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**

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Petitioner and its *amici* disagree with *Brown* but do little more than recycle the arguments of the dissent in that case. In particular, they urge the Board to ignore the sound policy reasons for not imposing an inherently adversarial bargaining obligation on the collaborative, academic relationship between graduate students and the private universities they attend. To accomplish that result, Petitioner and its *amici* insist that the Board apply a rigid, common law test that would classify graduate assistants as employees simply because they, at times, provide services to the university in exchange for "compensation."

No evidence of a change in circumstances, legal precedent, or any other change is offered to support *Brown*'s reversal. Petitioner presented no evidence or argument to support the employee status of graduate assistants that was not available when *Brown* was decided. As was true then, graduate students attend school to pursue academic and professional goals – not to earn a paycheck. Nothing in the record alters the plain reality that the relationship between graduate student and university is primarily educational rather than economic, and that it thus should not be governed by the National Labor Relations Act. Columbia's conclusion in this regard is shared by our nation's leading universities, and by the most important academic professional associations.[1]

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[1] *See* Brief of *Amici Curiae* Brown University, Cornell University, Dartmouth College, Harvard University, Massachusetts Institute of Technology, University of Pennsylvania, Princeton University, Stanford University, Yale University; *Amici Curiae* Brief of the American Council on Education, the Association of American Medical Colleges, the Association of American Universities, the Association of Jesuit Colleges and Universities, the College and University Professional Association for Human Resources and the National Association of Independent Colleges and Universities; *Amicus* Brief by the Higher Education Council of the Employment Law Alliance; *see also Amicus Curiae* Brief of the National Right to Work Legal Defense and Education Foundation.

I. *BROWN* IS CONSISTENT WITH THE POLICIES AND PURPOSES OF THE ACT

Determination of employee status under the Act cannot be based on a mechanical application of statutory language, especially given the tautological nature of the language at issue. In *Allied Chem. & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971), which held that retired employees are not "employees" within the meaning of Section 2(3), the Court explained that "[i]n doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) with meaning." *Id.* at 168. The Board has similarly recognized "the principle that employee status must be determined against the background of the policies and purposes of the Act." *WBAI Pacifica Found.*, 328 NLRB 1273, 1275 (1999). Indeed, even the cases cited by Petitioner and its *amici* support this principle. *See, e.g. NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995) (Board's interpretation of "employee" to include company workers who are also paid union organizers is consistent with the purposes of the Act); *Sure-Tan Inc. v. NLRB*, 467 U.S. 883 (1984) (extending the Act's coverage to undocumented aliens is consistent with its purpose of encouraging and protecting the collective bargaining process); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (examining the policies of the Act in considering employee status of strikers); *Sunland Constr. Co.*, 309 NLRB 1224 (1992) (analyzing whether protecting paid union organizers as "employees" furthers the policies of Act); *Seattle Opera Ass'n*, 331 NLRB 1072, 1074 (2000) (finding an economic relationship between an opera company and auxiliary choristers; "to find individuals not to be employees because they are compensated at less than the minimum wage . . . contravenes the stated principles of the Act").

Brown's focus on the primary nature of the relationship to determine employee status is consistent with cases interpreting the closely analogous definition of "employee" under the Fair

Labor Standards Act – cases which Petitioner and its *amici* fail to address at all. As explained in Columbia's Brief on Review, the "primary benefit" test adopted by courts to determine employee status under the FLSA provides strong support for the "primary relationship" test adopted in *Brown*. Columbia Br. at 19-20. Specifically, to determine the employee status under the FLSA of interns and trainees, courts have rejected the kind of simple, mechanical test urged upon the Board here in favor of a nuanced, flexible standard that considers and balances various factors. *See id.* (citing *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015), *amended and superseded*, 811 F.3d 528 (2d Cir. 2016); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 526 (6th Cir. 2011)); *see also Berger, et al. v. NCAA, et al.*, Case 1:14-cv-01710-WTL-MJD (S.D. Ind. Feb. 16, 2016) (applying the "totality of circumstances" and the "economic reality of the situation" test to determine that students participating in NCAA athletic teams at the University of Pennsylvania as part of their overall educational program are not employees for FLSA purposes).

Petitioner continues to rely on *Boston Medical Center,* 330 NLRB 152 (1999), the inapplicability of which Columbia has already addressed. Columbia Br. at 29-30. Remarkably, Petitioner asserts that the Board should revert to *New York University*, 332 NLRB 1205 (2000) ("*NYU I*"), because *Boston Medical* "has not been questioned by the courts of appeals" and *NYU I* is consistent with *Boston Medical*. Pet. Br. at 17-18. But neither has *Brown* been questioned by courts of appeals, and it is *Brown* that directly applies to graduate student assistants at private universities. Indeed, because there are significant differences between the house staff in *Boston Medical* and graduate student assistants, *see St. Barnabas Hosp.*, 355 NLRB No. 39 (2010), *Brown*'s consistency (or inconsistency) with *Boston Medical* is irrelevant.

