UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE UNIVERSITY OF CHICAGO **and** **GRADUATE STUDENTS UNITED, AFFILIATED WITH THE ILLINOIS FEDERATION OF TEACHERS, THE AMERICAN FEDERATION OF TEACHERS AND THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AFL-CIO**	**Case No. 13-RC-198325**

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PRELIMINARY STATEMENT

The University of Chicago ("Chicago" or the "University") requests review of the finding and conclusion in the Regional Director's August 8, 2017 Decision and Direction of Election ("DDE"), that Chicago's graduate student teaching and research assistants are "employees" as defined in Section 2(3) of the National Labor Relations Act ("NLRA" or the "Act") based on *Columbia University*, 364 NLRB No. 90 (2016) ("*Columbia*").

Columbia represents an abrupt and unjustified reversal of long-standing Board precedent holding that graduate students who teach or conduct research in connection with their academic programs are not "employees" under the Act. The Board has held for nearly its entire history that the Act was not intended to apply to relationships that are primarily educational rather than economic in nature. It should reaffirm that principle, reconsider and reverse *Columbia* and return to its historical precedent as most recently articulated in *Brown University*, 342 NLRB 483 (2004) ("*Brown*"), holding that graduate students who teach and perform research as part of their academic programs are not statutory employees.

Even if *Columbia* is not reconsidered, however, the DDE here cannot stand because it improperly extends *Columbia* well beyond any reasonable limitations. The Regional Director found many significant factual differences between Chicago and Columbia, concluding that graduate student teaching is an integral part of academic training in virtually every PhD program at Chicago, and that graduate student research assistants have no fixed tasks but do research on their own PhD dissertations under the guidance of faculty mentors. Yet the Regional Director improperly relied upon those very factual distinctions as proof that graduate student teaching and research assistants at Chicago operated under the University's direction and control and were employees under the Act. The Board should reject this dramatic expansion of *Columbia*.

Furthermore, the Regional Director erroneously concluded that a one-year look-back eligibility formula should apply, allowing students who were in the petitioned-for positions at any time during the past academic year to vote, even if they do not hold teaching or research positions at the time of the election. (DDE at 23.) Petitioner had the heavy burden to present evidence to demonstrate that the Board's normal eligibility formula should not apply in this case, and that students who held unit positions in the past were likely to hold those positions in the future. Petitioner not only failed to meet that burden, it presented no evidence in support of its position. By contrast, Chicago presented unrebutted evidence showing that, due to the highly decentralized nature of its graduate programs and their varied teaching and research requirements across the Schools, Divisions and Departments, it cannot be stated with any reasonable degree of certainty that graduate assistants who held an appointment in the past are likely to hold another one in the future. Indeed, the Regional Director's error in this case could not be clearer insofar as he included master's degree students, who are in one year or two year academic programs with no teaching requirements, in the unit. Moreover, of the twelve universities that have been subject to graduate student representation petitions after *Columbia*, nine have used the standard voter eligibility formula, including the election conducted by Region 13 at Loyola University of Chicago. The Regional Director should have applied the standard voter eligibility formula in this case.

Finally, the Regional Director erroneously ordered Chicago to produce the list of eligible voters by August 17, 2017, *two months* before the scheduled election, disregarding Chicago's arguments that it was impossible to produce an accurate and complete list by that date. As Chicago explained in its correspondence with the Regional Director, the Autumn 2017 quarter has not begun, and student teaching assignments will not be finalized until several weeks into the

quarter. Chicago cannot predict who will be in the covered positions until on or about October 2, 2017, more than two weeks in advance of the election. The Regional Director's August 10, 2017, order prejudiced Chicago by forcing it to produce a list that is inherently incomplete and inaccurate for reasons beyond Chicago's control, exposing Chicago to a risk that the election will be set aside.[1]

The University of Chicago therefore requests that the Board grant expedited review of the DDE, pursuant to Section 102.67 of the Board's Rules and Regulations, because:

1. There are compelling reasons for the Board to reconsider its *Columbia* decision, which is unsupported by the statute and ignores significant policy considerations;

2. Chicago's graduate student teaching and research assistants are distinguishable from the graduate students found to be employees in *Columbia* and are not statutory employees under the test created by the Board in *Columbia*;

3. A substantial question of law or policy is raised because of the absence of direct Board precedent with respect to devising an eligibility formula among graduate student assistants; and

4. The Regional Director erred in ordering Chicago to make eligibility predictions, which produce an inherently incomplete and inaccurate voter eligibility list.

PROCEDURAL HISTORY

On May 8, 2017, Petitioner filed a Petition seeking to represent "all graduate students" from Chicago's School of Divinity, the Division of Social Sciences, the Division of Humanities, the School of Social Service Administration, the Physical Sciences Division and the Biological Sciences Division.[2] (Bd. Ex. 1.) According to Petitioner, "[a]ll graduate students" includes both master's degree students and PhD graduate students. (Tr. 14:12-18.) The Petition covered a

[1] For these and other reasons, Chicago is filing a request for a stay of all proceedings with Region 13 and will renew this request before the Board in the event the request for a stay is denied.

[2] The Petition also sought inclusion of the Oriental Institute. During the hearing, Petitioner stipulated to removal of the Institute from the Petition. (Tr. 816:10-818:16.)

wide variety of positions: TAs, RAs, Course Assistants, Workshop Coordinators, Writing Interns, Preceptors, Language Assistants, Instructors and Lecturers. (Bd. Ex. 1.)

On May 16, 2017, Chicago filed a Statement of Position, in which Chicago raised the following issues, *inter alia*, for resolution by the Regional Director: (1) that graduate students at Chicago were not similarly situated to the students found to be statutory employees by the Board in *Columbia* and thus could not be deemed employees under Section 2(3) of the Act; (2) that *Columbia* was wrongly decided; and (3) that if Chicago's graduate student teaching or research assistants could properly be considered employees under Section 2(3) of the Act, master's degrees students, Non-Lab Research Assistants, Workshop Coordinators, and students teaching in excess of their academic teaching requirements could not be included in a bargaining unit with graduate students teaching to satisfy pedagogical requirements in their academic degree programs. (Bd. Ex. 3.)

On May 18, 2017, the record was opened and Chicago submitted two Offers of Proof, seeking a hearing on several issues, including employee status and the appropriateness of the proposed bargaining unit. On May 18, 2017, the Regional Director for Region 13 of the NLRB granted Chicago a hearing on all issues contained in its Offers of Proof. Thereafter, an 11-day hearing was conducted from May 18, 2017 to June 1, 2017. At the conclusion of the hearing, the parties agreed that if an election were to be directed, voting should take place in person in October, during the Autumn quarter of 2017.

THE DDE

On August 8, 2017, Regional Director Peter Ohr issued the DDE, directing an election in the unit sought by the Petitioner and rejecting every argument made by the University. The Regional Director extended the *Columbia* test in a new and different direction to conclude that

all of the petitioned-for students – both teaching and research assistants, both PhD and master's degree students, and all of the other disparate positions sought in the petition – perform services for the benefit of the University under its direction and control, were compensated for such services, and thus were indistinguishable from the students considered in *Columbia.*

The Regional Director's rationale for this conclusion stands in stark contrast to the *Columbia* ruling itself. There, the Board majority found that student teaching assistants had a common-law employment relationship with their university because they were ***not trained or mentored*** but were "thrust wholesale into many of the core duties of teaching" undergraduate classes. 364 NLRB No. 90, slip op. at 16.[3] The Board majority specifically found that it was **"[t]he delegation of the task of instructing undergraduates**, one of a university's most important revenue-producing activities, ...[that] suggests that the student assistants' relationship to the University has a salient economic character." *Id.* (emphasis added.)

At Chicago, by contrast, **graduate students are carefully mentored and taught how to teach as part of their academic training**. Indeed, the Regional Director specifically found that this was the case, concluding that virtually all of the University's PhD programs require teaching as an academic requirement to obtain a PhD (DDE at 5); that "[t]he University considers learning to teach and to evaluate student work as an integral part of graduate students' education" (DDE at 12); that "[e]very faculty witness acknowledged the importance of training the University's PhD students in pedagogy" (DDE at 16); and that the University offers extensive pedagogical training through its various PhD programs as well as through the Chicago Center for Teaching which "offers pedagogical courses, seminars, workshops and other programs . . . to advance the skills of teaching among anyone who teaches at the University." (DDE at 14).

