

BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

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In the Matter of: :  
 :  
THE NEW SCHOOL, :  
 :  
Employer, :  
 :  
and :  
 :  
STUDENT EMPLOYEES AT THE NEW :  
SCHOOL-SENS, UAW, :  
 :  
\_\_\_\_\_  
Petitioner. :

Case No. 02-RC-143009

**PETITIONER'S REQUEST FOR REVIEW OF SUPPLEMENTAL DECISION  
AND ORDER DISMISSING PETITION**

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## I. INTRODUCTION

This petition, seeking a unit of student employees, is before the Board for the second time. The Regional Director initially dismissed this petition without a hearing on the authority of Brown University, 342 N.L.R.B. 483 (2004), because the unit sought is composed of student employees. The Board promptly reversed, reopened this case, and ordered that a hearing be held. On remand, following the hearing, the Acting Regional Director again concluded that she was compelled to dismiss this petition on the sole basis of the Brown decision.

Since 2010, this Board has granted review six times, in five cases, finding “compelling reasons” to reconsider Brown.<sup>1</sup> Nevertheless, that decision remains on the books, frustrating efforts by student employees to utilize the Board’s electoral processes as they organize. The time has come to squarely overrule a decision that has no basis in the statute, precedent, logic, or experience.

## II. PROCEDURAL HISTORY

On December 17, 2014, Student Employees at the New School - SENS, UAW (“the Petitioner” or “the Union”), filed this petition seeking to represent a unit of student employees who provide instructionally-related services and research services for the

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<sup>1</sup> The Board first found compelling reasons to reconsider Brown in New York University, 356 N.L.R.B. No. 7 (NYU II) in October 2010. That case was again dismissed after a hearing, and the Board again granted review to reconsider Brown in an unpublished order dated June 22, 2012. That same day, the Board granted review in a second case that was dismissed on the authority of Brown, Polytechnic Institute of New York University, Case No. 29-RC-12054. These two petitions were ultimately withdrawn, a year and one-half after review had been granted, pursuant to an agreement for a private election procedure. The Board granted review in Northwestern University, 13-RC-12139, on April 24, 2014, and, on May 12, 2014, invited briefs to address, *inter alia*, whether the Board should overrule Brown. Finally, the Board reopened this case and Columbia University, Case No. 02-RC-143012, in February of this year, citing NYU II.

New School (“the Employer” or “the University”) (Bd. Ex. 1(a)).<sup>2</sup> The Regional Director dismissed the petition for the first time on February 6, 2015, holding that she was “constrained” to follow Brown (Bd. Ex. 1(i)). Just five weeks later, on March 13, the Board unanimously reversed the Regional Director’s Order, citing New York University, 356 N.L.R.B. No. 7 (2010) (“NYU II”), in which the Board had held that there were “compelling reasons for reconsideration of the decision in Brown University.” (Bd. Ex. 1(k)).

Following reinstatement of the petition, a hearing was conducted before Hearing Officer Gregory Davis on seven hearing dates between April 20 and May 14, 2015. The unit sought in the petition was amended at the hearing to include student employees in one subdivision of the New School, the Parsons School, who perform the duties of Research Assistants but are given the title “Student Assistant 3” for payroll purposes (Tr. 69, 75-76; Dec. 7, fn. 5). As amended, the Unit sought is:

Included: All student employees who provide teaching, instructionally-related or research services, including Teaching Assistants (Course Assistants, Teaching Assistants, Teaching Fellows, Student Assistants 3 at the Parsons School and Tutors); and Research Assistants (Research Assistants and Research Associates) and Student Assistants 3 at the Parsons School.

Excluded: All other employees, Student Assistants at schools other than Parsons, guards and supervisors as defined in the Act.<sup>3</sup>

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<sup>2</sup> References to the record in this proceeding shall be indicated as follows:  
 Supplemental Decision and Order Dismissing Petition ..... Dec. (followed by page number)  
 Transcript ..... Tr. (followed by page number)  
 Employer Exhibits ..... Er. Ex. (followed by Exhibit number)  
 Petitioner Exhibits ..... Pet. Ex. (followed by Exhibit number)  
 Board Exhibits ..... Bd. Ex. (followed by Exhibit number)

<sup>3</sup> During the course of the hearing, the parties agreed to exclude student assistants at schools other than Parsons because they do not provide instructional or research services (Tr. 314). The Regional Director noted that some Research Assistants are mis-classified in the Employer’s payroll system (Dec. 7, fn. 5). The Petitioner seeks to represent all Research Assistants, regardless of payroll classification errors.

Certain basic facts about this Unit were either undisputed or overwhelmingly established by the evidence on this record. First, as the Regional Director found, it is composed of individuals who provide services to the University that further the mission of the University and generate income for the University. Second, these individuals receive financial compensation from the University for performing these services. Finally, it is undisputed that these individuals provide these services under the direction and supervision of the Employer. Thus, they fit the general understanding of the term “employee” and the definition of that word under the NLRA and virtually any other statute covering employees.