The interpretation of "employee" in the Restatement of Employment Law fails to support

the use of a mechanical common law test to determine whether graduate students are employees. The portion of the Restatement Petitioner relied on, Pet. Br. at 16, is based on *Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230 (11th Cir. 2004), a Title VII case which applied the "economic realities test" to determine employee status. The court found that a number of factors weighed in favor of treating a research assistant as a student, including the fact that much of her work was done to satisfy the lab-work, publication and dissertation requirements of her graduate program. *Id.* at 1234. The court found, however, that these factors were outweighed by other facts demonstrating that the university treated her as an employee. Most significantly, plaintiff was considered an employee under applicable state law and was already covered by a collective bargaining agreement that governed her employment relationship and provided for a stipend, sick leave and other employee benefits. *Id.* The facts here are completely different, and the significance of *Cuddeback* is not the outcome after the court weighed the factors, but the recognition that, to determine the employee status of a student, the overall facts must be balanced in the context of the statutory purpose.[2]

Petitioner asserts that the definition of "professional employee" discloses "the understanding of Congress that student employees working in an advanced intellectual field would be treated as employees in the same fashion as apprentice tradespeople." Pet. Br. at 20. The Act defines a "professional employee" as

> [A]ny employee, who (i) has *completed* the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

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[2] The notes to comment g in the Restatement also state that the NLRB has vacillated on the employee status of graduate students, citing *Brown* and *NYU I*. Restatement (Third) of the Law, Employment, § 102, comment g (2014). While true as to graduate teaching assistants, this statement does not reflect the fact that, for almost forty years, the Board has treated research assistants as not employees under *Leland Stanford* and *NYU I*.

29 U.S.C. § 152(12)(b) (emphasis added). Clause (iv) refers to:

> knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

29 U.S.C. § 152(12)(a).

The conference report states that "[t]his definition in general covers such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35-36 (1947). The interns and residents in *Boston Medical* who already received their advanced academic degrees and were pursuing further training after graduation seem to meet that definition. Indeed, in *Boston Medical*, the Board expressly noted that residents are "junior professional associates" of regular physicians who "possess the types of skills and are required to perform the types of job duties common to other physicians, at similar, albeit not identical, skill levels." 330 NLRB at 161, 167. In contrast, graduate student assistants are *still* enrolled in academic programs to receive their degrees, and thus do not come within that definition. Not only are they performing teaching and research required to fulfill their doctoral degrees, but they pay tuition and student fees, register for classes, take tests, receive grades for their teaching and research and have all the attributes of students in a traditional academic setting. Graduate assistants typically work under close supervision of faculty members who are ultimately responsible for the students' teaching or research. As such, they are neither apprentices nor junior professional associates, and they certainly are not "professional employees." Indeed, the Board has never included these students in the same bargaining unit as faculty. *See, e.g.*, *Adelphi Univ.*, 195 NLRB 639 (1972).

Notably, Petitioner's argument that *Brown* is inconsistent with precedent finding apprentices to be employees relies on cases distinguished or deemed not relevant in *Brown*. Pet.

Br. at 19 (citing *Newport News Shipbuilding & Dry Dock Co*., 57 NLRB 1053 (1944); *Chinatown Planning Council, Inc.*, 290 NLRB 1091 (1988); *Gen. Motors Corp.*, 133 NLRB 1063 (1961)). These cases involved apprentices who received on-the-job training performing the same work in the same workplace as regular employees, with the goal of being promoted to "journeyman" or a similar senior position, as soon as they gained the necessary technical competence. In contrast to apprentices, teaching and research assistants work on their own educational programs within the setting of a large educational institution and are almost always seeking employment after graduation with outside employers, whether in the private sector or academia. There is no expectation of future employment by the same school in which they are enrolled.

Moreover, contrary to Petitioner's assertions, even in apprenticeship cases, the Board examines whether the relationship is predominantly educational or economic, and has found apprentices not to be employees under the Act where the relationship was predominantly educational. *See Towne Chevrolet*, 230 NLRB 479 (1977) (student working for a company as part of a vocational-training program had more of an educational than an employment relationship with employer); *Firmat Mfg. Corp.*, 255 NLRB 1213 (1981) (student working pursuant to high school education apprenticeship program had an educational rather than employment relationship with employer due to educational focus of the position).

II. THE POLICY CONSIDERATIONS THE BOARD RELIED ON IN *BROWN* REMAIN VALID

Petitioner and its *amici* misconstrue what is at stake in this case and make the absurd contention that the "fear that collective bargaining would damage educational institutions is born out of the imagination of those hostile to collective bargaining." Pet. Br. at 24. Columbia has for many years maintained successful collective bargaining relationships with more than a dozen

bargaining units. Columbia is not a stranger to, and certainly has no fear of or hostility to collective bargaining. But that deep familiarity forms the basis for its belief, shared by its *amici*, that given the nature, purpose, and quality of graduate education at private universities, the *Brown* Board correctly recognized the detrimental impact that collective bargaining would have on academic freedom and on student/faculty relations.

Even assuming that no empirical evidence of the deleterious effect of collective bargaining on academic freedom and student/faculty relations exists, there is no justification for tampering with our system of graduate education in private universities by imposing the inherently adversarial rules that govern collective bargaining on academic relationships. Surely, it is not necessary to wait for the assault to be realized to appreciate the threat. There simply is no reason to "take these risks with our nation's excellent private educational system." *Brown*, 342 NLRB at 493.