[3] In its references to *Columbia,* Chicago is relying on the facts found by the Board majority in the *Columbia* decision, but does not adopt those facts as an accurate summary of the evidence in the record.

Despite these clear distinctions from *Columbia,* the Regional Director concluded that the University's "extensive training" and mentoring of its students in pedagogy was itself proof of the University's direction and control of student "work." (DDE at 19) Taken together, the DDE and *Columbia* create an irrebuttable presumption that all graduate student teaching assistants are employees; if they are given little or no instruction they are "thrust wholesale" into a relationship that has a "salient economic character" and are statutory employees, and if they are carefully taught, trained and mentored as part of their academic requirements, the University "directs the work of graduate students performing teaching functions," (DDE at 19) making them statutory employees.

Likewise, the Regional Director found an employment relationship between the University and student research assistants working in University laboratories who "both support and actively contribute to the [primary mission of the University to conduct original research] when they perform experiments at the University, advancing scientific knowledge..." (DDE at 17) Although these research assistants "advance scientific knowledge" and support the University's "primary [original research] mission" **when they conduct research for their own PhD dissertations**, they were found to do so under the "control" of the University because they "perform research **under the guidance** of their respective faculty member, publish or co-publish studies with their PIs, and help secure funding for research by applying for grants." (DDE at 20) (emphasis added) The University's extensive training of its research assistants in proper research techniques, as an incident of their academic education, was found by the Regional Director to establish that the University "directs the work of graduate student RAs through extensive training and regulations," even though some of those regulations and training involve laboratory safety. (DDE at 20) The Regional Director found more evidence of University

"direction and control" because "PIs regularly meet and discuss RA's' experiments and progress, **guiding the RA's focus** and suggesting modifications to their experiments." (DDE at 20) (emphasis added)

Once again, considering this type of "guidance" by faculty mentors "direction and control" is hardly consistent with *Columbia*, where the Board majority found that externally funded research assistants were subject to Columbia's direction and control because students had to "fulfill[] the duties defined in the [external] grant" and, therefore, "performance of defined tasks [was] a condition of the grant aid." 364 NLRB No. 90, slip op. at 18. There is no evidence in this record that **any** external grant or funding arrangement sets forth **any** "defined tasks" that research assistants must perform; the Petitioner introduced no grants and no witness testified that he or she had to perform any specific tasks to receive funds from any grant or funding agreement. **Unlike *Columbia***, Chicago's graduate student research assistants are in fact "permitted to simply pursue their educational goals at their own discretion, subject only to the general requirement that they make academic progress." 364 NLRB No. 90, slip op. at 18. Graduate student research assistants at Chicago do their own research in support of their dissertations, with guidance from faculty mentors. Yet the DDE concludes that any sort of faculty guidance is sufficient "direction and control" to establish employee status.

When read together, the DDE and *Columbia* establish an irrebuttable presumption that all graduate student research assistants must be employees. If their tasks are defined by external grant provisions, as in *Columbia*, they are employees controlled by the university, and if their tasks are not specified and they merely "perform research under the guidance of their respective faculty member, publish or co-publish studies with their PIs, and help secure funding for

research by applying for grants," they are under the University's control and are employees. This is not what the *Columbia* Board held, and cannot be the law.

ARGUMENT

I. THERE ARE COMPELLING REASONS FOR THE BOARD TO RECONSIDER AND REVERSE *COLUMBIA.*

In holding that students who provide teaching and research services at a university are statutory employees under Section 2(3) of the Act, the Board majority in *Columbia* improperly rested its decision on the common law definition of "employee" and rejected the relevance and centrality of the fundamentally educational relationship between students and the university. The majority also ignored significant policy considerations that weigh heavily against the intrusion of collective bargaining into that educational relationship. The *Columbia* decision furthers no legitimate purpose of national labor policy, while threatening serious harm to graduate education at private universities across the United States. It should be reconsidered and reversed for reasons explained below and in the dissenting opinion of then-Member Miscimarra, and the sound decision in *Brown University* should be reinstated.

A. *Columbia* Represents An Unwarranted Departure From Board Precedent Recognizing The Primarily Educational Relationship Between Graduate Student Assistants And Their Universities.

With the exception of a four-year period following its decision in *New York University*, 332 NLRB 1205 (2000) ("*NYU*"), the Board has consistently held that students who serve as teaching and research assistants at private universities covered by the Act are not statutory employees. In *Adelphi University*, the Board excluded graduate students serving as teaching and research assistants from a unit of full-time faculty members because they were "primarily students" who were "working toward their own advanced academic degrees." 195 NLRB 639, 640 (1972). The Board observed that, unlike the largely autonomous nature of the work

performed by regular faculty, graduate student assistants were "guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members." *Id.*

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

In *NYU*, the Board unjustifiably departed from this long-standing precedent and held that graduate students who served as teaching and research assistants were employees under the Act. 332 NLRB at 1206. The *NYU* Board based its decision on *Boston Medical Center Corp.*, which had held that members of a medical house staff were employees, but also carefully noted that "while house staff possess certain attributes of student status, they are unlike many others in the traditional academic setting." 330 NLRB 152, 161 (1999).

The flawed *NYU* decision survived for only four years. In *Brown,* the NLRB overruled *NYU*, recognizing once again that the nature of the relationship between the students and the university is "primarily an educational one, rather than an economic one." 342 NLRB at 489. In support of that well-reasoned conclusion, the Board cited the following undeniable facts, no less true today at Chicago than in 2004 at Brown:

- Graduate assistants are admitted into the university as students, not hired as employees;
- Graduate assistants must be students actively enrolled in the university to receive an instructional or research appointment;
- Graduate assistants focus principally on obtaining a degree, *i.e.*, being a student, and service time is capped so as not to interfere with their studies;
- Teaching is an important component of most Ph.D. programs, and is often required as a condition to receive the Ph.D. degree;
- Graduate assistant positions, whether in teaching or research, are directly related to the core elements of the Ph.D. degree and the student's educational objectives;
- Graduate assistants perform their service under the guidance of department faculty members, who typically also act as the students' advisors;
- The university provides financial support only to students, and only for the period during which the students are enrolled;
- Graduate students without teaching or research appointments receive the same financial aid as students appointed to instructional and research assistantships; and,
- The vast majority of doctoral students receive financial aid.

Brown, 342 NLRB at 485, 488-89.

The *Brown* Board noted several aspects of the student/teacher relationship that contributed to its basic incompatibility with collective bargaining. Specifically, collective bargaining is "fundamentally an economic process," which does not belong in a relationship

"predicated upon a mutual interest in the advancement of the student's education, and thus academic in nature." *Id.* at 489 (citing *St. Clare's Hosp. & Health Ctr.*, 229 NLRB 1000, 1002 (1977)). The academic concerns that dominate the relationship are "largely irrelevant to wages, hours, and working conditions," making collective bargaining "not particularly well suited to educational decisionmaking." *Id.* Additionally, graduate and professional education is "intensely personal," both for the student and the faculty, while the collective treatment of individuals represents "the very antithesis of personalized individualized education." *Id.* at 489-90. The Board also recognized that the essential purpose of collective bargaining is "to promote equality of bargaining power, a[] concept that is largely foreign to higher education." *Id.* at 490.

The *Brown* Board thus concluded that treating graduate student assistants as employees would be incompatible with the purposes of the Act. *Id.* at 488-90. Indeed, the Board opined that "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process." *Id.* at 493.

The Board in *Columbia* overruled this well-reasoned precedent by holding that students who perform various teaching and research tasks in partial fulfillment of their graduate degree programs are "employees" within the meaning of the Act. Though the *Columbia* Board asserted that changes in higher education over time justified a new look at the employment status of graduate students, *Columbia*, 364 NLRB No. 90, slip op. at 8-9, the Board failed to appreciate that the fundamental nature of the relationship between graduate student assistant and the university remains unchanged. As discussed in detail below, the *Columbia* Board erroneously applied the common law definition of employee without regard to the realities of the higher education environment or the policy considerations that had justified their exclusion forty years

earlier in *Adelphi*, *Leland Stanford*, and *Brown*. This Board should correct this error and reconsider the *Columbia* decision.