The Regional Director nevertheless concluded that she was compelled to dismiss this petition because these individuals also happen to be students at the institution that employs them. Her decision again states that she was “constrained” by the precedent of Brown to reach this conclusion (Dec. 3, 19).

The majority in Brown recognized that graduate assistants have an economic relationship with their university but concluded that they are not statutory employees because they are “primarily students.” The majority found that working as a graduate student assistant “cannot be divorced from the other functions of being a graduate student.” 342 N.L.R.B. at 489. The Board proceeded to find that collective bargaining with respect to the employment relationship between graduate student assistants and a university would cause certain speculative harms to the academic relationship. This decision was not based upon the text of the statute, precedent regarding the definition of “employee” under the NLRA, or any evidence that those speculative harms were real.

The Board should rule on the validity of Brown without further delay. That decision cannot be reconciled with the language of Section 2(3) of the NLRA or any other decision interpreting that language. An empirical study published since the Brown decision debunks the speculation in that case regarding the supposed harm that could be caused by collective bargaining by student employees. Indeed, that very speculation is founded upon a hostility to collective bargaining that is inimical to the policies of the Act. The record in this case clearly contradicts the premise of Brown that the employment relationship between a university and graduate assistants is inseparable from the academic relationship. Accordingly, Brown should be overruled forthwith.<sup>4</sup>

In addition to arguing that Brown controls, the Employer made the alternative argument that these student employees should be denied an election on the ground that they are temporary employees. The Regional Director rejected this contention, finding that “a number of students are offered repeat appointments.” (Dec. 21).<sup>5</sup> Thus, the only issue presented by this Request for Review is whether the time has finally come to overrule Brown. The Board should promptly grant review, reinstate the petition, and order an election in the petitioned-for unit.

### III. FACTS

#### A. The Overall Operations of the Employer

The Employer is engaged in operating institutions of higher education in New York City (Tr. 8, 53; Dec. 1, 3). The New School derives 85% of its revenues from

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<sup>4</sup> The Employer did not raise any issues regarding the scope of the unit or claim that these individuals lack a community of interest with one another.

<sup>5</sup> The Regional Director, evidently recognizing that the Brown decision is an anomaly that should be overruled, suggested that the Board may devise a voting eligibility formula for graduate student employees (Dec. 21, fn . 12).



tuition (Tr. 102-03; Er. Ex. 6, 2<sup>nd</sup> page; Dec. 4). Those revenues total approximately \$300 million per year (Tr. 42).

The University is divided into five schools or divisions: the New School for Social Research (“NSSR”), which contains the graduate faculty; the Eugene Lang College, which is a liberal arts undergraduate school; the New School for Public Engagement (“NSPE”); the Parsons School of Design; and the Performing Arts School. The Performing Arts School was recently formed from the merger of three programs: the Mannes School of Music, the Drama School and the Jazz School (Tr. 47-48; Dec. 3, 16-17). Slightly more than 10,000 students are enrolled at the New School, including about 6,700 undergraduate students and 3,400 graduate students (Tr. 47). Of the 3,400 graduate students, approximately 550 or 560 are doctoral students (Tr. 65, 188).<sup>6</sup> The University employs about 420 full-time faculty, and it employed about 1,700 part-time or adjunct faculty during the Fall 2014 semester. Over the course of a full academic year, the Employer employs about 2,300 part-time faculty (Tr. 43-44; Dec. 3).

The Employer offers a wide range of undergraduate degrees. In addition to a number of traditional Bachelor of Arts (“BA”) and Bachelor of Science (“BS”) degrees, the New School offers a Bachelor of Fine Arts (“BFA”) degree, a Bachelor of Music (“BM”) degree, and a variety of Associate Degrees, certificates and diplomas (Er. Ex. 3; Tr. 52-53). At the Master’s level, the Employer offers Master of Arts (“MA”), Master of Science (“MS”), Master of Fine Arts (“MFA”), and Master of Music (“MM”) degrees (Er. Ex. 3; Tr. 54; Dec. 3).

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<sup>6</sup> All but one of the doctoral students are enrolled in programs leading to a Ph.D. degree. One student is seeking a degree of Doctor of Social Science (Tr. 188). Unless otherwise indicated, the terms “doctoral student” and “Ph.D. student” are used interchangeably in this brief.