A. No Empirical Studies Disprove Brown's Concerns

Petitioner relies, as expected, on the Rogers study to suggest that it "contradicts the conjecture by the *Brown* majority." Pet. Br. at 28. In its Brief on Review, Columbia explained why that study provides no support for Petitioner's claim. Columbia Br. at 27-28; *see also* Br. of *Amici Curiae* Brown University, Cornell University, Dartmouth College, Harvard University, Massachusetts Institute of Technology, University of Pennsylvania, Princeton University, Stanford University, Yale University ("Ivy Plus") at 6. It bears emphasis that the study *completely ignored* the concern in *Brown* that graduate student unionization would restrict the freedom of faculty and administration to make academic and educational decisions. *See Brown*, 342 NLRB at 490. The study focused only on students, not faculty. *See* Empl. Ex. 81 at 495.[3]

[3] The questionnaire used in the study asked students questions, such as "As long as I restrict myself to the subject matter of the course, I am free to choose what I say or discuss with students

As faculty did not participate at all, the study provides no basis for any conclusion about academic freedom from the perspective of faculty or university administration. Tr. 558-59 (Farber). Moreover, as Dr. Farber pointed out, the study found no evidence that student-teacher relations were *not* worse in the context of graduate student representation, or that unionization would not have an adverse effect on these relationships at private universities. Indeed, to the extent that the study found any differences in the responses between union and non-union students, these differences were measured so imprecisely that they reflect no more than the difference in responses that one would find in the population as a whole. Tr. 552-54.

The Rogers study also failed to analyze the underlying cause of any differences in student responses. It only looked at each university at a single point in time. As Dr. Farber explained, this flaw, which applies across the board to the results relating to student/faculty relations and students' perception of academic freedom, results in attribution of the differences (or the lack of differences) to the effect or the fact of unionization, when those differences could have been caused by a myriad of other, unexplored factors. Tr. 545-46, 551; *see* Tr. 560 (the design of the study "can't get you to a causal inference that unions caused the difference or didn't cause the difference").

Finally, the Rogers study did not examine laboratory sciences students at all – they, like faculty, were simply not included. Empl. Ex. 81 at 499, 508; *see* Tr. 564. As students in different departments may have widely varying attitudes toward unionization, and different departments may be larger in different schools, the study cannot even claim to be relevant to the hundreds of Columbia science students who hold research assistant positions. As Dr. Farber concluded, one cannot "learn anything at all from this study[,] one way or the other – good or

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in my courses." Empl. Ex. 81 at 503.

bad – about what would happen at Columbia were graduate students to unionize." Tr. 565; *see* Tr. 543-44.

Dr. Hewitt's study (which was available when *Brown* was decided) is also of little value. In Dr. Farber's opinion, one cannot draw a single conclusion from the study because it does not evaluate any relevant variations in subjects. Tr. 566-67. Dr. Hewitt's study simply asked professors in five schools where graduate students are already unionized for their thoughts on collective bargaining and whether they think they have good relationships with students. Tr. 566. To the extent that the study tries to draw the kind of conclusions that the Rogers study attempts to draw, it suffers from the same weaknesses. Tr. 566-67. Indeed, Dr. Hewitt's study concludes only that "it looks like they have pretty good relationships, and things are going okay." Tr. 566.

The studies cited by *amici* Individual Academic Professors of Social Science and Labor Studies are similarly inapposite. Br. at 3. The Julius and Gumport study, cited by the dissent in *Brown*, did not address the effect of unionization on academic freedom. Daniel J. Julius & Patricia J. Gumport, *Graduate Student Unionization: Catalysts and Consequences*, 26 REVIEW OF HIGHER EDUC. No. 2, 187 (2002). With respect to student/teacher relationships, the study's results are ambiguous and ambivalent, finding "no conclusive evidence that collective bargaining in and of itself has compromised the student-faculty relationship in general or resulted in faculty unwillingness to serve as mentors." *Id.* at 201; *see id.* at 203.

The Lee study focused on one public research university and examined barriers to graduate student unionization and how those barriers can be understood from a cultural perspective. Jenny J. Lee *et al.*, *Tangles in the Tapestry: Cultural Barriers to Graduate Student Unionization*, Journal of Higher Education, 75(3): 340-361. In stating that the faculty did not

"perceive their interactions with students as being negatively affected by unionization," the study relies on Professor Hewitt's findings. *Id.* at 356. To the extent the study claims that "graduate students did not feel that unionization negatively affected their relationships with their professors," the study suffers from the same flaw as the Rogers study – it provides only the students' perspective. *Id.* at 355.[4]

B. Experience at NYU and at Public Universities Has No Bearing on Whether Collective Bargaining with Graduate Students Is Detrimental to Academic Freedom or Student/Faculty Relationships

1. The Unique Experience at NYU Does Not Disprove *Brown*'s Concerns

The experience at NYU amply demonstrates the negative impact of collective bargaining between a private university and its graduate assistants. As explained in Columbia's Brief on Review, the NYU experience underscores *Brown's* conclusion that collective bargaining in this context is not compatible either with academic freedom or with the type of student/faculty relationship that is at the core of graduate education. Columbia Br. at 25-26; *see also* Ivy Plus Br. at 6.

Remarkably, Petitioner contends that the NYU Senate Committees' report is "[d]irectly contrary to at least one of the assumptions underlying *Brown*" and that "unionization had been positive for the student/faculty relationship." Pet. Br. at 27. This gross distortion of the report is accomplished by presenting only selected, one sided comments included by the report's authors to reflect the diversity of opinion on campus, rather than the actual conclusions of the report.