B. Relevant Policy Considerations Establish That Students Who Teach And Perform Research As Part Of Their Educational Programs Are Not Employees.

1. The Board Must Consider The NLRA's Purpose In Determining Its Reach.

Section 2(3) of the NLRA tautologically defines the word "employee" to include "any employee." 29 U.S.C. § 152(3). Section 2(3) does not further define the term, nor is "employee" defined elsewhere in the Act.[4] It is a bedrock principle of statutory interpretation that "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *Brown*, 342 NLRB at 488. The Board and the courts have a duty "to construe statutes, not isolated provisions." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citation omitted). And in construing the NLRA, the Court has held that "[i]n doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) with meaning." *Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971); *see id.* at 167 ("The term 'employee' must be understood with reference to the purpose of the Act and the facts involved in the economic relationship."); *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999) ("At the heart of each of the Court's decisions is the principle that employee status must be determined against the background of the policies and purposes of the Act."). Because Section 2(3) "contains no detailed provisions for determining statutory employee status," that issue "must be examined in the context of the Act's overall purpose." *Brown*, 342 NLRB at 492.

The purpose of the Act remains as clear today as it was when enacted. Section 1 of the NLRA sets forth a policy to encourage "practices fundamental to the friendly adjustment of

[4] The definition includes a number of exceptions, none of which is relevant here.

industrial disputes" to avoid "industrial strife or unrest." 29 U.S.C. § 151. The Supreme Court has recognized that the "Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry," and that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" *NLRB v. Yeshiva University*, 444 U.S. 672, 680-81 (1980) (citation omitted). The Board has similarly acknowledged that the NLRA envisions a statutory scheme applicable to the economic relationship between employer and employee. *WBAI Pacifica Foundation*, 328 NLRB at 1275 ("A central policy of the Act is that the protection of the right of employees to organize and bargain collectively restores equality of bargaining power between employers and employees and safeguards commerce from the harm caused by labor disputes. *The vision of a fundamentally economic relationship between employers and employees is inescapable.*" (emphasis added)); see *Columbia*, 364 NLRB No. 90, slip op. at 26 (Member Miscimarra, dissenting) ("Congress did not adopt our statute to advance the best interests of college and university students.").

The Board and reviewing courts have routinely applied these principles to the analysis of employee status, and have held that persons who might otherwise fall within the Act's definition of "employee" (or who might be considered common law employees) may fall outside of the statutory definition, based on relevant economic facts or policy concerns. In *NLRB v. Bell Aerospace Co.*, the Court held that "managerial employees" who surely fall within the common law definition are not covered by the Act, even though they are not specifically excluded under Section 2(3). 416 U.S. 267, 289 (1974). *See also Yeshiva University*, 444 U.S. at 686 (recognizing the tension between the Act's inclusion of "professional employees" and its exclusion of "managerial employees" in the context of full-time university faculty); *Retail Clerks*

International Association v. NLRB, 366 F.2d 642, 644-45 (D.C. Cir. 1966) (employees closely aligned with management excluded from coverage because of "potential conflict of interest between the employer and the workers"). Similarly, in *Pittsburgh Plate Glass Co.*, the Court excluded retirees from the Act's coverage, reasoning that inclusion of retirees would not further the Act's policy of preventing disruption to commerce caused by interference with the organization of active "workers." 404 U.S. at 166. In *Brevard Achievement Center*, 342 NLRB 982, 989 (2004), the Board refused to include workers with disabilities at a rehabilitative facility within the definition of "employee" because the employer's relationship with the individuals at issue was not guided by economic business considerations, but rather was "primarily rehabilitative." *See also NLRB v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 178-79 (1981) (upholding the Board's refusal to extend collective bargaining rights to "confidential employees"); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 495-96, 499 (1979) (declining to exercise jurisdiction over teachers at church-operated schools because doing so would necessarily entangle the Board in matters of religious education and run afoul of the First Amendment).

Most recently, in *Northwestern University*, 362 NLRB No. 167 (2015), the Board declined to exercise jurisdiction over a representation case involving student football players, explaining that "it would not promote stability in labor relations to assert jurisdiction" (*id.*, slip op. at *3) even if scholarship players were found to be statutory employees.[5] The Board should

[5] The appropriateness of such policy considerations in construing the scope of the NLRA was not affected by the Supreme Court's decision in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995) (cited in *Columbia*, 364 NLRB No. 90, slip op. at 4), which simply established that the Board could – but was not required to – apply the common law agency definition of employee as a means for determining whether paid union organizers were protected by the Act. Indeed, the Supreme Court in *Town & Country* examined the underlying purposes of the Act when determining employee status. 516 U.S. at 91.

apply the same deference it applied in deciding not to interfere with college athletic programs to the graduate academic programs of the nation's leading colleges and universities.

Notably, well-established case law under analogous provisions of the Fair Labor Standards Act ("FLSA") provides strong support for the "primary relationship" test applied in *Brown* and throughout most of the Board's history. Like the NLRA, the FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e).[6] In deciding whether students in a variety of settings should be considered employees under that statute, courts have adopted a "primary beneficiary" test very similar to the "primary relationship" test of *Brown*. *See, e.g., Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 526 (6th Cir. 2011) (students at a vocational boarding school are not employees; "identifying the primary beneficiary of a relationship provides the appropriate framework for determining employee status in the educational context"); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (finding that students were not "employees" because the chores that they were required to do were "primarily for the students', not the [school's], benefit"); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) ("[T]he proper legal inquiry in this case is whether [the employer] or the [trainees] principally benefited from the weeklong [training] arrangement."); *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1326-27 (10th Cir. 1981) (comparing respective benefits of the student resident assistants and the college to determine whether the resident assistants were "employees" of the college and noting that "[t]he mere fact that the College [employer] may have derived some economic value from the [resident assistant] program does not override the educational benefits of the program and is not dispositive of the 'employee' issue").

[6] *See Patel v. Quality Inn South*, 846 F.2d 700, 702-03 (11th Cir. 1988) (finding the statutory definitions of "employee" in the NLRA and FLSA to be analogous); *Berger v. NCAA*, 843 F.3d 285, 290 (7th Cir. 2016) ("Section 203(e)(1) [of the FLSA] defines 'employee' in an unhelpful and circular fashion as 'any individual employed by an employer.'").

In *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2015), in considering whether student interns working for a motion picture company were FLSA "employees," the U.S. Court of Appeals for the Second Circuit adopted a "primary beneficiary" standard, which "focuses on what the intern receives in exchange for his work" and "accords courts the flexibility to examine the economic reality as it exists between the intern and the employer." *Id.* at 536. The court also identified a list of non-exhaustive factors to determine the primary beneficiary, including "[t]he extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit" and "provides training that would be similar to that which would be given in an educational environment." *Id.* at 537; *see also Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1212 (11th Cir. 2015) (adopting *Glatt's* "primary beneficiary" test); *Berger v. NCAA*, 843 F.3d 285, 291 (7th Cir. 2016) (determining that student-athletes are not employees under the FLSA because of the history of amateurism in college sports and because "factors [to determine employment status] used in the trainee and private-sector intern context fail to capture the nature of the relationship between" student athletes and the university).

These court decisions interpreting the definition of "employee" under the FLSA further support the consistent rulings under the NLRA that the Board should not look solely to the common law definition of employee, but must analyze "the underlying fundamental premise of the Act," *i.e.*, that the Act is designed to cover economic relationships, as the Board properly recognized in *Brown*, 342 NLRB at 488. *Columbia*, 364 NLRB No. 90, slip op. at 25 (then-Member Miscimarra, dissenting) ("I agree with the Board majority's reasoning in *Brown*.").