The New School for Social Research is exclusively a graduate school (Tr. 183; Dec. 3). All but 59 of the 550 doctoral students at the University are enrolled at NSSR (Tr. 65-66, 187-88; Dec. 3). Most of the original research conducted by the Employer is performed at NSSR (Tr. 188). NSSR offers doctoral programs in various social sciences and the humanities (Er. Ex. 5, 3<sup>rd</sup> page; Tr. 189-90; Dec. 3). NSSR also offers Masters' of Arts in several humanities and social science fields, including the fields in which it offers doctoral degrees (Er. Ex. 5, 3<sup>rd</sup> and 4<sup>th</sup> pages; Tr. 189). Students enrolled in NSSR perform instructional and research services in the positions sought in the petition in several schools throughout the University (Tr. 225, 317, 544). At NSSR itself, the Employer utilizes the services of Teaching Assistants, Research Assistants and Research Associates, but it does not use the services of Course Assistants, Tutors or Teaching Fellows (Tr. 200-01; Dec. 17).

The Eugene Lang School is exclusively an undergraduate school, offering B.A. degrees in a variety of arts, humanities and social science fields (Tr. 317-18; Er. Ex. 3, 5<sup>th</sup> page; Dec. 3). It is the only one of the divisions of the New School that does not offer graduate programs (Tr. 54-55, 318; Dec. 3, 16-17). While there are thus no graduate students at Lang, the school does utilize graduate students from other divisions to serve as Research Assistants, Teaching Assistants, Teaching Fellows, and Course Assistants (Tr. 317; Dec. 16).<sup>7</sup>

The New School for Public Engagement includes both graduate and undergraduate students in four divisions or "colleges": the Bachelor Program for Adults and Transfers; the Milano School of International Affairs, Management and Urban

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<sup>7</sup> Course Assistants are informally referred to as "Graders" at Lang but are classified as Course Assistants in the Employer's payroll system (Tr. 317; Er. Ex. 7). The Union seeks to represent these student employees.

Policy; the School of Media Studies; and the School of Writing (Tr. 48, 255; Er. Ex. 2, p. 6). About 1,400 graduate students and 600 undergraduate students were enrolled in NSPE at the time of the hearing (Tr. 255). NSPE offers several Bachelor's and Master's degrees and a Ph.D. in Public and Urban Policy at the Milano division (Er. Ex. 2, p. 6; Tr. 257). NSPE utilizes the services of Teaching Assistants, Teaching Fellows, Research Assistants, Course Assistants, and Tutors, but not Research Associates (Tr. 256; Dec. 17).

The Parsons School of Design enrolls about 5,000 students, one-half of the student body of the University, in various programs related to art and design (Tr. 542-43). This includes approximately 860 Master's students and no Ph.D. students (Tr. 543). The Parsons School utilizes the services of Teaching Assistants, Teaching Fellows, Research Assistants (referred to as Student Assistants III), Research Associates, and Tutors, but no Course Assistants (Tr. 542; Dec. 17). Most of the students who provide these services at Parsons are Ph.D. students enrolled at other schools (Tr. 543-44; Dec. 17).

Within the Performing Arts School, the Employer utilizes the services of Tutors to assist students in one class, Techniques of Music (Er. Ex. 67; Dec. 17).

**B. Academic Requirements**

The NSSR admits students to Master's programs based upon their previous academic records, whether their interests fit with the programs offered by the Employer, and any ideas, projects or proposals submitted by the applicant. Upon admission, they receive a letter offering a place as a student in the program (Er. Ex. 28(a)-(e)). The offer letters for most programs provide that, upon completion of the Master's program

“you will be eligible to be considered for continued study toward the Ph.D.” (Er. Ex. 28(a)-(e)). To obtain the degree, the student is required to complete 30 or more course credits and produce a major work: either a research project, a thesis paper or a practical project (Tr. 81, 194; Dec. 4). Full-time students generally require two or more years to complete a Master’s degree (Tr. 194-95; Dec. 4).

Most students who apply for admission to a Ph.D. program at the New School have already earned a Master’s Degree (Tr. 81-82, 347). The University sends a very simple letter to applicants who are accepted, informing them of their admission as students (Er. Ex. 29, 69). To become eligible for award of a Ph.D. degree, students must complete additional course credits, ranging from 30 to 60 credits, pass comprehensive or qualifying exams, prepare and obtain approval of a dissertation proposal, write the dissertation, and obtain final approval of the dissertation by a doctoral committee (Tr. 82). On average, students require a total of seven years to obtain a Ph.D., including the time to obtain the Master’s Degree (Tr. 195; Dec. 4).

Some Master’s and Doctoral students receive merit based scholarships in varying amounts that can be applied toward the cost of tuition only (Er. Ex. 28, 69). Students, of course, are not required to perform any services in order to receive a scholarship (Tr. 557). Unlike many wealthier research institutions, the New School does not offer teaching or research positions to students as part of their admission to degree programs (Tr. 222). Rather, in order to obtain any of the positions that are the subject of this petition, the student must go through a separate application process and be selected for those positions (Tr. 223, Dec. 13-15). The University does not require

students to serve in any of these positions in order to obtain a degree (Tr. 119; Dec. 18).

