

**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

**CONDITIONAL REQUEST FOR REVIEW OF
THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK**

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The Trustees of Columbia University in the City of New York (“Columbia” or the “University”), pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board, submits this Conditional Request for Review of the Supplemental Decision and Order Dismissing Petition (“Decision”) issued by the Regional Director, Region 2, on October 30, 2015. Columbia does not request review of the Decision insofar as it dismisses the petition filed by Graduate Workers of Columbia – GWC, UAW (“GWC” or “Petitioner”) in accordance with *Brown University*, 342 NLRB 483 (2004) (“*Brown*”). However, in the event that the Board grants review of the Decision in order to reconsider *Brown*, Columbia requests that the Board also review and reverse the Decision insofar as it included in the bargaining unit: (1) Columbia’s undergraduate and Masters students with instructional appointments; and (2) students supported by training grants.

Review is warranted because the Regional Director failed to conduct a necessary analysis of whether a community of interest exists among doctoral, Masters, and undergraduate students. As a result, she created a bargaining unit consisting of students with vastly different career aspirations, academic pursuits, duties and responsibilities, and terms and conditions of service. Particularly if *Brown* is to be reconsidered, the absence of direct precedent on whether and under what circumstances Masters and undergraduate student may be included in a unit with doctoral students, combined with the paucity of analysis in this case, requires that the Board thoughtfully address the issues.

In addition, the Regional Director departed from longstanding Board precedent regarding students in general finding, without explanation, that the duration of an appointment is an insufficient basis upon which to exclude Masters and undergraduate students. Lastly, the Regional Director erred by including in the bargaining unit students on

training grants because those students would not qualify as employees even if *Brown* were reversed.

Accordingly, in the event *Brown* is reconsidered, there are compelling reasons for the Board to review and reverse the Regional Director's holding that undergraduate and Masters students with instructional appointments and graduate students supported by training grants should be included in a bargaining unit with doctoral students serving as teaching assistants and research assistants. In addition, substantial questions of law and policy are raised because: (1) there is no direct precedent regarding the standard that should apply to determine an appropriate bargaining unit of student assistants or whether Masters and undergraduate student assistants constitute temporary employees; and (2) the Regional Director's decision is, in any event, a departure from the officially reported Board precedent that exists as to other types of student employees and employees generally. NLRB Rules and Regulations, Section 102.67 (1).

Notably, the Board recognized the need to address these same issues regarding the scope of any bargaining unit of graduate student assistants, in the event *Brown* were reversed, when it invited briefing three years ago in *New York University* (Case 02-RC-023481) and *Polytechnic Institute of New York University* (Case 29-RC-012054). There, the Board invited the parties and *amici* to address in relevant part the following questions:

1. If the Board were to conclude that graduate student assistants may be statutory employees, in what circumstances, if any, would a separate bargaining unit of graduate student assistants be appropriate under the Act?
2. If the Board were to conclude that graduate student assistants may be statutory employees, what standard should the Board apply to determine (a) whether such assistants constitute temporary employees and (b) what the

appropriate bargaining unit placement of assistants determined to be temporary employees should be?¹

Those cases were subsequently resolved without a decision by the Board. The same reasons that warranted review of the above questions in those cases are clearly present here. In the event that the Board grants review of this case to reconsider whether graduate student assistants may be statutory employees, it should also grant Columbia's request that it review the bargaining unit issues addressed by the Regional Director.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

1. The Prior Proceedings

On December 17, 2014, Petitioner filed a petition seeking to represent the following bargaining unit of student instructional and research assistants at Columbia:

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.

(Decision at 1; Bd. Ex. 1A)² By stipulation of the parties, the petition was amended to delete the classifications of Law Associate, Instructor and Listening Assistant from the list of inclusions in the petitioned-for bargaining unit. (Decision at 1 n. 2)

¹ Notice and Invitation to File Briefs, dated June 22, 2012.

² Employer Exhibits are referred to herein as "Empl. Ex.", Petitioner Exhibits as "Pet. Ex." and Board Exhibits as "Bd. Ex". Transcript references are indicated as "Tr." followed by the page number.

On January 12, 2015, the Regional Director issued an Order To Show Cause directing Petitioner to “provide written cause as to why this petition should not be dismissed based on the decision in *Brown*” and “identify facts that it intends to present during a hearing that support its position and would distinguish this case from *Brown*.” Columbia replied to the Petitioner’s response on January 27, 2015.