[4] The Gross study is not actually a study, but an essay of a former student reflecting on his experience as a graduate student assistant during an organizing drive at University of California-Davis and as a postdoctoral teaching fellow during a campus strike. Andrew Gross, *Campus Union Coalitions and the Corporate University: Organizing at the University of California.* Like the opinions expressed by *amici* Individual Professors of Social Science and Labor Studies, it is of little value in this case because it is based on personal experiences, with no context and no ability for testing.

Petitioner simply ignores numerous comments that focused on the negative impact of unionization:

- Recruitment ("I do not think union representation in its current form does anything good for our [recruitment] efforts . . . My view is that anything that hurts our competitiveness as a Ph.D. program and stifles our ability to adapt in the long run hurts students most, by decreasing the value of their degree" Empl. Ex. 21 at 9-10;
- The quality of the student/faculty relationship ("some faculty feel less comfortable about their communications with TAs and RAs," "the relationship has been hurt," "unionization establishes too much rigidity," and "now some faculty are concerned about major problems, and want official involvement." Empl. Ex. 21 at 10; and
- "I do not believe union representation in its current form agrees with the ideals the university supports;" "a tension between the values of an industrial union and of a research university . . . [a] tension over the nature of a graduate assistantship . . . [which for us] is a form of financial aid" Empl. Ex. 21 at 11.

Similarly, the Faculty Advisory Committee, as a whole committee, concluded "that a traditional employee/employer relationship should not be at the core of students' relationship with the university; educational and intellectual matters are." Empl. Ex. 20 at 1.

Most important, both Committees' reports unequivocally concluded that it was in the best interests of the University to withdraw recognition from the union. Empl. Ex. 21 at 11; Empl. Ex. 20 at 2. The Senate Committees' report's determination to withdraw recognition was explicitly premised on the "realities and risks to maintenance of the University's management rights and academic decision making . . . ." Empl. Ex. 21 at 11. Similarly, the Faculty Advisory Committee concluded 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." Empl. Ex. 20 at 2. There can be no doubt that both faculty reports found that graduate student unionization at NYU presented a real threat to its academic mission.

Moreover, as Columbia explained in its brief, NYU's recent recognition of UAW does not raise the policy concerns at issue in this case because NYU has restructured its doctoral programs to eliminate any requirement to teach, and instead separately compensates students who choose to teach as adjunct faculty. Columbia Br. at 26-27. As the teaching done by NYU teaching assistants is no longer required as part of the academic program, the relationship with students in their capacity as teachers is significantly different from that at Columbia.

Finally, with respect to this point, Petitioner notes that NYU's CBA with the union included language excluding academic matters from collective bargaining. Pet. Br. at 26. To the extent Petitioner suggests that academic freedom could be protected by such language, it assumes other unions would agree to similar language. It also assumes that a union would not challenge or have a vastly different interpretation of that or other agreed upon language. To the contrary, the union at NYU filed numerous grievances and arbitrations challenging the academic autonomy of the university. NYU's success in defending against these challenges hardly disproves *Brown*'s conclusion that academic freedom is threatened, and suggests instead that the student/faculty relationship will be irretrievably altered by the fact that, once collective bargaining is permitted, adversarial dispute resolution procedures become the norm.[5]

2. Collective Bargaining in Public Universities Does Not Support Extending the Act to Private Universities

Echoing the dissent in *Brown*, Petitioner relies on collective bargaining at public universities as "evidence that fears that collective bargaining will damage higher education are

[5] As Columbia's *amici* Ivy Plus universities aptly point out, the "real issue is not *whether* a particular union or university will concede certain issues in bargaining; the issue is *whether they have to, what are the consequences if they do not, and whether, as at NYU, a union will challenge language it agreed to.*" Ivy Plus Br. at 18 n.21. Indeed, "[g]iven the experience of NYU, it is a near certainty that the advent of bargaining with graduate students will irrevocably damage graduate education in the private sector, and potentially undergraduate education as well." *Id.* at 16.

unrealistic." Pet. Br. at 24. The majority in *Brown* correctly explained why this public sector experience is irrelevant. 342 NLRB at 493. Similarly, Columbia explained that, in this context, private universities cannot be compared to public universities. Columbia Br. at 27; *see also* Ivy Plus Br. at 18. This is because almost every state prohibits or restricts strikes by public employees. *See, e.g.*, Vermont St. Title 3, Chap. 27 § 903. In some states, the scope of bargaining over employees enrolled in an academic program is restricted, *see, e.g.*, RCW 41.56.203, while in others state law defines managerial rights which are not subject to bargaining. *See, e.g.*, *Town of Danvers*, 3 MLC 1559, 1571 (1977) (Massachusetts Labor Relations Commission). Similarly, some state courts have limited the list of bargainable subjects. *See Univ. Educ. Ass'n v. Regents of the Univ. of Minn.*, 353 N.W.2d 534 (Minn. 1984). Thus, state laws significantly mitigate the risks that concerned the Board in *Brown* while no similar checks and balances exist in the private sector.

Even if the Board looks to the public sector for guidance, however, it will find that many states which permit bargaining by graduate teaching assistants at public universities nevertheless *exclude* research assistants from bargaining either entirely or where, (as here), research assistants perform research that is primarily related to their education.