2. Applying The NLRA To Graduate Student Assistants Does Not Promote The Purposes Of The NLRA.

Just as the Board found in *Brown*, the essential elements of the relationship between Chicago and its teaching and research assistants are decidedly educational – not economic. This primarily educational relationship is not seriously in dispute. Chicago is and remains the "teacher of teachers."[7] The University's emphasis upon training PhD students how to teach at the college level is absolutely clear on the record in this case as established by the following undisputed facts:

- Only graduate students enrolled in the University can serve as teaching or research assistants;
- Teaching is a core component of virtually every PhD student's academic training at Chicago, and with few exceptions student teaching or alternative pedagogical training is required as a condition of receiving a doctoral degree;
- Teaching and research assistants focus principally on obtaining a degree, *i.e.*, being a student, and PhD students are limited to 20 hours per week to do anything other than coursework and research, including participating in teaching experiences;
- Both teaching and research assistants at Chicago are closely mentored by faculty members, as multiple faculty members and students called as witnesses by the Union admitted without hesitation;
- The instructional services that teaching assistants perform are almost invariably related to their academic discipline and provide an educational experience that broadens and deepens students' understanding of their field and related fields, as well as excellent training and preparation for future faculty positions;
- Research assistants affiliate with a laboratory in their desired field of study, and in those laboratories conduct research in support of their dissertation "under the guidance of their respective faculty member, publish or co-publish studies with their PIs and help secure funding for research by applying for grants" (DDE at 20);

[7] Nirenberg 127:3-4; Wild 434:11-15; Robertson 489:10-490:1; Prince 601:13-21; Owens 992:22-993:13; Hopkins 821:17-822:11; Morse 1818:23-1819:13; Hirschfeldt 1340:15-19.

- The University provides tuition remission, financial support (stipends) and health insurance premiums under the student (non-employee) health care plan to doctoral students annually, through the fifth year of study and often longer, regardless of whether they are teaching;

- PhD students participating in required teaching receive the standard stipend as promised in their letter of admission, irrespective of their level or type of assignment and the time commitment associated with it; and

- Doctoral students who seek to fulfill a teaching requirement or expectation for whom no teaching or professional development opportunity can be identified or created still receive full financial aid even though they do not teach during a given quarter.

The ultimate purpose of graduate student teaching at Chicago is solely educational; teaching practice serves the academic and future professional needs of PhD students who will often become college faculty members. The DDE itself concluded that only four of the 52 PhD programs covered by the petition do not require teaching as an academic requirement, and of those four two in fact require a two-week TA training period. (DDE at 5) Multiple witnesses called by both the Union and the University testified without contradiction that Chicago considers itself a "teacher of teachers," and uniformly makes learning to teach a central component of all PhD education. Dean of Social Sciences (and now Executive Vice Provost) David Nirenberg explained why:

> [T]he whole reason why [Chicago] ha[s] pedagogical requirements in the Ph.D. and the Social Sciences is because teaching is such an important part of how the job market is going to look at you when you're done . . . It's because teaching is a skill you have to show you've had and you've acquired when you go into the job market, and to such a degree that we now, I think almost every graduate student who applies for a job in any field in the Social Sciences . . . – a professorial job – has to produce a teaching statement.
>
> (Nirenberg 157:23-158:10.)

Graduate student teaching assistants at Chicago do not serve as a pool of cheap labor for the University. The fundamental nature of their relationship is academic, rather than economic, and it does not fit into a traditional employer-employee framework.[8]

Indeed, as noted in then-Member Miscimarra's dissent in *Columbia*, substantial policy reasons counsel against treating graduate student assistants with an educational relationship to their school as employees. Collective bargaining rights under the NLRA could serve as an economic weapon that if fully utilized would thwart students' primary goal: to obtain a degree. *See Columbia*, 364 NLRB No. 90, slip op. at 29 (then-Member Miscimarra, dissenting) ("I believe collective bargaining and its attendant risks and uncertainties will tend to detract from the primary reason that students are enrolled at a university—to satisfy graduation requirements, including in many cases the satisfactory completion of service in a student assistant position.")

Additionally, imposing collective bargaining on the academic relationship between universities and their graduate students would also have a "deleterious impact" on the educational decisions made by faculty and administrators. *Brown*, 342 NLRB at 490; *see id.* at 492 ("[T]he broad power to bargain over all Section 8(d) subjects would, in the case of graduate student assistants, carry with it the power to intrude into areas that are at the heart of the educational process.")

An employer's duty to bargain over terms and conditions of employment is expansive, *see Production Plated Plastics, Inc.*, 254 NLRB 560, 563 (1981), and the duty would be no less so in higher education. *Kendall College*, 228 NLRB 1083, 1088 (1977) (rejecting Kendall's

[8] Graduate student assistants also fit poorly within the common law definition of "employee." *Brown*, 342 NLRB at 490 n.27 (Member Schaumber, concurring). As the Board observed in *Brown*, "[u]nder the common law, an employee is a person who performs services *for another* under a contract *of hire*, subject to the other's control or right of control, and *in return for payment*." *Id.* (emphasis in original) (quoting *Town & Country Elec.*, 516 U.S. at 94). Graduate students are not "hired" as assistants; they are admitted to a graduate education program with a teaching component. And, teaching is not performed "for" the university, but rather for the students' educational development. Furthermore, the financial assistance provided to graduate student assistants is "not a *quid pro quo* for services rendered." *Brown*, 342 NLRB at 490 n.27 (Member Schaumber, concurring).

argument that the "law requiring bargaining on mandatory subjects requires a different interpretation in the halls of academia than it does in an industrial shop"), *enf'd*, 570 F.2d 216 (7th Cir. 1978); *see also Catholic Bishop of Chicago*, 440 U.S. at 503 (noting that "nearly everything that goes on in the schools affects teachers and is therefore arguably a 'condition of employment'") (citation omitted).

Literally any identifiable "term" or "condition" of a graduate student's relationship with the university could be subject to collective bargaining, including the timing and content of degree programs as well as stipend levels and tuition. *Brown*, 342 NLRB at 490; *Columbia*, 364 NLRB No. 90, slip op. at 25 (then-Member Miscimarra, dissenting). Bargaining would interfere with "broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends." *Brown*, 342 NLRB at 490. Furthermore, because stipends are a part of graduate students' financial package, bargaining over "wages" would necessarily have a major impact on financial aid policies and tuition rates. Similarly, negotiation of performance evaluations would be tantamount to bargaining over grades.

Treating graduate students as employees also would result in Board entanglement in academic policy making. Because a student's work as an assistant is an integral part of his or her course of study, the quality and results of that work are part of his or her academic record, making it impossible to separate "academic" and "employment" issues. At this level of advanced study, any evaluation of "academic" work is beyond the technical competency and expertise of the Board and its ALJs. It would also require the Board to second-guess the academic standards and subjective academic decisions of the University vis-à-vis students – a role never envisioned by Congress in enacting the NLRA. [9]

[9] For this reason -- unlike the NLRA -- many state laws explicitly define the scope of bargaining for educational employers. *See, e.g.*, Illinois Educational Labor Relations Act, 115 ILCS § 5/4 (excluding from collective

Other aspects of the NLRA demonstrate that it is ill-suited for application to graduate students teaching as part of their academic program. As noted in then-Member Miscimarra's dissent, strikes and other economic tactics could lead to the loss, suspension, or delay of academic credit; suspension of stipends and tuition waivers; potential replacement; loss of tuition previously paid; and, academic suspension. *Columbia*, 364 NLRB No. 90, slip op. at 29-30 (Member Miscimarra, dissenting). Similarly, a lockout -- lawful under the NLRA in appropriate circumstances -- could deprive students of the opportunity to pursue and complete their academic programs. Accordingly, resort to accepted forms of economic leverage when bargaining breaks down could disrupt the students' academic progress. These tools are a necessary component of the statutory scheme for resolving bargaining disputes, *see NLRB v Insurance Agents' International Union*, 361 U.S. 477, 489 (1960), but they would have a significant adverse impact upon the academic relationship, impeding the students' academic progress. *See Columbia*, 364 NLRB No. 90, slip op. at 29 (then-Member Miscimarra, dissenting). [10]

In like fashion, the Board's procedures in representation and unfair labor practice cases are cumbersome and time-consuming; they are a poor fit with graduate education. *Columbia*, 364 NLRB No. 90, slip op. at 31 (then-Member Miscimarra, dissenting). Litigation of unfair labor practice cases can extend for years before the Board issues a decision. In that time, "the

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bargaining "matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees and direction of employees"); California Government Code § 3562(q) (University of California) (excluding from collective bargaining: admission requirements for students, conditions for awarding degrees, and content and supervision of courses, curricula, and research programs); Washington Revised Code § 41.56.203 (Washington State University) (excluding from collective bargaining the ability to terminate individuals if they are not meeting academic requirements, the amount of tuition and fees, the academic calendar, and the number of students to be admitted to a particular class or section); Maine Revised Statutes Annotated, tit 26, § 965(1)(c) (excluding "educational policies" from scope of bargaining); *see also Brown*, 342 NLRB at 492 n.31.