After receipt of these submissions the Regional Director, by Order dated February 6, 2015, dismissed the petition without a hearing based on *Brown*, as it sought an election among graduate students who are not employees entitled to representation under the Act. (Decision at 1)

On February 20, 2015, Petitioner filed a Request for Review, which Columbia timely opposed. On March 13, 2015, the National Labor Relations Board entered a brief order granting Petitioner’s Request for Review “as it raises substantial issues warranting review. *See New York University*, 356 NLRB No. 7 (2010).” (Decision at 1) The Order reinstated the petition, and remanded the case to the Regional Director for a hearing and issuance of a decision. (*Id.*) A hearing began on March 31, 2015 and continued for twelve sessions. (*Id.*) The record closed on June 8, 2015. (*Id.*) The parties submitted post-hearing briefs on June 24, 2015.

2. The Regional Director’s Decision

On October 30, 2015, the Regional Director issued a decision dismissing the Petition in accordance with the holding in *Brown*. The Regional Director went on to address, and reject, Columbia’s argument that even if the Board decides to reverse *Brown*, Masters and undergraduate students with instructional appointments should be excluded from the bargaining unit as temporary employees who do not share a community of interest with doctoral students. (Decision at 29-30) The Regional Director stated that while “[t]he

evidence is clear in this record that, on average, undergraduates and Master's Degree instructional assistants serve in the petitioned-for unit for a far shorter duration than do doctoral students," the "shorter number of terms worked by most undergraduate and Master's students may not suffice to find that they have an insufficient community of interest with the doctoral assistants to be included in the unit." (Decision at 30)

In addition, the Regional Director rejected Columbia's argument that graduate students supported by training grants should be excluded from the bargaining unit. Specifically, the Regional Director stated that "while 'training grant recipient' may not be a classification appropriately included in a unit of graduate student assistants, those who are performing research or instructional tasks equivalent to GRAs or other included classifications should not be excluded merely because their funding is sourced from training grants." (Decision at 31)

In so holding the Regional Director committed error by departing from officially reported Board precedent holding that: (1) students employed by the schools in which they are enrolled in similar circumstances are temporary employees who should be excluded from any bargaining unit; and (2) a single unit is not appropriate where, as here, the interests of one group of employees are dissimilar from those of another group.

ARGUMENT

I. THE DECISION INCORRECTLY FOUND THAT, SHOULD BROWN BE REVERSED, UNDERGRADUATE AND MASTERS STUDENTS AT COLUMBIA SHOULD BE INCLUDED IN A BARGAINING UNIT

As an initial matter, it is undisputed that no direct precedent exists regarding the standard for determining an appropriate bargaining unit of graduate students or whether Masters and undergraduate student assistants constitute temporary employees. Indeed, as already noted, the Board recognized the absence of such precedent in *NYU* (Case 02-RC-

023481) and *Polytechnic Institute of New York University* (Case 29-RC-012054) when it invited briefing on precisely those issues.

The issues are deserving of Board consideration for the same reasons that warranted review in 2012. Moreover, decision by the Regional Director is, in any event, contrary to Board precedent as to other types of student employees and employees generally.

A. Board Precedent Compels the Exclusion of Masters and Undergraduate Students Because They Do Not Share A Community of Interest With Doctoral Students.

To determine whether a petitioned-for bargaining unit is appropriate, the Board generally applies a traditional community of interest analysis. *See Freeman*, Case Nos. 16-RC-070839, 16-RC-070942, 2012 NLRB Reg. Dir. Dec. LEXIS 15, at *34 (Feb. 13, 2012) (citations omitted). The community of interest analysis considers multiple factors, including: 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. *Id.*

The Regional Director failed to appropriately examine the applicable community of interest factors, which demonstrate that Masters and undergraduate students do not belong in the same unit as Ph.D. students. Instead, the Regional Director merely states in conclusory fashion that these students "may share a community of interest with doctoral candidates because they are all performing essentially the same work."³ This finding is both factually erroneous and legally insufficient.

