TA IIIs in the Mathematics department receive a stipend of $1,800 per semester. (Decision at 10; Tr. 222-23; 245) Similarly, Readers in GSAS receive a $1,800 tuition rebate and a $1,800 stipend per semester, (Tr. 220), and Course Assistants typically receive financial aid consisting of a $1,800-$2,500 stipend per semester. (Tr. 668; 674; 694)

All doctoral students enrolled in GSAS receive the standard Fellowship Package, subject only to the student making satisfactory progress toward the doctoral degree. (Decision at 6) The Fellowship Package consists of a stipend of $28,586 (for academic year 2014-15), full tuition, payment for student health services, University facilities fees, a health insurance premium, and guaranteed access to student housing. (Tr. 299-300; Empl. Ex. 38; *see also* Empl. Exs. 22; 23; 36; 37; 99) The total value of the Fellowship Package for the past year was $73,617 for a student in the Humanities and Social Sciences (students in the Natural Sciences received a stipend of $35,048, with a total value of $81,903). (Empl. Exs. 36; 37; 99; Tr. 297)

Accordingly, issues likely to be important to Ph.D. students, such as the quality of health insurance, the availability of health coverage for spouses and other dependents, or the quality, cost and options of student housing, are inapposite to Masters and undergraduate students. In addition, undergraduate and M.A. students are under an entirely different set of pressures to finance their education through financial aid or other means. In one bargaining unit, it would be

difficult if not impossible for these disparate groups to coalesce around common bargaining objectives.

Fourth, the compensation received by undergraduate and Masters students is directly tied to the service they provide. Masters students only receive a stipend or tuition remission during semesters in which they hold an academic appointment. To the contrary, doctoral students receive the same Fellowship Package each year (subject to annual increases) regardless of whether they have teaching or research responsibilities in a given year — students will receive the same package in year one as in year two even if they only teach in year two. (Decision at 6; Tr. 301-03; 633) In the Humanities and Social Sciences, doctoral students typically do not hold an instructional or research appointment in their first or fifth years of study. (Decision at 6; Tr. 301-02) Yet, these students receive the same Fellowship Package during these years as they do when they are appointed to teach. (Decision at 6; Tr. 302) Ph.D. students typically have one or more years where they do not hold an academic appointment, yet they all receive a funding package identical to students in the same program who are appointed.

Upon analysis of all of these factors, it is clear that Masters and undergraduate students do not share a community of interest with Ph.D. students, and that the Regional Director's finding undermines the Board's long-standing holding that a single unit is not appropriate where one group of employees is dissimilar from those in another group. *See Swift & Co.*, 129 NLRB 1391, 1394 (1961). Indeed, Board precedent is clear that in determining the appropriate scope of a bargaining unit, the Board will not certify a grouping of employees that is "arbitrary" or "heterogeneous." *Am. Cyanamid Co.*, 110 NLRB 89, 95 (1954). Although the Board has articulated the importance of being "especially watchful in guarding the rights of minority groups whose . . . interests differ in kind from the bulk of the [bargaining unit]," the Regional

Director ignored this principle, *Syracuse Univ.*, 204 NLRB 641, 643 (1973), and attempted to create an over-inclusive bargaining unit that is exposed to significant dangers of conflicts of interests between the "minority interest group," which may become "submerged in an overly large unit." *T.K. Harvin & Sons*, 316 NLRB 510, 533 (1995).

CONCLUSION

The Regional Director's dismissal of the Petition should be affirmed because: (i) graduate student assistants are not employees within the meaning of Section 2(3) of the Act; and (ii) Master's degree students and undergraduate students are temporary employees who should be excluded from collective bargaining.

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