**C. Duties of the Positions Included in the Proposed Unit**

**1. *Teaching Positions***

Student employees in all of the instructional classifications included in the petitioned-for unit provide services related to teaching students at the New School, primarily undergraduate students at Lang.

*Course Assistants* assist classroom instructors by performing duties that do not entail classroom teaching responsibilities. These include help with grading, preparation of class presentations, assisting with presentations in the classroom, and generally supporting a faculty member in presenting the course to students (Tr. 80, 117, 328; Tr. 8-9). *Course Assistants* may be called upon to meet outside of class with students who are having trouble with the class (Tr. 284). Their support duties may include photocopying, setting up equipment, and other administrative duties (Tr. 284; Dec. 4).

*Teaching Assistants* (“TAs”) provide more advanced support services to faculty members, generally including some teaching responsibilities (Tr. 77; Dec. 4, 5). Their duties include preparing documents for the instructor, locating reading materials or other information requested by the instructor, distributing materials to the students, and holding office hours to meet with students in the class (Tr. 109-10, 118; Dec. 5). Many *Teaching Assistants* assist in large lecture classes, including the University Lecture (“ULEC”) classes (required classes for undergraduate students from across the University) and large lecture classes offered at Parsons (Tr. 510-11, 543-44; Dec. 6). These TAs attend the large lecture classes taught by faculty members and conduct

recitation sections, or in-depth discussion sessions, with smaller groups of students from the class (Tr. 121-22, 205-06, 544; Dec. 5-6). The TAs will then often meet with the instructor to discuss what has been taking place in the recitation sessions, determine whether the students are grasping the materials, and discuss techniques to ensure that the students are learning the material of the course (Ibid). In general, the duties performed by Teaching Assistants depend upon the needs of the course (Tr. 118; Dec. 5).

The *Teaching Fellow* (“TF”) position is a more advanced teaching position entailing greater responsibility (Tr. 77-78, 111-12; Dec. 6). Teaching Assistant positions are available to students at varying educational levels, whereas Teaching Fellow positions are generally limited to Ph.D. students or students in a terminal Master’s program who have completed the majority of the degree requirements (Tr. 112, 522; Dec. 5). A Teaching Fellow is the instructor of record with responsibility for the syllabus of the class and for teaching and grading the class under the supervision of a department chair or program director (Tr. 521-22, 547; Er. Ex. 46; Dec. 6). They teach classes, read and grade assigned work, revise the syllabus, develop class assignments in consultation with faculty, assess student learning, and generally take responsibility for a class (Er. Ex 46). The University considers movement from a Teaching Assistant to a Teaching Fellow to be “the natural progression.” (Er. Ex. 74, 2<sup>nd</sup> page; see Tr. 112). Thus, there is a continuum from Course Assistant to TA to TF (Tr. 283).

*Tutors* provide one-on-one assistance to students who need help with their classwork (Tr. 79-80, 287, 288-89; Er. Ex. 56; Dec. 9). The University provides various “learning centers” which are staffed by Tutors to assist foreign students who need help

with English, students who need help with creative writing, and students in foreign language classes who need help with written or spoken languages (Tr. 79-80, 289; Er. Ex. 56; Dec. 9).

## **2. Research Positions**

Research Assistants and Research Associates work with faculty members conducting research at the University.

The University allocates up to \$5,100 to each full-time faculty member to pay *Research Assistants* to provide assistance with the faculty member's work (Tr. 78-9, 116, 308; Dec. 9).<sup>8</sup> The duties performed by Research Assistants are determined by the research projects and areas of interest of the particular faculty member (Tr. 78-9, 326; Er. Ex. 50; Dec. 7). The particular duties assigned can vary widely (Dec. 7). Research Assistants collect and analyze data or literature related to a professor's research (Tr. 113, 206; Dec. 7). Research Assistants in the social sciences may interview and work with human subjects to collect information for the faculty member's study (Tr. 206, 227-28; Dec. 7). Some faculty members assign Research Assistants to prepare materials to be presented at a conference or to help write a paper (Tr. 274, 326-27, 417; Dec. 7-8). Other faculty members assign their Research Assistants to help with correspondence, maintain websites, and perform other administrative tasks (Tr. 274, 416; Dec. 7). The Deputy Provost testified that Research Assistants, "generally speaking", work in fields that they are interested in, but that the particular assignment depends upon the interests of the faculty member (Tr. 79; Dec. 7). Thus, for example, a Research Assistant who is interested in policing methods and plans to

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<sup>8</sup> More money may be available for faculty at the NSSR in departments that attract grants from outside sources to support research (Tr. 116; Dec. 7).

write her dissertation about the use of surveillance by the NYPD will be working with a professor whose interests lie in sociology of religion and the Middle East (Tr. 485).