³ Although the Regional Director recognized that the financial compensation to Masters and undergraduate students "differs significantly from that provided to doctoral students," she failed to consider additional factors discussed in Columbia's post-hearing brief. (Decision at 30)

As an initial matter, 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. 220:4-9; 414:10-21) For example, undergraduates who serve as TA IIIs in the Mathematics department typically assist in computer labs, grade homework, lead problem sections or staff the help room. (Decision at 10, 16; Tr. 69:19-70:2; 222:1-5) Undergraduate assistants are prohibited from grading exams. (Tr. 222:3-5)

M.A. students who are appointed as Teaching Assistants and Readers in the Graduate School of Art and Sciences (“GSAS”) grade exams, papers or homework. (Decision at 10; Tr. 70:3-7; 220:4-9; 414:10-21) M.A. students who hold the positions of Course Assistants, Graders and Lab Assistants typically 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 as part of a course assignment, like a homework exercise. (Decision at 13; Tr. 667:23-668:9; 669:6-8; 695:22-696:8) Likewise, M.A. students who hold the positions of Service Fellow and Program Assistant perform administrative and support functions that do not involve teaching. (Decision at 24; Empl. Ex. 90; Tr. 376:12-17)

Ph.D. assistants may at times perform some of the same administrative tasks as undergraduate and Masters assistants, but their core functions are related to actual teaching or to training to be a teacher, and are thus more advanced and varied. (Decision at 10, 16; Tr. 69:19-70:7; 222:1-5; 664:8-18; 665:6-11; 889:7-14) A Teaching Fellow 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. 68:23-69:7; 203:16-204:5; Empl. Exs. 39, 76) The nature of a Teaching Fellow's responsibilities may vary significantly based on the nature and requirements of the academic program and the training that the student needs in his/her specific field. (Decision at 10; Tr. 307:16-308:9) They will typically begin with simpler responsibilities in their first year, taking on functions with increasing responsibility and independence in their later years of teaching: "Teaching fellows should be offered a range of teaching responsibilities with increasing independence and student contact to gradually prepare them for independent teaching." (Decision at 10; Empl. Ex. 40; Tr. 812:24-815:1; 1043:7-16) Because Teaching Fellows have more teaching responsibilities than Masters and undergraduate 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. 206:1-7; 207:6-9; 312:1-17; 315:4-316:8; 321:3-19; 322:24-323:19; 631:18-632:23; 858:19-859:17; 824:11-827:8; 859:1-11; Empl. Ex. 40, 41; 74)

Likewise, 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. 164:19-165:2)

Thus, while a student seeking assistance in a Help Room may not be able to differentiate between an undergraduate TA III who is helping him and a doctoral student in that limited circumstance, the record, viewed in its entirety, 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 Institute*, 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 evidence in 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 are pursuing the highest degree in their field so that they may become the next generation of scholars, academics and scientists. (Tr. 625:21-23; 626:17-24; 652:24-653:5; 746:9-14; 815:2-14; Empl. Exs. 2; 22; 25; 32) Undergraduate and Masters students are in a completely different situation. As explained by Carlos Alonso, Dean of the Graduate School of Arts and Sciences, doctoral education is “the means through which the University reproduces itself as an institution” and creates “the future teachers of the nation.” (Tr. 269:21-270:3) Accordingly, teaching and research are indispensable aspects of doctoral

education. (Tr. 269:17-271:18; 284:14-285:12; 762:1-6; Empl. Exs. 23, 36, 37, 38) Indeed, the cornerstone of the doctoral program is the advancement of academic knowledge through original research. (Tr. 269:17-271:18) Thus, unique to the Ph.D. degree is the requirement that students create and defend a piece of original research and exposition, the dissertation. (Tr. 271:1-18; 752:11-15)

In contrast, students in M.A. and undergraduate programs 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. 271:1-18; 769:13-770:1; 1021:18-22)

Doctoral students also commit far more time to earning their degree than Masters or undergraduate students. Although the time it takes to obtain a Ph.D. degree varies by field, typical times are eight to nine years in the Humanities, six to seven years in the Social Sciences, and five or six years in the Biomedical Sciences.⁴ (Decision at 5) M.A. programs, however, typically take only one year or slightly longer. (Tr. 413:23-414:6; 832:7-13; Empl. Ex. 25) While undergraduate programs typically last four years, the first years of study towards a bachelor degree entail a student taking “core curriculum” courses. In addition, a bachelor degree stands in stark contrast to a Ph.D. degree.