[10] This has not been a problem in graduate student bargaining in public sector universities because most states prohibit strikes by public employees. *See, e.g*, New York Civil Service Law § 210 (prohibiting all public sector strikes); *see also* Milla Sanes & John Schmitt, Center for Economic and Policy Research, Regulation of Public Sector Collective Bargaining in the States (March 2014), http://www.cepr.net/documents/state-public-cb-2014 - 03.pdf (only twelve states allow teachers to strike).

academic world may experience developments that dramatically alter or even eliminate entire fields of study." *Id.* Additionally, student assistants may no longer hold their instructional positions, may be in different departments, and may even have graduated by the time a Board case affecting them is resolved. As then-Member Miscimarra observed in his *Columbia* dissent, "[i]n these respects, treating student assistants as employees under the NLRA is especially poorly matched to the Board's representation and ULP procedures." *Id.* at 32.

Granting NLRA protections to graduate students also may have a deleterious effect on the students' "college experience." *Id.* at 30. Specifically, under recent Board interpretations of the NLRA, it could be deemed unlawful interference with Section 7 employee rights for universities to prescribe and enforce certain standards of civility applicable to graduate student assistants. *Id.*

These "unfortunate consequences," identified in the *Columbia* dissent, demonstrate the overwhelmingly negative effect of applying the Act to student assistants. As explained by then-Member Miscimarra in *Columbia*, and by the Board in *Brown*, collective bargaining has no place in graduate education, which is characterized by individualized, academic decision-making necessary to educate, mentor, guide, and evaluate graduate students. "The Board has no jurisdiction over efforts to ensure that college and university students satisfy their postsecondary education requirements." *Columbia*, 364 NLRB No. 90, slip op. at 23 (then-Member Miscimarra, dissenting). And, the students' "instruction-related positions do not turn the academic institution they attend into something that can fairly be characterized as a 'workplace.'" *Id.*[11]

[11] Congress has recognized the unique role of post-secondary education and the unique demands it places on students by passing "an array of federal statutes and regulations [applicable] to colleges and universities, administered by the U.S. Department of Education, led by the Secretary of Education." *Columbia*, 364 NLRB No. 90, slip op. at 23 (then-Member Miscimarra, dissenting). Congress passed the Higher Education Act of 1965, Pub.

C. Empirical Evidence Relied Upon By The *Columbia* Majority Does Not Support Extending The Act To Graduate Student Assistants.

The Board majority in *Columbia* asserted that "the relevant empirical evidence" supported its conclusion. *Columbia*, 364 NLRB No. 90, slip op. at 4. That is not the case.

First, the Majority noted that some 64,000 students had organized at 28 public-sector institutions, and that the parties "successfully have navigated delicate topics near the intersection of the university's dual role as educator and employer." *Columbia*, 364 NLRB No. 90, slip op. at 9. But evidence regarding the experience of public university unions -- which is hardly new and was available when *Brown* was decided -- is not indicative of how graduate student unions would operate under the NLRA. Significantly, public sector bargaining is governed by state laws, which generally impose limits on the right to strike and on the scope of bargaining. *Brown*, 342 NLRB at 492 n.31 (collecting sources); *Lamphere Schools v. Lamphere Federation of Teachers*, 252 N.W.2d 818, 821 (Mich. 1977) (example of state law significantly restricting the right to strike); *School Committee of Boston v. Boston Teachers Union, Local 66*, 389 N.E.2d 970, 973 (Mass. 1979) ("It is by now well recognized that the subjects of public sector collective

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L. 89-329, 79 Stat. 1219 (1965), which authorizes most federal student assistance programs for students in postsecondary and higher education. The Higher Education Act has been reauthorized multiple times, including by the Higher Education Opportunity Act of 2008, which, among other things, added provisions that improve access to postsecondary education for students with intellectual disabilities. Pub. L. 110-315, 122 Stat. 3078 (2008). Congress also passed the Family Educational Rights and Privacy Act ("FERPA"), which restricts the disclosure of students' educational records. Pub. L. 93-380, 88 Stat. 484 (1974); 20 U.S.C. § 1232g. Congress thus has addressed – and has the authority to continue to address -- the interests of graduate students in multiple contexts outside of the NLRA, suggesting that it did not intend the NLRA to apply to this setting. *FDA v. Brown & Williamson*, 529 U.S. 120 (2000). The Board should not "disregard [its] responsibility to accommodate this extensive regulatory framework." 364 NLRB No. 90, slip op. at 23 (then-Miscimarra, dissenting). Indeed, the Board "has no regulatory authority over efforts to ensure that undergraduates and graduate students at colleges and universities satisfy their degree requirements." *Id.* at 25. Congress has spoken to the ability of students to obtain their educational objectives by enacting statutes to address "access, availability, affordability and effectiveness" of postsecondary education and the Board need not intrude there. *Id.* at 27.

There is an obvious and patent conflict between FERPA and NLRA-driven requirements regarding University disclosure of certain personal student information to the union, *e.g.*, eligible voter list data and, in the context of ongoing representation, other personal information required under § 8(d) of the Act. FERPA protects students' "education records" and the information contained in education records cannot be disclosed by the school absent consent of the students or an exception to FERPA. Indeed, the Board majority acknowledged this conflict and concluded "that the Act recognizes that a union's right to information may, in a particular context, be subordinated to a legitimate confidentiality interest." *Id.* at 13 n.93.

bargaining are more restricted than those in private sector labor relations."); *see also supra* n.10. State laws thus significantly mitigate the risks that concerned the Board in *Brown* and dissenting then-Member Miscimarra in *Columbia*.

Second, the Board majority inappropriately relied upon a study -- virtually commissioned by then-Chairman Wilma Liebman -- for the proposition that there is "'no support' for the contentions [in *Brown*] that graduate student unionization 'would harm the faculty-student relationship' or 'would diminish academic freedom.'" *Columbia*, 364 NLRB No. 90, slip op. at 9 (quoting Sean E. Rogers, Adrienne E. Eaton, and Paula B. Voos, *Effects of Unionization on Graduate Student Employees: Faculty-Student Relations, Academic Freedom, and Pay*, 66 Industrial & Labor Relations Rev. 487, 507 (2013) ("Rogers Study")).[12] The Rogers Study, aimed directly at *Brown's* reversal, simply ignored the *Brown* Board's concerns that graduate student unionization would restrict the freedom of faculty and administration to make academic decisions. *See Brown*, 342 NLRB at 490. The result-oriented study focused solely on students, with no attention whatsoever to faculty concerns. *See* Rogers Study at 495 ("In this study we will explore the impact on the academic freedom of graduate students themselves, and on their perception of overall academic freedom in the institution *but not specifically the academic freedom of faculty who work with them or the institution in which they work*" (emphasis added). As faculty did not participate, the study provides no basis for any conclusion about academic freedom from the important perspective of university faculty or administration.

The study also did not counter the *Brown* Board's concern about unionization harming student-faculty relations. The study did not address whether unionization would have an adverse effect on faculty-student relationships at private universities. Expert testimony in *Columbia*

[12] The Rogers study resulted from a suggestion by then-Chairman Wilma Liebman made directly to Dr. Voos and others regarding the kind of evidence needed to bolster her dissent in *Brown*. *See* Motion for Recusal, at 2-3, *New York University*, Case No. 02-RC-23481 (August 11, 2011).

showed that one cannot "learn anything at all from [the Rogers Study,] one way or the other – good or bad – about what would happen at Columbia were graduate students to unionize."[13] Indeed, the majority in *Columbia* acknowledged that Columbia's evidence showed that "neither harm nor benefit from collective bargaining can be ruled out" by the study, but nevertheless somehow concluded that "the dire predictions of the *Brown University* Board are undercut." *Columbia*, 364 NLRB No. 90, slip op. at 9.[14]