*Research Associates* are more advanced Ph.D. students or occasionally Master's students on a path toward a Ph.D. (Tr. 79; Dec. 8). Generally, Research Associates are "supported," or paid with funds provided by a research grant from a government or other outside source (Tr. 79, 357, 363; Er. Ex. 63; Dec. 8). To obtain a grant, a faculty member, known as the Principal Investigator or "PI," must submit a detailed description of the research he or she plans to conduct (Tr. 357; Er. Ex. 64). A Research Associate conducts research and performs duties related to the grant (Dec. 10). For example, a Psychology Professor, Michael Schober, used Research Associates in a study to determine whether respondents to a survey conducted by iPhone answer questions differently depending upon whether the questions are asked via text or voice and upon whether the questions are administered by a human interviewer or automated system (Tr. 359-60; Er. Ex. 64; Dec. 8). Several Research Associates worked on this project, including one who designed interactive dialog systems to be used in the surveys (Tr. 361, 362-63; Dec. 8). The Employer contends that the work done by Research Associates is often related to their dissertation proposals (Tr. 79). That is undoubtedly true in some cases. However, three of the Research Associates who worked on Dr. Schober's research project in the Psychology Department were Design and Technology students from the Parson's School (Tr. 386). In all cases, the work performed by the Research Associate must be in furtherance of the grant (Tr. 237-38, 376; Dec. 10).



#### **D. The Application and Selection Process**

Most teaching positions are filled through an annual call for applicants for Teaching Assistantships and Teaching Fellowships (Tr. 513, 519; Dec. 13). The University Provost's office disseminates information about the requirements and duties of the positions and invites eligible students to apply (Er. Ex. 46, 47, 70, 71 and 72; Tr. 318, 513-14, 519; Dec. 13). To be eligible, students must meet certain minimum academic standards (Tr. 512-13; Er. Ex. 46, 70; Dec. 13). Applicants for these positions fill out an on-line application form, providing personal information, e.e.o. information, and information regarding the applicants' preferences (Tr. 514, 519; Pet. Ex. 24). As with many job application forms, this form requires the applicant to disclose any criminal history and authorizes the Employer to conduct a background check (Pet. Ex. 24, p. 4).

The Provost transmits the applications to the Dean's office of the school in which each applicant is enrolled to verify that the applicant meets the minimum academic requirements (Tr. 514, 519; Dec. 13). After verification, the Provost forwards the applications to the faculty in the departments where the teaching positions are located (Tr. 514, 519; Dec. 13). Those faculty members review the applications, interview applicants, and make their selections (Tr. 514, 519-20; Dec. 13). A faculty member conducting an interview and making a selection is referred to as "the hiring faculty." (Tr. 126; Pet. Ex. 13; Er. Ex. 72). The purpose of the interview is to enable the faculty member to assess whether the applicant has the qualifications to do a good job in the position (Tr. 126, 375, 531). After the hiring faculty make their selections, the Provost's office reviews the selection to ensure that no individual is hired for more than two TA positions in one semester or more than one TF position (Tr. 514; Dec. 13).

When students apply for positions within the school in which they are enrolled, the Provost's office may not be involved, but the candidates are still evaluated for their qualifications to perform the duties of the job (Dec. 14). For example, applications for employment by NSSR students for positions at NSSR are handled within the school, through the Dean's office, without involvement of the Provost of the University (Tr. 223, 268; Dec. 14). Students are sent an announcement of available positions within NSSR, including research positions, and those who wish to apply must complete a similar application to the one used by the Provost's office (Tr. 203, 268; Er. Ex. 30). Students applying for these positions may indicate an interest in a particular position, but many express a willingness to work with any professor in a department in order to maximize their chances of obtaining a job (Er. Ex. 32; Tr. 482). Students also obtain positions less formally through referrals by other students who have held a particular position (Tr. 407, 466; Pet. Ex. 19; Dec. 14-15).

The University sends an e-mail to successful applicants, officially offering the position. A student at NSSR who is appointed to a position within NSSR receives an e-mail from the Dean's office, spelling out the number of hours the appointee is expected to "work," the amount of compensation, and information regarding payments (Er. Ex. 31).<sup>9</sup> While the precise wording varies, an offer letter for a TA position in Sociology is representative of the letters introduced by the Employer. After announcing the selection, the e-mail continues:

You are expected to work no more than a total of 150 hours, which breaks down to 10 hours per week in the semester(s) in which you are assigned. You must be registered in order to receive your RA or TA-ship. Please contact the professor you will be working with several weeks before the semester begins to go over your TA duties.

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<sup>9</sup> Employer Exhibit 31 consists of four sample offer letters.

Your stipend for this position is: \$4125.

The funds will be disbursed to you in equal, biweekly installments in the semester(s) in which you are working, including the winter break if your award is for the full academic year. Please note that the IRS regulations consider this stipend taxable income and taxes will be withheld for each payment according to the tax withholding documents that you have on file with the University Payroll Office. You cannot receive your award if you are not a registered student.