Second, unlike doctoral students, undergraduate and Masters students are not required to hold instructional or research positions. A limited number of these positions are available as optional means of receiving financial aid from Columbia. Undergraduate and Masters

⁴ GSAS has a limit of nine years for completion of the degree. (Tr. 279:11-18)

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)

M.A. students receive very little or no financial assistance and must pay tuition of nearly \$50,000 per year. (Decision at 7; Tr. 299:23-300:1; 414:7-21; 832:14-19) M.A. students can receive a relatively small amount of financial assistance, typically a \$3,000 stipend or tuition remission, by applying for and being awarded an instructional appointment. (Decision at 7; Tr. 414:7-21; Empl. Ex. 3) For example, TA IIIs in the Mathematics department receive a stipend of \$1,800 per semester. (Decision at 10; Tr. 222:17-19; 223:1-2; 245:3-9) Similarly, Readers in GSAS receive a \$1,800 tuition rebate and a \$1,800 stipend per semester, (Tr. 220:10-13), and Course Assistants typically receive financial aid consisting of a \$1,800-\$2,500 stipend per semester. (Tr. 668:19-23; 674:5-7; 694:12-25)

All doctoral students enrolled in GSAS receive a standard five-year funding package (“Fellowship Package”), subject only to the student making satisfactory progress toward the doctoral degree. (Decision at 6; Tr. 297:14-298:1; 200:20-25; 579:23-25; 749:14-22; 809:4-10; 875:9-11; Emp. Ex. 24.) 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. 299:9-

300:21; 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. 297:14-19)

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 — meaning 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. 301:16-303:14; 633:1-5) 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. 301:16-302:6) Yet, these students receive the same Fellowship Package during these years as they do when they are appointed to teach. (Decision at 6; Tr. 302:7-11) 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.

Thus, upon proper analysis of all of the proper factors, it is clear that Masters and undergraduate students do not share a community of interest with Ph.D. students. Accordingly, the Regional Director's finding undermines the Board's longstanding holding that a single unit is not appropriate where one group of employees is dissimilar from those in another group. *Swift & Co.*, 129 NLRB 1391 (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." *American Cyanamid Company*, 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 has ignored this principle. *Syracuse University*, 204 NLRB No. 85, at *643 (1973). In so doing, the Regional Director has improperly condoned 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 No. 90, at *533 (1995).

B. Masters and Undergraduate Students Should Be Excluded From Any Unit Because Their Positions Are Temporary.

Although there is no precedent on this precise issue, the Regional Director departed from the longstanding Board precedent excluding temporary employees from inclusion in a bargaining unit, as well as precedent regarding student employees in general. The Regional Director found that, "[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)

Indeed, the Regional Director noted:

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. Most undergraduates and Masters students are not eligible to hold these positions until the final year — two semesters — of their programs.

(Decision at 30) Board precedent is clear that employment for such a limited duration is insufficient to confer collective bargaining rights.

As a general matter, the Board’s determination as to which employees are eligible to participate in an election under the Act 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 offered by the employer.” *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (2002). To this end, the Board often finds that temporary or “casual” employees do not have a sufficient interest in the outcome of collective bargaining to participate in the process. *Columbus Symphony Orchestra, Inc.*, 350 NLRB 523, 524 (2007). Although the Board has not addressed this issue in the context of Masters and undergraduate student assistants, the Board has held in other cases that students who work for their universities in a variety of part-time positions “are best likened to temporary or casual employees” and has thus historically excluded them from collective bargaining under the Act. *Saga Food Serv. of Calif.*, 212 NLRB 786 (1974); *San Francisco Art Inst.*, 226 NLRB 1251, 1252 (1976).

The Board first held that such student employment is insufficient to confer collective bargaining rights in *Saga Food Service*. In that case, the Board found that student and non-

student food service employees did not share a community of interest sufficient to warrant their inclusion in the same bargaining unit. *Saga Food Service*, 212 NLRB 786, 787 (1974). In so ruling, the Board noted that the rate of turnover among student employees as compared to non-student employees differed, with many students working for the Employer for less than five months. The petitioner there also sought, in the alternative, a unit consisting solely of student food service workers. The Board denied that unit as well, stating:

[i]n view of the nature of [the students'] employment tenure and our conclusion that their primary concern is their studies rather than their part-time employment, we find that it would not effectuate the policies of the Act to direct an election among them as a separate unit for purposes of collective bargaining.