Finally, the Board's reliance on the experience of NYU as a "case in point" supporting employee status of graduate assistants also was misplaced. *Id.* at 10. The Board wrongly discounted evidence from three committees at NYU that had studied the school's experience with graduate assistant collective bargaining and concluded that the threat posed by continued union representation presented an unacceptable risk to the university. The committees expressly recommended withdrawal of recognition to safeguard the university's academic freedom.[15] Specifically, the Faculty Advisory Committee on Academic Priorities (consisting of senior faculty members who advise the Provost) expressed "concern" that grievances filed under the Graduate Assistant bargaining agreement "threatened to impede the academic decision-making authority of the faculty" concerning issues such as staffing the undergraduate curriculum, the appropriate measure of academic progress, and terms and conditions of fellowships that do not involve assistantships.[16] The Faculty Advisory Committee also noted the union's willingness to arbitrate such grievances, as well as the possibility that an arbitrator not familiar with the workings of a University would severely restrict academic freedom.[17] Similarly, the NYU

[13] *See* Br. on Review of Columbia University, *Columbia*, Case No. 02-RC-143012, at 28 (February 29, 2016).
[14] Other studies cited by the Board in *Columbia* were available at the time of the *Brown* decision and are, in any event, similarly inconclusive. *Columbia*, 364 NLRB No. 90, slip op. at 9.
[15] *See* Br. on Review of Columbia University, *Columbia*, Case No. 02-RC-143012, at 25-27 (February 29, 2016).
[16] *Columbia*, 02-RC-143012, Empl. Ex. 20 at 2.
[17] *Id.*

Senate Academic Affairs and Executive Committees (each comprised of students, faculty and administrators) expressed concern that "[o]ver time, a number of these grievances, if successful, have the potential to impair or eviscerate the management rights and academic judgment of the University faculty to determine who will teach, what is taught, and how it is taught."[18] Contrary to the *Columbia* Board's assertion, therefore, the experience at NYU under the Graduate Assistant Collective Bargaining Agreement *confirmed* the concern in *Brown* about the impact of collective bargaining on academic freedom and student/faculty relations.[19]

In sum, there was no empirical evidence to support the *Columbia* majority's rejection of the well-founded concerns of the Board in *Brown* that permitting collective bargaining between graduate student assistants and their schools would present serious risks to both academic freedom and student-faculty relationships.

II. CHICAGO'S GRADUATE STUDENT TEACHING AND RESEARCH ASSISTANTS ARE DISTINGUISHABLE FROM GRADUATE STUDENTS FOUND TO BE EMPLOYEES IN *COLUMBIA.*

A. Chicago's Graduate Students Are Not Similarly Situated To Graduate Assistants At *Columbia.*

The Board in *Columbia* did not purport to decide that all graduate student teaching and research assistants at every college and university throughout the United States are statutory

[18] *Columbia*, 02-RC-143012, Empl. Ex. 21 at 8.

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

employees under the Act. Indeed, the Board majority expressly acknowledged in *Columbia* that it had not decided that question across-the-board:

> We do not hold that the Board is required to find workers to be statutory employees whenever they are common-law employees, but only that the Board may and should find ***here*** that student assistants are statutory employees.

Columbia, 364 NLRB No. 90 at 4 (emphasis added). Only after analyzing each of the several graduate student classifications identified in the petition did the Board conclude – mistakenly, we submit – that the common law test of employee status had been met. *See id.* at 13-18.

For this reason, it is critically important to address the many material differences between the graduate student teaching and research assistants at Chicago and the graduate students considered in *Columbia*. The following list summarizes of some of the most material and significant differences.

1. **Unlike *Columbia***, the record here demonstrates that there is absolutely no "salient economic character" to the relationship between graduate student assistants and Chicago. The graduate assistants at Chicago are students enrolled in courses of study leading to advanced academic degrees. They take classes, do assignments, are given examinations, and receive grades. They perform the independent research necessary to obtain a PhD in their respective fields. The students who teach or conduct research do so to fulfill their academic requirements and for their own benefit. The assistantships are not motivated by Chicago's "business" considerations, but rather educational concerns. The tuition remission and the stipend package the students receive from Chicago support their overall academic education – that academic funding is not pay for a job.

2. **Unlike *Columbia*,** PhD graduate students are not "thrust" (*i.e.*, "push (something or someone) suddenly or violently") "wholesale" (*i.e.*, "done on a large scale")[20] into teaching, and there is not even the suggestion of a "salient economic character" to the relationship between Chicago and its graduate student teaching assistants. The relationship between the graduate students and the University is that of students in an academic institution, with teaching opportunities offered solely for the benefit of the graduate students' education and career aspirations.

It is beyond dispute that students develop a wide range of teaching skills through teaching assistantships, including conveying complex, technical information in a clear manner, developing methods of running a class discussion, and learning instruction in the design and development of syllabi, tests, and assignments. (*See, e.g.*, Chicago Post-Hearing Br. at pp. 26-30.) Teaching also provides an opportunity for students to master the subject matter of a course with which they have prior familiarity in greater depth, thus solidifying the students' understanding of the essential principles of their discipline. As Dean Nirenberg explained, "pedagogy is very important. It's very important to be able to teach and one of the reasons it's very important is because you won't get a chance to do research if you aren't pedagogged in the arts and sciences. That's just the way the modern American University is." (Nirenberg 162:9-14; *see also* 157:23-158:10.)

Because the pedagogical experience is so essential to graduate education, doctoral students in almost all of Chicago's programs must acquire a specified amount of pedagogical experience to obtain their doctoral degree. The DDE does not disagree; as discussed above, the

[20] *New Oxford American Dictionary* 1809, 1974 (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010).

Regional Director found that virtually all of the University's academic programs require teaching as an academic requirement in order to obtain a PhD (DDE at 5); that "[t]he University considers learning to teach and to evaluate student work as an integral part of graduate students' education" (DDE at 12); that "[e]very faculty witness [including those called by the Petitioner] acknowledged the importance of training the University's PhD students in pedagogy..." (DDE at 16); and that the University offers extensive pedagogical training through its various PhD programs as well as through the Chicago Center for Teaching which "offers pedagogical courses, seminars, workshops and other programs ... to advance the skills of teaching among anyone who teaches at the University." (DDE at 14).

3. **Unlike *Columbia***, where the Board found that graduate student teaching assistants were "thrust wholesale into" their roles, at Chicago the record established that graduate student teaching assistants at Chicago (including those who testified on behalf of Petitioner) receive extensive education, guidance, teaching and mentoring to support them in developing their pedagogy skills. As Dean Nirenberg described it, "far from thrusting students wholesale into any teaching context, that's what we would avoid. Abhor." (Nirenberg 156:1-3.) Indeed, the substantial and time-consuming pedagogical development programs and mentoring of PhD graduate students established in this record involves a considerable expenditure of resources for which Chicago receives no financial return. The DDE accurately found that "[e]very faculty witness acknowledged the importance of training the University's PhD students in pedagogy..." (DDE at 16).

4. **Unlike the Board's view in *Columbia*,** Chicago does not depend on its graduate students as a labor pool to staff its undergraduate classes. Indeed, just the opposite is true; Chicago is first and foremost a research institution, (Nirenberg 126:23-127:4; Amit 1286:7-13;

Hirschfeldt 1344:9-10), its primary focus – "more than any of [its] peers" -- is "just on producing researchers." (Nirenberg 126:23-127:4; *see* 162:15-18 ("[R]esearch is why you're at the University of Chicago, so we need ... to teach you to teach, but we cannot let you think that that's why – that's the principal reason you're here."), 167:10-14 ([P]edagogical training is important, and we want you to get the pedagogical training you need, but you don't want it to interfere with the research, which is the reason for the season.").) Because of Chicago's research focus, most PhD students in the humanities are required to spend only four quarters in training – three as a teaching assistant and one quarter in which the student gets experience creating and teaching his or her own course. In comparison to other schools, the teaching requirements to obtain a PhD at Chicago are not onerous, and certainly are not designed to ensure a labor pool to staff undergraduate programs.

In fact, several programs in the sciences have no teaching requirement at all, (DDE at 5), and the vast majority of sciences programs require students to teach only two one quarter courses to receive their PhD. (Er. Ex. 15A.) In the Biological Sciences Division, students may enroll in a classroom-based training course instead of one quarter of teaching, and some students in the sciences may also substitute one of the teaching requirements with an equivalent activity, including training spent at other institutions, such as teaching at a local high school, teaching "Boot Camp" to incoming PhD graduate students, or doing outreach work for the Kavli Institute for Cosmological Physics. (Prince 605:4-20; Er. Ex. 15A, n.1; Er. Ex. 15A, n.4; Swanson 1077:23-1078:1.) This structure is plainly not designed to create a "labor pool" to teach undergraduate classes.