In Michigan, for example, state law explicitly excludes "individual[s] serving as a graduate student research assistant or in an equivalent position" from participating in collective bargaining. *See* Michigan Consol. Laws § 423.201(1)(e)(iii) (2014). Similarly, in Iowa, the Public Employment Relations Board excluded "Research Assistants . . . whose appointments are (a) primarily a means of financial aid which do not require the individuals to provide services to the University, or (b) which are primarily intended as learning experiences which contribute to the students' progress toward their graduate or professional program of study or (c) for which the

students receive academic credit." *Univ. of Iowa/State Bd. of Regents v. United Electrical, Radio & Machine Workers of America, Local 896* (COGS), Case No. 5463, (May 6, 1996). A similar exclusion exists in Illinois and California. *See Graduate Emps. Org. v. Illinois Educ. Labor Relations Bd.*, 315 Ill. App. 3d 278, 285 (1st Dist. 2000) (the proper test is a "significant connection test," whose proper application "will exclude from organizing those graduate students whose work is so related to their academic roles that collective bargaining would be detrimental to the educational process."); Cal. Gov. Code § 3562(e) ("The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter."); *Ass'n of Graduate Student Employees v. Regents of the Univ. of Cal.*, Case No. SF-Ce-17-9-H, PERB Dec. No. 730-H at 48 (April 26, 1989) (Graduate student instructors and graduate student researchers are not entitled to collective bargaining rights under California's Higher Education Employer-Employee Relations Act).

Contrary to the assertion in the *amicus* American Association of University Professors ("AAUP") brief, AAUP Br. at 25, the recent voluntary agreement between NYU and the UAW expressly excludes research assistants in the hard sciences and the Engineering School. Pet. Ex. 47 at 2 (excluding "research assistants at [the School of Engineering], research assistants in the Biology, Chemistry, Neural Science, Physics, Mathematics, Computer Science and Psychology departments").

In sum, Petitioner offered no evidence to disprove *Brown*'s concerns about how ill-suited collective bargaining is to the relationship between a private university and its graduate

assistants. Nor has it shown any changed circumstances to justify reversing *Brown*.[6]

III. INSTRUCTIONAL AND RESEARCH ASSITANTSHIPS SERVE THE ACADEMIC AND PROFFESIONAL NEEDS OF GRADUATE STUDENTS

Petitioner presents a simplistic model unrelated to the realities of graduate education at Columbia and similar universities, and ignores or distorts facts to support its contention that academic aspects of graduate assistantships can somehow be divorced from their employment aspects. Columbia's and its *amici*'s briefs demonstrate, however, that graduate education at private universities like Columbia is much more complex and nuanced, and that, while some aspects of instructional and research appointments resemble employment, those aspects are inseparable from the universities' overriding purpose of enhancing the education and development of students who pursue doctoral degrees. *See* Columbia Br. at 3-12; Ivy Plus Br. at 1-3; Br. of American Council on Education *et al.* ("ACE") at 9.

Petitioner's assertion that the teaching and research requirements are tied to funding, not academics, Pet. Br. at 5-6, simply is not supported by the record. These academic requirements are not limited to students who accept University funding. The University requires *all* graduate students in GSAS Ph.D. programs to fulfill a one-year instructional requirement. Empl. Ex. 28; Tr. 281-82, 754, 815. Similarly, the University requires that all doctoral students create and defend a dissertation, a piece of original research and exposition. Tr. 271, 752. Contrary to Petitioner's assertion, students teach and conduct research not "in order to receive their funding," Pet. Br. at 5, but in order to fulfill the academic requirements of their doctoral degrees. Tr. 412-13; Empl. Ex. 52. Petitioner is reading it backwards – the stipends relieve students of financial

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[6] The suggestion by *amicus* General Counsel of the NLRB that the expression of a desire to organize by graduate assistants at other private universities is a "significant development in industrial life . . . warrant[ing] a reappraisal" of *Brown* is inapposite. Br. at 16-17. Neither the principles articulated in *Brown* nor the determination of employee status under the Act has anything to do with student desires or lack thereof for collective bargaining.

concerns while they are fulfilling their academic requirements; stipends are not provided as compensation for teaching and research. Indeed, the only condition for receiving the Fellowship Package is that students make satisfactory progress toward the doctoral degree. *See, e.g.*, Empl. Ex. 24; Tr. 200, 297-98, 302, 749.[7]

Because teaching is such an integral part of graduate education, Columbia takes the training of its graduate student teachers very seriously and has created training and supervision mechanisms geared specifically for that purpose. Tr. 315-16, 322-23. Contrary to the assertion of *amicus* AAUP, the training is not "relatively slight" and goes far beyond "ensuring that [the graduate students] teach competently for the sake of Columbia undergraduates whom they serve." AAUP Br. at 8. As demonstrated by the record, the training programs, activities and initiatives are not tied to any specific undergraduate courses, and are designed to develop and enhance the general pedagogical skills of graduate students. Tr. 426; Empl. Ex. 71. The Teagle Fellows Program enables graduate student teachers to develop "reflective teaching practices and also to connect graduate students across disciplines with each other around issues of effective teaching." Tr. 488-89. Similarly, the Lead Teaching Fellows Program allows select doctoral students to participate in discussions about teaching methods and ultimately conduct a pedagogy workshop or events in their home department. Tr. 490; Empl. Ex. 71. Through these programs, graduate students not only learn the skills they need to be effective teaching assistants, but also the skills they need to be future faculty. Tr. 315.