Id. at 787, n.9. Thus, the Board excluded the student workers from comprising a bargaining unit. *Id.*

In *San Francisco Art Institute*, 226 NLRB 1251 (1976), the Board again considered this issue when determining whether to include student janitors in a unit with non-student janitors. The Board first found no community of interest between full-time non-student janitors and student janitors who worked, on average, less than 20 hours per week on a semester by semester basis. 226 NLRB at 1251. In doing so, the Board specifically noted that turnover by students was “relatively high” and no student had ever continued as a full-time janitor after graduation. *Id.* When asked to consider certifying a student-only bargaining unit, the Board concluded that it would “not effectuate the policies of the Act to direct an election” among students only. *San Francisco Art Institute*, 226 NLRB at 1252. The Board cited “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,” adding that “owing to the

rapid turnover that regularly and naturally occurs among student janitors, it is quite possible that by the time an election were conducted and the results certified the composition of the unit would have changed substantially.” *Id.* at 1252.⁵

Thus, in both *Saga Food Service* and *San Francisco Art Institute*, the Board held that the fact that the duration of the student’s employment was limited made it inappropriate to certify such a bargaining unit. In contrast, in *University of West Los Angeles*, 321 NLRB No. 14 (1996), the Board found that students working as clerks in the university law library were properly included in a non-student bargaining unit where the positions were not related to their enrollment as students and they did not have a certain end date to their positions, as evidenced by the fact that students often continued in the same positions after they graduated. *Id.* at 61.

The Board applied these principles in *NYU* to exclude graduate students who acted as “graders” and “tutors” from a bargaining unit of student teaching and research assistants. 332 NLRB at 1221. The Board stated:

[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

⁵ In reaching this conclusion, the Board took note of several decisions in which students working part-time for an employer other than their school were found to be employees under the Act. *Id.*; see, e.g., *Hearst Corp.*, 221 NLRB 324, at 325; *Display Sign Serv., Inc.*, 180 NLRB 49, at 50; *Delight Bakery, Inc.*, 145 NLRB 893, at 905-06 (1964). However, none of these cases involved a determination that a student working for his or her university was an employee under the Act, a distinction that the Board found “critical.” *San Francisco Art Inst.*, 226 NLRB at 1252. Further, unlike here, in both *Hearst* and *Delight Bakery*, the Board noted that the students at issue could continue their employment with the commercial employer following graduation, and in all three cases, the students worked at least 20 hours per week. See 221 NLRB at 325; 180 NLRB 49 at 50; 145 NLRB at 905-06.

duration, or have no substantial expectancy of continued employment, such employees are excluded as temporary.

(*Id.*)

More recently, in *Columbia University*, 2-RC-22358 (DDE February 11, 2002) (“*Columbia I*”),⁶ relying on *NYU*, the Regional Director excluded as temporary a number of student positions based on the limited duration of their appointments. (*Id.* at 36) In that case, the Regional Director excluded School of International and Public Affairs (“SIPA”) TAs and Course Assistants – some of the very same positions at issue here – holding:

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, 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.*) Notably, the Regional Director reached this conclusion notwithstanding her finding that SIPA’s TA’s 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 (about half appointed for one semester and about half appointed for an additional semester), which are the very same positions at issue in this case. (*Columbia I* at 36, 45-46) In addition, the Regional Director excluded from the bargaining unit: DRAs 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

⁶ The Regional Director’s decision in *Columbia I* was vacated in light of the Board’s decision in *Brown*.

Service Fellows in the School of the Arts (appointed for one semester or one year at a time).
(*Columbia I* 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* and distinguishable from *University of West Los Angeles*, as the positions at Columbia are a direct consequence of the students' enrollment at Columbia and are for a limited duration, which in no event can continue beyond graduation. Indeed, the temporary nature of the Masters and undergraduate student positions at Columbia is similar to the grader and tutor positions in *NYU I*. 332 NLRB at 1221. There is no dispute that Masters and undergraduate student positions are almost all for 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 were appointed for 2.37 terms.⁷ (*Id.*)

In addition, the evidence regarding Masters and undergraduate students in specific schools, as discussed below, supports the exclusion of all such students, particularly in light of the parties' stipulation that such evidence would be treated as representative of all other schools and departments. (Tr. 1070:17-25; Joint Ex. 12, at ¶¶ 1-2)

⁷ Dr. Rittenberg's study used "terms" as the measure of appointments, rather than years, since 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. 72:22-73:15)

i. **School of International and Public Affairs**

The School of International and Public Affairs (“SIPA”) offers two M.A. degrees, the Masters of International Affairs and the Masters of Public Administration, both two year programs. (Tr. 702:10-14; 703:12-19)