Please print, sign and return a copy of this letter to our office by April 30, 2013 to indicate your acceptance.

(Er. Ex. 31, 1<sup>st</sup> page). The letters all include the number of hours of work expected, the level of compensation, and the taxation information, but some refer to the payment as a “salary” rather than a “stipend” (Er. Ex. 31, 4<sup>th</sup> sample e-mail, Research Assistantship).

Offer letters sent by the Provost’s office to applicants selected to serve as Teaching Fellows are more formal and legalistic (Pet. Ex. 38; Er. Ex. 39, 48). The letter informs the student of the class she has been selected to teach, the compensation, the identity of the department chair or program director who will be supervising her work, the schedule, and other administrative information. The letter states, “Working under the guidance of the supervising department chair/program director, your duties for the course will include revising or creating a syllabus, developing assignments, assessing student learning, and making yourself available to students for individual academic assistance.” The letter reiterates that enrollment as a student is a requirement of serving as a Teaching Fellow, and contains information regarding training provided by the University to Teaching Fellows. The letter continues with this cautionary language:

A Teaching Fellowship constitutes student employment at The New School and, therefore, this appointment provides no entitlement to employee status and/or benefits, including but not limited to part-time faculty status or benefits. In addition, this assignment may be modified or terminated for poor performance or conduct without notice or entitlement right to further compensation or participation within the program. **Please note that, as with any teaching opportunity, enrollment in a course is a variable that is difficult to control and which often determines whether or not a section/course will run.**

(Pet. Ex. 38; Er. Ex. 39, 48) (emphasis in original). The letter further specifies that Teaching Fellows are expected to work 10 hours per week and reminds students of the need to have a Social Security number in order to be paid.

Thus, in order to obtain an instructional or research position, a student must go through a process that is entirely separate and distinct from the admissions process. He must fill out an application form, including criminal information and authorization for a background check. The University screens the applications to ensure that the applicant meets the minimum academic standards. The faculty member who seeks the services of an instructional or research person interviews the applicant to assess his qualifications. The University sends a letter to a successful applicant, formally offering a position. If the student accepts the offer, he is placed on the University payroll system and performs services in exchange for pay. In short, these positions are filled through a hiring process typical of an employment relationship.

**E. Pay for Performing Services in these Positions**

At the hearing, the Employer characterized the payments made to the student employees in these classifications as “financial aid.” This is a very different kind of financial aid from scholarships, which are provided on the basis of merit or need (Tr. 557). These student employees receive payment, “for particular duties that the person

performs” (Tr. 341, 564). The students take these positions and perform these duties in order to earn money (Tr. 373, see also Tr. 306, 472-73). The Employer pays them through a payroll account, with withholding for income taxes (Tr. 73-74, 169-70, 452; Er. Ex. 31). In order to work in these positions, the student employees must produce I-9 documentation (Tr. 170; Pet. Ex. 15). Course Assistants, TAs, TFs, Research Assistants, and Research Associates are paid in the form of a stipend or salary, which does not vary between pay periods on the basis of the number of hours worked (Tr. 170, 204-05, 225-26, 299-300, 517). Some Tutors are paid hourly, while other Tutors receive a stipend (Er. Ex. 56; Tr. 292-93, 552).

The amount of compensation is related to the nature and value of the services provided by the student employee. The Employer’s witnesses testified that the rate of pay for particular positions depends upon the number of hours the Employer anticipates will be required to fulfill the duties of the position, the amount of work required, the availability of resources to pay the student employee, the skills and expertise that the position requires, the amount of responsibility that the position entails, and the nature of the project (Tr. 105-06, 230-31, 307, 533-34, 550). A document prepared by the Provost’s office listing TA positions states that compensation is determined by a formula based upon the number of hours the Provost anticipated that the position will require, multiplied by an hourly rate of \$28.19 (Pet. Ex. 42). All of these factors that go into setting the rate of pay for these graduate student employees are the types of considerations that play a role in determining the rate of pay for any job. Moreover, at least with respect to TAs, the Dean of Academic Planning at Parsons testified that the

cost of hiring students to work as TAs was comparable to what it would cost the University to hire part-time faculty to perform the same functions (Tr. 562-63).<sup>10</sup>

**F. The Work Performed by these Student Employees Benefits the Employer**

The student employees in each of these classifications perform services that help to fulfill the function and purposes of the University. The mission of the New School is to teach and to increase knowledge through research (Tr. 175, 185, 232-33, 559). As the Regional Director found, work performed by the student employees in the petitioned-for unit helps the University to fulfill this mission:

In some respects the evidence shows that the work performed by the graduate students benefits The New School as an institution in the same way as the work of faculty or support staff. Graduate assistants support the New School's mission by educating the undergraduate students. Research Assistants help fulfill the conditions of grants awarded to The New School, which contribute generally to the financial health of The New School, as well as, its academic reputation.