[7] Petitioner mischaracterizes Professor Pinkham's testimony by suggesting that students supported on NSF fellowships are excused from teaching because they are not supported by University funds. Pet. Br. at 5 (citing Tr. 216-17). As Professor Pinkham testified, the NSF requires that its recipients "not do any teaching" for two semesters while they are supported on a two- to three-year NSF grant. Tr. 217. And as Professor Pinkham further testified, students supported by such teaching-restricting grants still have a teaching obligation. *Id.*

Petitioner further contends that academic status can be separated from an economic relationship because students are evaluated on their performance and may be subject to discipline for failing to fulfill their duties. Pet. Br. at 12. The contention illustrates petitioner's refusal to acknowledge that, in its dealings with graduate assistants, a university like Columbia is not an employer managing a conventional workplace. Faculty members observe student instructors and provide feedback in order to enhance the students' education and pedagogical skills, not to assess "job performance" or determine whether discipline is appropriate. If a graduate student's teaching is ineffective, the University will intervene to provide training and resources. Tr. 187, 314-16, 470-71; Empl. Ex. 40.

Petitioner's assertion that "[t]eaching assignments and duties for [teaching fellows] are determined by the academic needs of the departments or programs where they perform their duties" is belied by the record and misunderstands the purpose of the instructional requirement. Pet. Br. at 33. As Dean Alonso testified, teaching responsibilities are determined "based on the pedagogical and academic needs of the training that the department is trying to give the student." Tr. 302; *see* Tr. 307 ("[T]he particular responsibilities . . . will be determined by the ways in which the faculty thinks would be best to train this student to teach."); *see also* Tr. 308. Thus, some students only hold office hours; others lead discussion sections; others essentially teach a class. Tr. 302, 307-08. Doctoral students in the Teaching Scholars Program, for example, teach a course *of their own creation* based on the student's dissertation topic. Tr. 429-434; Empl. Exs. 58; 61-64. The pedagogical experience, regardless of the subject taught, serves the educational goals of the students. For instance, Roosevelt Montas, the Director of the Core Curriculum, served as a Preceptor at Columbia in the Literature Humanities course of the Core Curriculum while studying for his Ph.D. in English. Tr. 166. Professor Montas described his own

experience teaching as "intellectually formative," and testified that his service as a Preceptor was "where [he] learned to speak authoritatively about text and how to get underneath the surface of the text and kind of uncover its architecture and how it deploys meaning." Tr. 166. Professor Montas "found the voice" for his dissertation while serving as a preceptor. Tr. 166; Joint Ex. 12, at ¶ 7. By teaching, students of course contribute to the mission of the University, but the purpose of the instructional requirement is to enhance and complement the students' educational experience. The benefits students receive far outweigh any advantage the University receives from student-performed teaching.

We note that the University does not assign students to teach courses to alleviate the faculty's burden or minimize its expenses. Indeed, the stipend received by graduate students exceeds, by a significant margin, the replacement cost of the services provided by those students. Adjunct professors can be retained for a cost of approximately $6,625 per course (including salary and fringe benefits). Tr. 605-06; Empl. Ex. 84. Thus, if Columbia sought to minimize its expenses, it could save substantially by hiring adjuncts to provide the services performed by teaching assistants. Tr. 304-05. Similarly, the stipend for a first year graduate research assistant is approximately the same as the cost of hiring a postdoctoral researcher who has already received his or her Ph.D. training and degree and requires far less supervision than a graduate student. Tr. 1022-23. Columbia chooses to appoint graduate students to perform these services, despite the cost, precisely because of the value to the students and Columbia's commitment to discharge its mission of training the next generation of academics. *Id.*; Tr. 271, 1021.[8]

[8] Similarly, *amici* Ivy Plus universities do not consider the value of the services provided by the students or the cost to replace those services in establishing stipends. Ivy Plus Br. at 9-10. Rather, "[t]he 'value proposition' in these institutions is 'what is the educational value of the experience?" not, 'what is the lowest cost to teach each undergraduate?" *Id.* at 10.

Most importantly, Petitioner and its *amici* fail to recognize that it is simply not possible to separate "academic" from "employment" issues at universities like Columbia, which require students to teach and conduct research as a condition of obtaining a doctoral degree, and where the evidence of the student's work is part of the academic record. *See* Columbia Br. at 3-12; Ivy Plus Br. at 1-3. As recognized by the Board in *Brown*, where graduate students have research and teaching responsibilities as "part and parcel" of their academic programs, students cannot be treated as employees under the Act. Other schools, like NYU and many public universities, choose to structure their graduate programs differently, so the Board's reconsideration of *Brown* needs to take account of these differences, and to decide this petition on the facts of this case. *See* Ivy Plus Br. at 3; ACE Br. at 7, 21-23.