Second year SIPA students with a 3.4 GPA in their first year are eligible to apply for four types of assistantship positions: Teaching Assistant, Departmental Research Assistant, Reader or Program Assistant.⁸ (Tr. 707:13-708:3) SIPA assistantships typically last one semester, but could be renewed for a second semester in limited circumstances. (Tr. 713:8-15) Notably, during calendar years 2013/14 and 2014/15, not a single student served more than two semesters in an assistantship. (Empl. Ex. 97) In addition, sixty-five percent of the instructional appointments served only one term, while 35% percent of the instructional appointments served two terms. Similarly, SIPA students with a non-instructional position as Program Assistants serve a maximum of two terms, with 27% serving one term and 73% serving two terms. (Empl. Ex. 97)

Accordingly, students holding these positions should be excluded on the same grounds that SIPA TAs, Course Assistants and Program Assistants were excluded in *Columbia I*.

ii. **School of the Arts: MFA Students in Visual Arts, Writing and Film Divisions**

Nearly all of the graduate students in the School of Arts are pursuing the Master of Fine Arts (“MFA”). (Tr. 336:13-24; 342:1-23) MFA degrees are offered in four disciplines: Visual Arts, Film, Writing, and Theater. (Tr. 334:2-10; 336:13-337:14) In the Visual Arts

⁸ Petitioner takes no position as to whether Program Assistants, who provide administrative support, should be included in the unit. (Tr. 728:23-729:2)

program, all students are given the opportunity to serve as a TA for either one or two semesters in a studio class. (Tr. 343:13-344:8; 344:14-18; Empl. Ex. 49) In the Film program, students can be selected to serve as a TA in a lecture or seminar class for one, or a maximum of two, semesters. (Tr. 349:7-350:12) Third year students in Film can also be selected as Preceptors who lead undergraduate labs in screenwriting or filmmaking, typically only for one semester. (Tr. 351:23-352:7; 354:20-353:5) In the Writing program, third year students can serve as Teaching Fellows in undergraduate fiction, non-fiction and poetry workshops, typically only for one semester. (Tr. 355:25-356:3; 357:3-6; 360:25-361:1)

Accordingly, for the reasons already stated, all of these assistants should be excluded as temporary just as DRAs in the Film division of the School of the Arts were excluded in *Columbia I*. (*Columbia I* at 45)

iii. **GSAS Masters Students**

Students in the Masters programs in GSAS are permitted to hold instructional appointments as a Teaching Assistant or Reader. (Tr. 414:7-24) M.A. programs in GSAS are typically 1-2 years, and M.A. students are “virtually never” appointed during their first year. (Tr. 95:18-23; 220:14-221:6; 413:23-414:6) Masters students are appointed to these positions in their second year, and thus would have only one, or at most two, terms of appointment. (Tr. 95:18-25; 220:14-221:2)

iv. **Undergraduate Assistants**

Undergraduate students at Columbia College and the School of Engineering can be appointed to Teaching Assistant III positions. (Tr. 69:20-70:2; 669:20-670:21) TA IIIs in Columbia College typically serve for two semesters, while TA IIIs in the Engineering School typically serve for one to two years. (Tr. 222:17-19; 245:3-9; 669:20-670:7)

Notwithstanding this undisputed evidence, as well as Columbia's eight-page discussion of the relevant law governing this issue in its post-hearing brief, the Regional Director departed from Board precedent and provided only a cursory discussion of the issue. Specifically, the Regional Director disregarded the Board's clear holding in *Saga Food Service*: "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). Nothing in the Board's *Saga Food Service* decision, however, supports such a conclusion. Likewise, the Regional Director misreads *San Francisco Art Institute* when she states 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.*) As discussed above, the Board's refusal to certify a separate unit of students in both cases 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 Service*, 212 NLRB at 787 n. 9, *see also San Francisco Art Institute* 226 NLRB at 1251.