5. **Unlike *Columbia***, where "teaching assistants who do not adequately perform their duties to the University's satisfaction are subject to corrective counseling or removal," 364

NLRB No. 90, slip op. at 15, graduate student teaching assistants at Chicago are not subject to discipline or removal from their positions if they are not successful teachers. Indeed, the DDE specifically so finds:

> PhD students fulfilling their teaching requirement are not disciplined based on their teaching performance nor is their performance graded. Rather, PhD students fulfilling their teaching requirement who do not perform well are counseled by the faculty member in charge of the course to aid their improvement.

(DDE at 6.)

6. **Unlike *Columbia***, graduate student research assistants at Chicago are "permitted to simply pursue their educational goals at their own discretion, subject only to the general requirement that they make academic progress." *Cf. Columbia*, 364 NLRB No. 90, slip op. at 18. Students choose their own laboratory and mentor, perform research in furtherance of their dissertations, and "perform research under the guidance of their respective faculty member, publish under or co-publish studies with their PIs, and help secure funding for research by applying for grants." (DDE at 20) Indeed, the arrangement between graduate research assistants and Chicago was anticipated by the Board majority in *Columbia*, when the majority speculated that "[i]t is theoretically possible that funders may wish to further a student's education by effectively giving the student unconditional scholarship aid, and allowing the student to pursue educational goals without regard to achieving any of the funder's own particular research goals." *Id.* at 17. That is precisely the case at Chicago. The Regional Director's refusal to acknowledge this, and to dismiss the Petition as to these graduate student research assistants, is ample reason for the Board to accept this Request for Review.

B. The Regional Director's Ruling Improperly Renders All Graduate Student Teachers and Research Assistants Employees.

Despite this litany of determinative differences between Chicago and Columbia, the Regional Director concluded that all graduate student teaching and research assistants at Chicago

are nonetheless statutory employees. By extending *Columbia* to an entirely different situation at Chicago, he created a Scylla and Charybdis through which no university can possibly navigate, thereby ensuring that all graduate student teaching and research assistants at every college and university must be found statutory employees. *See, e.g.*, *Loyola University Chicago*, 13-RC-189548, 2017 WL 2963203, at *1 (NLRB July 6, 2017) (Chairman Miscimarra, dissenting) (stating that the Chairman would have granted the university's request for review based on his belief that student assistants are not employees within the meaning of the Act); *The New School*, Case 02-RC-143009, 2017 WL 2963205, at *1 (NLRB July 6, 2017) (Chairman Miscimarra, dissenting) (stating that the unit is inappropriate for the reasons expressed in his dissents in *Columbia University* and *Yale University*); *University of Chicago*, 13-RC-198365, 2017 WL 2402773, at *1 (NLRB June 1, 2017) (same). *See also Duke University*, 10-RC-187957, 2017 WL 971643, at *1 (Feb. 23, 2017); *Yale University*, 365 NLRB No. 40, at *1 (2017); *The New School*, 2016 WL 7441005, at *1 (NLRB Dec. 23, 2016).

According to the Regional Director, graduate students at Columbia who receive little or no training and are "thrust wholesale" into an economic relationship and are employees as a result, *and* graduate students at Chicago who are carefully trained, mentored and taught how to teach as an integral part of their academic training nonetheless teach under the University's "direction and control" and are employees as well. Similarly, the Regional Director concluded that graduate student research assistants at Columbia who have tasks specifically defined for them in external funding grants therefore operate under the university's control and are employees, *and* that graduate students at Chicago who have no such fixed duties and do research on their own dissertations under the mere guidance of their faculty mentors – the central reason

why PhD research assistants are students at Chicago in the first place – also are sufficiently controlled by the University to be considered employees.

This irrebuttable presumption – a fiction and extreme outlier in American law – renders a hearing and the development of a factual record in this or any other case an exercise in futility and thus raises serious questions about due process and fundamental fairness. Why bother to hold a hearing to determine whether graduate student teaching assistants are being trained to teach as part of an academic program if careful pedagogical training itself makes them statutory employees? And, why bother to hold a hearing if merely having a faculty mentor guide a student research assistant's experiments is sufficient to establish employee status?

Nothing in *Columbia* itself requires this result. As discussed above, *supra* at 26-27, *Columbia* does not hold that all graduate students at every private college or university in the United States serving as teaching or research assistants are employees within the meaning of the Act. Indeed, under *Columbia,* careful factual analysis is *always required* to determine whether graduate student teaching and research assistants at any given college or university should be considered employees. In his April 6, 2015 *Guidance Memorandum on Representation Case Procedure Changes* ("GC Memo 15-06"), General Counsel Griffin recognized that employee status issues – and particularly student versus employee status under Section 2(3) – is a factual issue that must be resolved through a pre-election hearing:

> Issues as to whether individuals are employees within the meaning of Section 2(3) of the Act must be litigated at the initial hearing if they involve the entire unit and should likely be litigated at the initial hearing if they concern classifications that constitute more than 20 percent of the unit.

GC Memo 15-06 at 16-17. Elaborating, the General Counsel stated that this interpretation of the new R-Case rules would "include determinations of . . . whether graduate students who serve as teaching assistants and research assistants are employees." *Id.* at 17 (citing *New York University,*

356 NLRB 18 (2010); *Brown University*, 342 NLRB 483; and *Boston Medical Center Corp.*, 330 NLRB 152 (1999)).

In case after case, the Board has made clear the need for a factual record to decide whether graduate student teaching or research assistants are employees under *Columbia.* In *The New School,* the Board remanded the case to the Regional Director for "further appropriate action consistent with *Columbia University*, including reopening the record, if necessary." Case No. 02-RC-143009, 2016 WL 7441005, at *1 (NLRB Dec. 23, 2016). Regarding the scope of the remand, the Majority (then-Member Miscimarra and Member McFerran) emphasized that "the record must be reopened at the request of either party to provide the opportunity to develop an evidentiary record that takes into account the Board's *Columbia University* decision." *Id.* at 2.[21]

The outcome in *New School* also reflects the Board's earlier ruling in *New York University*, 356 NLRB 18 (2010), which required the Regional Director to develop a "full evidentiary record" to determine the employment status of (1) students who received research grants from external sources, and (2) teaching assistants the University had not classified as adjunct faculty. In that case, the Board concluded that "because the Regional Director dismissed the petition without a hearing, we cannot assess the accuracy of [the Employer's] representations and the Petitioner's position on the factual and legal questions they appear to raise." *Id.* at 18. And, in *Yale University, Duke University* and in this case itself, various Regions have repeatedly accepted offers of proof and ordered extensive hearings to develop a factual record and probe whether graduate student teaching and research assistants at each institution are employees under the *Columbia* test.

[21] Only then-Chairman Pearce opined, in a terse footnote, that "the record here establishes that student assistants are statutory employees and that it is therefore unnecessary to remand that issue to the Regional Director." *Id.* at 1 n.2.

This practice, and prior Board pronouncements on the need for creating a factual record on the student versus employee issue, are vitiated if the Regional Director is correct. Proof clearly establishing that learning to teach is an academic requirement at Chicago in order to obtain a PhD (DDE at 5) and that "[t]he University considers learning to teach and to evaluate student work as an integral part of graduate students' education" (DDE at 12) cannot be construed as proof of University control and employee status. Just the opposite is true; learning to teach at Chicago is part of the student's academic training, nothing more and nothing less. And it cannot be that a record establishing that graduate research assistants are merely guided in their research by faculty mentors establishes employee status; how else would a graduate student in the sciences be trained while he or she seeks a PhD?

III. A SUBSTANTIAL QUESTION OF LAW OR POLICY IS RAISED BECAUSE OF THE ABSENCE OF BOARD PRECEDENT WITH RESPECT TO DEVISING AN ELIGIBILITY FORMULA AMONG GRADUATE STUDENT ASSISTANTS.

The Regional Director's finding that a one-year look-back formula should apply is erroneous for the reasons explained below. Moreover, to the degree *Columbia* survives Board review, this case presents the opportunity for the Board to determine that its standard eligibility formula should apply to representation cases involving graduate student assistants.