The New School's other students benefit from the instruction provided by the graduate student assistants in classrooms and one-on-one encounters. Break-out sections of large lecture classes provide a chance to ask questions in a smaller group setting and allow time for discussion. Some classes are specifically designed with roles for Teaching Assistants and Teaching Fellows. In its offer letters to graduate students for Teaching Assistant positions in the Riggio Honors Program, The New School expresses its belief that, "The work of the Teaching Assistants is vital to the success of the students in the Riggio Honors Program."

(Dec. 20).

The record is replete with evidence of the importance of the work of graduate student employees in the mission of the Employer. Teaching Fellows, as described

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<sup>10</sup> The Regional Director noted that the Employer claimed it would be less expensive to hire part-time faculty to perform the duties of TAs (Dec. 20). The Employer's witness testified that the Employer pays \$4,100 per semester for a TA, and that it would cost about \$4,000 to hire part time faculty to serve as recitation section instructors (Tr. 562-63). Thus, the amount the Employer pays for TAs is very close to what it considers to be the market rate for other employees to provide the same services.

above, serve as the instructor of record for a class. They thus fulfill the same role in the teaching mission of the University as the regular and part-time faculty. According to the testimony of the Deputy Provost, Teaching Fellows as well as Teaching Assistants contribute to providing undergraduate students with “the best educational experience [we] can...” (Tr. 120). The role of Teaching Assistants is to assist faculty members and to help undergraduates to succeed (Tr. 118). Teaching Assistants enable the students to “dive deeper into the content” of the classes (Tr. 529-30). The expectation is that this will enable the undergraduates to learn, “which is the purpose of the class.” (Tr. 530, 558). Course Assistants likewise help to deliver an education to undergraduate students, providing the faculty with “whatever they need” to help out in the classroom (Tr. 117). By playing a role in grading students, both Course Assistants and Teaching Assistants help to fulfill the expectations of the undergraduate students in the classes and to assess their progress (Tr. 294). The University likewise hires Tutors to help students “succeed in their education” (Tr. 117).

Thus, student employees in instructional classifications help to fulfill the educational mission of the University. Their services are directed primarily to the education of undergraduate students. Tuition paid by undergraduate students provides most of the income of the Employer (Tr. 102-03; Er. Ex. 6, 2<sup>nd</sup> page). Thus, student employees in the instructional categories help to fulfill the mission of the University and provide services that generate income for the University.<sup>11</sup>

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<sup>11</sup> This is not to suggest that the New School is in business to make a profit. However, the University does require money to fulfill its mission, and it generates \$300 million dollars annually to fulfill that mission. Individuals who get paid to help fulfill that mission and generate that income have an economic relationship to the University.

Research Assistants similarly help to fulfill the mission of the Employer. They perform a variety of assignments to help faculty members with their research (Tr. 114-15, 209, 227-29, 326-27). This research is a part of the function of the faculty members as employees of the University (Tr. 559). The Assistant Dean for Faculty Affairs at Lang explained that the duties of Research Assistants “vary very much depending on what the faculty member wants. The student might be asked to help in translations, prepare for conferences, that kind of thing. It’s really – it’s so dependent on **whatever it is that the faculty member needs**” (Tr. 326-27) (emphasis added). Thus, the record establishes that Research Assistants help faculty members to fulfill their role in the University.

Research Associates make an even greater contribution to the research mission of the University. The importance of that contribution is reflected in a much higher level of compensation. Research Associates are compensated from funds provided by government or foundations (Tr. 79, 357, 363). To obtain such a grant, a faculty member, referred to as the Principal Investigator or “PI”, must submit an application to a funding source. The application must explain the proposed research project in such a way as to appeal to the funding source (Tr. 357; Er. Ex. 64). The grant proposal may call for Research Associates to assist in conducting the proposed research (Tr. 361, 362-63). A grant proposal must include a budget describing how the funds will be spent in the event the grant is approved (Tr. 377). If Research Associates are to perform services, the budget will include a provision for the stipends to be paid to the Research Associates (Tr. 379). These costs are described as “personnel costs” in the grant proposal, and the stipend is termed a “salary” (Tr. 379-80).