IV. GRADUATE RESEARCH ASSISTANTS ARE NOT EMPLOYEES

Petitioner asserts that the parties agree that, "if *Brown* is overruled, then the Unit should include employees in research positions as well as those who provide instructional services." Pet. Br. at 2. Columbia rejects that assertion. As demonstrated in Columbia's Brief on Review, graduate research assistants are not employees under the Act even if *Brown* is reversed. Columbia Br. at 32-37; Columbia Post-Hearing Br. at 64. *Leland Stanford* and *NYU I*, not *Brown*, held that research assistants in science departments are not employees because they perform research that is inseparable from that required to complete their dissertations. *See* *Leland Stanford Junior Univ.*, 214 NLRB 621, 621-22 (1974); *New York Univ.*, 332 NLRB 1205, 1220-21 (2000). Thus, research assistants can be included in a bargaining unit with teaching assistants only if the Board also overrules *Leland Stanford*.

Amicus General Counsel of the NLRB suggests that *NYU I* and *Leland Stanford* "appear to have involved exceptional situations unlikely to recur with much frequency." Br. of General Counsel at 21. Simply put, there is no basis for that contention; indeed, the situation in this case

is precisely the same as it was in those earlier decisions. As the General Counsel notes, the Regional Director in this case found that graduate research assistants "are compensated out of income from an external grant which has been awarded to the University for a project overseen by a lead faculty member," and that the University "requires that the [graduate research assistant]'s work on a grant must both fulfill conditions of the research project" and ultimately relate to a dissertation. *Id.* These are the exact facts present in both *Leland Stanford* and *NYU I*. The research assistants in those cases were not at all "exceptional;" they performed the same responsibilities as research assistants at Columbia and at other Ivy League and similar institutions. *See* Ivy Plus Br. at 22 ("The *Leland Stanford* description of [research assistants] is characteristic of research assistants at *amici* institutions.").[9] There has been no significant change in the past forty-two years in the structure of research grants and the role of research assistants who work on those grants.

In *NYU I*, graduate research assistants "in certain science departments . . . receive[d] stipends from monies derived from external faculty research grants." 332 NLRB at 1214. Students "classified as [research assistants] in these departments [were] performing the research required for their dissertation[s], which is the same research for which the professor has obtained an outside grant." *Id.* Similarly, in *Leland Stanford*, graduate research assistants received support from a combination of sources including contracts or grants from the government or a third party or endowment income or other money, and were "required to engage in research . . . [a]s part of the course of instruction, a part of the learning process." 214 NLRB at 622.

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[9] *See also Ass'n of Graduate Student Employees v. Regents of the Univ. of Cal.*, Case No. SF-Ce-17-9-H, PERB Dec. No. 730-H at 48 (April 26, 1989), *aff'd,* 8 Cal. Reptr. 2d 275 (1992) ("Research is funded by the University itself or by [an outside] grant . . . . Research done by graduate student contributes to the grant purposes and will often lead to discovery of and constitute the core of the student's dissertation.").

The record here demonstrates that: (i) the research performed as a research assistant is indistinguishable from the research performed for a student's thesis, Decision at 28; Tr. 72; 116; 278; 409-10; 662, 775, 801-02, 983; Empl. Ex. 2; and (ii) the research assistants perform the same duties in the laboratory as any other students pursuing thesis work; they are funded solely to enable them to complete their doctoral degrees, as they would be if they were receiving a scholarship. Tr. 972-73; 1019-20; 1024-25; Empl. Ex. 116. As in both *Leland Stanford* and *NYU I*, the financial support received by research assistants does not vary based on the number of hours a student spends conducting his or her research or on the results. As the nature of their "services" is identical to the "services" provided in *Leland Stanford* or *NYU I*, the General Counsel cannot seriously contend that Columbia's research assistants are employees unless those cases are overruled. There is no basis for reversing *Leland Stanford*, a decision which has withstood more than four decades of changes in Board membership amidst disputes regarding the status of other graduate student positions. Its reasoning remains as sound and well-supported today as it was in 1974.[10]

V. MASTER'S DEGREE AND UNDERGRADUATE STUDENTS ARE TEMPORARY EMPLOYEES

Petitioner contends that appointment for at least one academic semester is sufficient to include Master's degree and undergraduate students in a bargaining unit, Pet. Br. at 49, but fails to explain how such students have any "real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Assocs.*, 306 NLRB 294, 296 (1992).

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[10] *Research Found. of the State Univ. of N.Y. Office of Sponsored Programs*, 350 NLRB 197 (2007), is not relevant because it did not involve graduate research assistants who perform dissertation research at their university. As stated by the Board, "the Employer is not a university or college and does not confer degrees or admit students" and it is "not an academic institution." 350 NLRB at 198. Not surprisingly, the Board found that there was no educational relationship between the individuals involved and their employer. *Id.*

The Board has frequently excluded temporary or casual employees with finite termination dates – like hourly-paid student workers – from a bargaining unit because they do not have a sufficient interest in the outcome of collective bargaining to participate in the process. In *Goddard College*, 216 NLRB 457 (1975), for example, the Board held that that visiting faculty members hired for a definite term of one semester or year were temporary employees. Even though visiting faculty members occasionally continued their employment beyond a year, and up to 10 percent had been offered permanent positions, the Board excluded all visiting faculty from the bargaining unit. Because Master's degree and undergraduate students are employed for a defined, brief duration of one semester to a year, and have no expectancy of continued employment, they should be excluded as temporary employees. *See Trs. of Stevens Inst. of Tech.*, 222 NLRB 16 (1976) (faculty member with a one-year contract is a temporary employee, notwithstanding being offered another temporary appointment); *Am. Fed. of State, Cnty. & Mun. Emps., AFL-CIO*, 224 NLRB 1057, 1058 (1976) (employee with a ninety-day contract which could be extended for an additional ninety-days by the employer is a temporary employee).