Moreover, the Regional Director ignored the 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 the holding in that case. In addition, although the Regional Director correctly notes that *Columbia I* included undergraduate teaching assistants in the

bargaining unit, she fails to recognize that the evidentiary basis that existed for that finding is no longer present. Specifically, that finding was based on evidence establishing that, in the prior semester, 70 undergraduates had served as TAs in the Computer Science department for a duration of up to 5 semesters. These facts have changed significantly since 2001. The vast majority of undergraduates appointed to TA III positions, including the approximately 155 undergraduates appointed to TA III positions in GSAS during the Fall of 2014, served in the positions for only about two semesters. (Tr. 222:17-19; Empl. Exs. 3; 4) Further, although TA IIIs in Computer Science in the School of Engineering are typically expected to serve for one to two years (Tr. 669:19-670:14), there are now only approximately 20 undergraduate students in that position. (Decision at 23; Tr. 672:18-674:4) As explained by Vice Dean Kachani of the School of Engineering, these are outstanding undergraduate students who do extremely well in a course and are being groomed by faculty to go to graduate school while they are serving as TA III's for that course. (Decision at 23; Tr. 669:17-770:9) Thus, the experience of undergraduates in Computer Sciences is not typical of TAs generally.

Accordingly, *Saga Food Services* and *San Francisco Art Institute* govern the eligibility of students employed by the schools in which they are enrolled and whose positions are of a limited duration, and the Regional Director erred by failing to follow those decisions.

Although not addressed by the Regional Director, the Board's decision in *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28 (2010), does not support inclusion of the Masters and undergraduate students in a bargaining unit here. In that case, the Board held that a bargaining unit consisting entirely of musicians who worked intermittently was appropriate. The decision was premised on the unique conditions in the entertainment

industry and utilized the specific eligibility formula for that industry as articulated in *Julliard School*, 208 NLRB 153 (1974), in determining that the musicians had a sufficient continuing interest in the terms and conditions of their employment. Furthermore, there was evidence that some employees were hired for multiple productions, or were hired during more than one season, so that they had “an expectancy of future employment.” *Kansas City Repertory*, 356 NLRB No. 28 at 1, n. 4.

Kansas City Repertory does not support a finding that Masters and undergraduate students, who have no expectation of continuing or repeated employment in the future, should be accorded collective bargaining rights. *Saga Food Service* and *San Francisco Art Institute* govern the eligibility of students employed by the schools in which they are enrolled and whose positions are of a limited duration. These cases are guided by the specific facts relevant to students in positions at educational institutions where, unlike in the entertainment industry, the students’ positions are limited in duration with no prospect of repetition. Accordingly, *Saga Food Service* and *San Francisco Art Institute*, and not *Kansas City Repertory*, are the controlling precedents and require that Masters and undergraduate students must be excluded from the petitioned-for unit.

II. EVEN IF BROWN IS REVERSED, STUDENTS ON TRAINING GRANTS SHOULD NOT BE INCLUDED IN A BARGAINING UNIT BECAUSE THEY CANNOT BE CONSIDERED STATUTORY EMPLOYEES.

In the event that *Brown* is reversed, students on training grants should not be included in the bargaining unit. Even if research assistants supported on an external grant could be considered statutory employees, the same conclusion could not apply to students whose research is supported by a training grant.⁹ Compare *New York University*, 332 NLRB 1205,

⁹ Biomedical Sciences Ph.D. students supported by training grants do not receive an academic appointment. (Decision at 14; Tr. 995:8-11)

1209 n. 10 (2000) *and Leland Stanford Junior University*, 214 NLRB 621 (1974) (holding that certain research assistants supported on external research grants are not statutory employees).

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. 989:11-21; 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. 989:22-991:16) 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. 985:19-986:15) 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. 996:4-13)

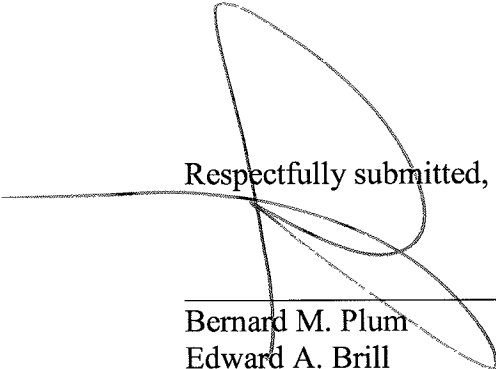
There is no aspect of their relationship with Columbia that could be viewed as employment under any possible definition, and they should, therefore, be excluded from any bargaining unit.

CONCLUSION

In the event that the Board grants review of the Regional Director's Supplemental Decision and Order Dismissing the Petition in order to reconsider the holding in *Brown* that graduate assistants are not employees under the Act, Columbia requests that the Board also review and reverse the Decision insofar as it included in the bargaining unit: (1) Masters and undergraduate students; and (2) students supported by training grants.

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Respectfully submitted,



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