The Board routinely applies its standard eligibility formula in every representation case absent proof that its application is inappropriate under the circumstances. The Board's standard eligibility formula allows all employees to vote if they are in the petitioned-for classifications and are on the employer's payroll and working as of the close of the pay period immediately preceding either the issuance of a decision and direction of election, or the approval of a stipulated election agreement. *See Greenspan Engraving Corp.*, 137 NLRB 1308, 1309 (1962); *Gulf States Asphalt Co.*, 106 NLRB 1212, 1214 (1953); *Reade Manufacturing Co.*, 100 NLRB

87, 89 (1952); *Bill Heath, Inc.*, 89 NLRB 1555, 1556 (1950); *Macy's Missouri-Kansas Division v. NLRB*, 389 F.2d 835, 842 (8th Cir. 1968); *Beverly Manor Nursing Home*, 310 NLRB 538, 538 n.3 (1993). This standard eligibility formula has been followed in other graduate student elections conducted by the Board, including NYU, Harvard, Yale, and Loyola University of Chicago, among others. (Tr. 1620:9-1623:14; Er. Ex. 65.) Of the twelve universities that have been subject to graduate student representation petitions, nine have applied the standard voter eligibility formula.[22] (*Id.*) Of the remaining three decisions, one – Duke University – can be given no weight because the Board held that the Regional Director improperly refused to hold a hearing on eligibility. *Duke University*, 10-RC-187957. The other two cases, *Columbia University*, 02-RC-143012, and *The New School*, 02-RC-143009 both come out of Region 2 and represent the views of a single Regional Director.

More critically, when the parties disagree on the formula to determine voter eligibility, as in this case, the Board has routinely held that unless "the evidence adduced at the hearings . . . support[s] a deviation from our usual eligibility requirements, eligibility will be determined by the usual payroll period." *See B-W Construction Co.*, 161 NLRB 1600, 1602 n.4 (1966) (citing *R.B. Butler, Inc.*, 160 NLRB 1595 (1966)). The burden is on the party seeking a non-traditional eligibility formula to present evidence to demonstrate that such formula is appropriate. *See B-W Construction Co.*, 161 NLRB at 1601; *R.B. Butler, Inc.*, 160 NLRB at 1602-03.

Petitioner plainly failed to meet that burden. Indeed, it presented no evidence in support of its claim for a one-year look back formula. It is well-accepted that the eligibility of periodic or seasonal employees to vote turns on whether the employees have a "continuing interest in the

[22] At the hearing, counsel for the Petitioner argued that "there was no discussion of the appropriate eligibility period" in eight of the cases that used the standard formula. (Tr. 2083:19-2084:1.) Even if true, Petitioner's assertion is irrelevant. What is relevant is that—in those cases—the Regional Directors all concluded that the standard eligibility formula was appropriate.

terms and conditions of employment of the unit," which in the graduate student setting means whether they are likely to be appointed again. *See Columbia,* 364 NLRB No. 90, slip op. at 21. Petitioner failed to produce **any** evidence demonstrating that students who were in petitioned-for classifications during the Summer 2016 quarter, Autumn 2016 quarter, Winter 2017 quarter and Spring 2017 quarter are likely to hold those positions in the future. Indeed, because the petitioned for unit includes master's degree students admitted into one or two year academic programs with no teaching requirements at all, the record is clear that this will not be the case for them.

Indeed, faculty and administrators from across the University presented uncontroverted evidence that students who satisfy their academic teaching or research assistantship requirements are **discouraged** from serving in those positions again. Dean David Nirenberg (Social Sciences), Dean Anne Robertson (Music), and Dean of Students Teresa Owens (Divinity) all testified that they actively discourage students from teaching beyond their academic requirement. (Nirenberg 164:1-5; Robertson 490:22-24; Owens 1001:12-24.) As Beth Niestat testified, Chicago does not have a centralized organization overseeing all of the graduate degree programs, and as a result of this decentralized structure, the various Schools and Divisions grant degrees and are responsible for defining their own academic requirements. (Niestat 55:14-56:6.)

Significantly, none of Chicago's evidence on the lack of "look back" eligibility has been rebutted by the Petitioner, which has produced no evidence of its own to support a finding that graduate students currently in a petitioned-for classification or in one during the 2016-17 school year would have a reasonable expectation of returning. Petitioner has entirely failed to meet its burden of proof, and has not shown—let alone proven—that graduate students who held an instructional or research assistantship in the past have the necessary "continuing interest" in the

terms and conditions of employment to justify their participation in an election. Accordingly, the Regional Director should have applied the standard eligibility formula and held that only those graduate students who are teaching and performing research during the Autumn 2017 quarter are eligible to vote.

The DDE in this case is based upon an entirely unsound foundation. It should be immediately reviewed and overturned to prevent an election that should never be held.

IV. THE REGIONAL DIRECTOR ERRED IN DENYING CHICAGO'S MOTION FOR EXTENSION OF TIME TO FILE THE VOTER ELIGIBILITY LIST.

On August 10, 2017, the Regional Director inexplicably ordered Chicago to produce voter lists by August 17, 2017, even though the election in this matter is not scheduled to take place until two months later, on October 17-18, 2017. Chicago requested until October 2, 2017, to file the list because until that date, Chicago will not know with any reasonable accuracy the identity of students who will be teaching in that quarter and therefore should be added to the list for that quarter. Rather than allow Chicago sufficient time to produce an accurate and complete list, the Regional Director ordered Chicago to hastily produce the list that is inaccurate *ab initio* and that exposes Chicago, the Petitioner and the students themselves, to a risk that the election will be set aside.

"The principle underlying the rationale of *Excelsior* requires employers to disclose the names and addresses of eligible voters to the union with an opportunity to inform the employees of its position so that they, the employees, will be able to vote intelligently." *Sprayking, Inc.*, 226 NLRB 1044, 1044 (1976). The NLRB Casehandling Manual states that the employer shall provide the list two business days after the issuance of a direction of election and, generally, the voter list must be received in the Regional Office and served on other parties "at least 10 days before the election." NLRB Case Handling Manual § 11312.1. But, the Board has cautioned

that the "rule of *Excelsior*" is not to be applied mechanically. *See Telonic Instruments, A Division of Telonic Industries, Inc.*, 173 NLRB 588 (1968); *U.S. Consumer Products*, 164 NLRB 1187 (1967); *Program Aids Company, Inc.*, 163 NLRB 145 (1967). In *U.S. Consumer Products*, for instance, the Board found that the employer's 17-day delay in producing the voter list was excusable because it was due to the parties' negotiations in attempting to resolve the representation issue and the employer supplied the list fourteen days in advance of the election. 164 NLRB at 1187. Likewise in *Pole-Lite Indus. Ltd.*, the Board found that the employer substantially complied with the rule (despite the late submission) because the union received the list fourteen days in advance of the election and there was no indication that the late submission was due to a lack of good faith. 229 NLRB 196, 197 (1977). In *Sprayking, Inc.*, the Board excused the delay where the Union was afforded sufficient opportunity to communicate with the small number of employees in the unit prior to the election. 226 NLRB at 1044.

Here, the Regional Director applied the rule mechanically by ordering Chicago to produce the list *two months* before the election, despite Chicago's arguments explaining why it could not produce an accurate and complete list by August 17, 2017. As Chicago explained in its letter motion for extension of time, the Autumn 2017 quarter at Chicago has not yet begun and teaching assignments will not be finalized until several weeks into the quarter, on or about October 2, 2017. It is not until that time that Chicago can definitively identify the students in the petitioned-for unit who will become eligible to vote. Accordingly, the list Chicago was ordered to produce on August 17 contained names of students who may be ineligible to vote in the election, and omits the names of eligible students who may be appointed after August 17. Notably, the date proposed by Chicago – October 2, 2017 – is *fifteen* days prior to the date of the election. The Union would have had the list 15 days prior to the election, which is ample time to

communicate with the students. Petitioner would not have been prejudiced, and indeed would only have benefitted from the accurate and complete list, if Chicago had been allowed to file the list on or about October 2, 2017.

The Regional Director's order prejudiced Chicago by forcing it to produce a list certain to result in inaccuracies that might set aside the election based on inadvertent and unavoidable exclusion of eligible voters or the presentation of inaccurate information.

CONCLUSION

The Board should grant The University of Chicago's Request for Review, reverse the Regional Director's DDE, reconsider and reverse *Columbia*, and dismiss the Petition.

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New York, New York

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