Petitioner states that "[t]he Board has long recognized that employees hired for a limited period of time with a defined endpoint have the right to organize." Pet. Br. at 47. In fact, none of the cases cited in its brief support this proposition. All employees in the cases cited by Petitioner had a reasonable expectation of continuing or repeated employment. In *Berlitz Sch. of Languages*, 231 NLRB 766 (1977), for example, the frequency with which the on-call language teachers were assigned depended on the demand for the language they taught and their availability. The teachers, however, remained on the school's on-call list for years and expected that the school would continue to give them assignments as long they were interested. Similarly,

in *Avis Rent-a-Car Sys., Inc.*, 173 NLRB 1366 (1968), there was no fixed endpoint to the assignments of auto-shuttlers who transported cars between the company's various rental facilities in Philadelphia. They would continuously show up and whenever work was available they would be assigned.[11] These employees are completely unlike the temporary Master's degree and undergraduate students at Columbia who have assignments for one or two semesters, with no expectation of future employment at all.

VI. DOCTORAL STUDENTS DO NOT SHARE A COMMUNITY OF INTEREST WITH MASTER'S DEGREE AND UNDERGRADUATE STUDENTS

Petitioner acknowledges that "whether undergraduate and Master's degree students should be included in a bargaining unit with doctoral students should be decided according to normal community of interest standards." Pet. Br. at 43. Petitioner suggests that the Regional Director properly analyzed these factors in determining that a unit of all teaching and research assistants would be appropriate. *Id.* at 43-44. The Regional Director's entire discussion of the community of interest factors, however, was comprised of four sentences:

> [D]uring the period [undergraduate and Master's] students are serving in [instructional or research] positions, all of them are performing duties identical or nearly identical to doctoral student assistants, often side-by-side with doctoral students. The record includes testimony that to a student's eye, an undergraduate Math Help Room TAIII is indistinguishable from a doctoral student working in the Help Room. Accordingly, undergraduate and Master's students serving in instructional and research positions may share a community of interest with doctoral candidates because they are all performing essentially the same work. On the other hand, as the Employer emphasizes, it is true that the financial compensation to Master's Degree students and undergraduates in assistant positions differs significantly from that provided to doctoral students.

[11] The same is true of the "temporary" employees in *Pulitzer Publ'g Co.*, 101 NLRB 1005 (1952); *Hondo Drilling Co.*, 164 NLRB 416 (1967); *Daniel Constr. Co.*, 133 NLRB 264 (1961). *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28 (2010), is not to the contrary because there was evidence that some employees had "an expectancy of future employment." *Id.* at 1, n.4.

Dec. at 30. In other words, the Regional Director considered just *two* factors – similarity of the work and financial compensation – and found that the financial compensation factor weighs *against* including Master's degree students and undergraduates in the same unit as doctoral students. *See Wheeling Island Gaming, Inc.*, 355 NLRB 637, 641 (2010) (describing multiple factors). The Regional Director's finding as to the similarity of work is plainly refuted by the record. As Columbia explained in its Brief on Review, while there may be some overlap in responsibilities, undergraduate and Master's students perform mostly different functions than Ph.D. student assistants. Columbia Br. at 44-46. Although doctoral teaching assistants may at times perform administrative tasks performed by Master's degree and undergraduate students, 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. The role played by Master's and undergraduate students could not be more dissimilar. But, even assuming that they performed the same work, 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 No. 204, at 1252 (1976) (no community of interest even though part-time student janitors performed the same job functions as the full-time janitor).

Petitioner further contends that graduate assistants share a community of interest "by virtue of their status as students." Pet. Br. at 44. It is ironic that Petitioner relies on student status to define the appropriate unit for bargaining over terms and conditions of *employment*, while at the same time maintaining that student status is irrelevant to determining whether graduate assistants are statutory "*employees*." By focusing on their identity as students, moreover, the Petitioner fails to discuss the evidence demonstrating that there is *no* community

of interest among the Master's degree and undergraduate students and doctoral students. *See* Columbia Br. at 47-50. The common status of "studenthood" is not sufficient to overcome the lack of shared interests.

Finally, Petitioner's reliance on *Adelphi University*, 195 NLRB 639 (1972), is misplaced. *Adelphi* held that graduate student assistants do not belong in the same bargaining unit as faculty. *Id.* at 640. The Board looked to community of interest factors related to the different terms and conditions of employment between students and faculty members; it did not simply focus on student status.

A proper application of the community of interest test demonstrates that – even if they are not excluded altogether as temporary – Master's degree and undergraduate students should not be in the same bargaining unit as doctoral students.

CONCLUSION

The Petition should be dismissed in its entirety.

Dated: New York, New York
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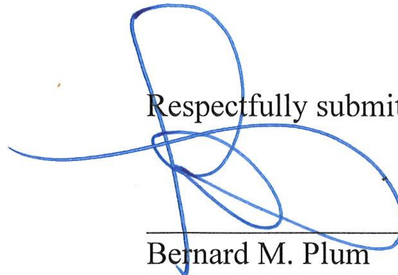
Respectfully submitted,



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