In the sample grant proposal of Professor Michael Schober, introduced into the record by the Employer, one graduate student from Parsons was hired to work in each of the three years of the project (Tr. 386). During the first year of the project, the proposal called for this Research Associate to receive a salary of \$30,000, plus tuition and reimbursement of other costs (Tr. 379-80; Er. Ex. 64, 43<sup>rd</sup> page).<sup>12</sup> The Budget Explanation for hiring this student expounds upon the importance of the Research Associate to the work to be done on the grant: "Supporting the collaboration of graduate students is critical to the success of the projects. The proposal includes studies that require technical expertise and work that cannot be done by inexperienced or uncommitted part-time assistants who do not fully understand the project's rationale." (Er. Ex. 64, 47<sup>th</sup> page). Thus, according to the grant proposal, the work performed by the Research Associate was "critical" to the research. This grant proposal was approved by the National Science Foundation ("the NSF") (Tr. 357-58; Er. Ex. 63). The work done by Research Associates on this project thus helped to fulfill the research mission of the University. Indeed, the PI is obligated, under the terms of the grant, to ensure that the services provided by any Research Associate are necessary to the grant (Tr. 237-38, 376-77; Er. Ex. 34; Dec. 10).

Working to fulfill the research mission is not the only way that Research Associates contribute to the University. Funds awarded pursuant to a grant are received by the University (Tr. 114, 375; Dec. 10). Much of this money must be applied

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<sup>12</sup> The pages of this document are not numbered. The numbers at the bottom of each page are numbers assigned to the project by the National Science Foundation and do not count pages. Locating a page, therefore, requires a manual counting through the pages, to the 43<sup>rd</sup> page, which is captioned "**SUMMARY PROPOSAL BUDGET YEAR 1**" for the New School. As this project involved collaboration with the University of Michigan, there are also budget pages for the University of Michigan. The budget page described herein is the budget for the New School.

to defray the direct cost of the research, including the salary of the Research Associates, but federal guidelines permit a university to receive reimbursement for “indirect costs” as part of a grant (Tr. 381). The New School has negotiated an agreement with the federal government under which it receives payment for indirect costs at a rate of 61.5% of salaries and wages paid pursuant to the grant (Tr. 235, 381-82, 392-93; Dec. 10). Payments to Research Associates are considered salaries for this purpose, just like the salaries of any other employees working on the project, and are included in this calculation (Tr. 380, 382). Thus, in the case of Professor Schober’s grant, the University was awarded 61.5% of the Research Associate’s \$30,000 salary, or \$18,450, to cover indirect costs (Tr. 382; Er. Ex. 64, 47<sup>th</sup> page). Indirect cost funds are awarded to the University in addition to the direct costs of the grant (Tr. 394, 396). According to Professor Schober, “Universities are able to do what they will with the indirect costs” (Tr. 397). As another witness put it, “those monies are available at the discretion of the receiving institutions” (Tr. 235; Dec. 10). Thus, the work of Research Associates contributes to the finances of the University as well as to its research mission.

**G. Supervision of Student Employees**

It is undisputed, and the record establishes, that the student employees in all of the classifications at issue are directed in their work by members of the faculty (Tr. 88-89, 122, 206, 354, 376-77, 446).

**H. Other Employees of the University**

The University maintains policies and procedures for its other employees that differ from those that apply to student employees (Dec. 3). These policies demonstrate

that student employees are treated differently from other employees and, therefore, have different interests and terms and conditions of employment.

One collective bargaining agreement that the University introduced is relevant to the impact of collective bargaining on academic relationships. The Employer is party to a collective bargaining with Academics Come Together, ACT-UAW, Local 7902, covering a bargaining unit of part-time faculty (Er. Ex. 8).<sup>13</sup> That collective bargaining agreement contains a provision reading:

The University and the Union agree that academic freedom is essential to the fulfillment of the purposes of the University. University policies on Academic Freedom, adopted January 21, 1987 and October 4, 1989, attached hereto as Appendix A, shall be in effect for all Faculty.

(Er. Ex. 8, Article VIII at p. 8). Those policies are, in fact, attached to the collective bargaining agreement as Appendices 1 and 2. The Employer's Senior Director of Labor Relations testified that collective bargaining with respect to part-time faculty had not impinged on academic freedom in any way (Tr. 180). She added that she could not think of any reason to believe that collective bargaining with respect to student employees would impinge upon the academic freedom either of the University or of the individuals (Tr. 181).

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<sup>13</sup> Employer Exhibit 8 was effective by its terms from September 1, 2005, through August 31, 2009. The parties have twice entered into agreements modifying and extending that agreement, so that there is now a contract in effect for the period September 1, 2014, through August 31, 2019 (Er. Ex. 9). The contract provision discussed herein has not been modified.

IV. THE BOARD SHOULD GRANT REVIEW, FINALLY OVERRULE BROWN UNIVERSITY AND HOLD THAT GRADUATE STUDENT ASSISTANTS WHO PERFORM SERVICES AT A UNIVERSITY IN CONNECTION WITH THEIR STUDIES ARE EMPLOYEES WITHIN THE MEANING OF SECTION 2(3) OF THE ACT

A. The Regional Director's Conclusion

As noted above, the Regional Director found that the work of these student employees "benefits the New School as an institution in the same way as the work of faculty or support staff." (Dec. 19) She also found that they receive financial compensation for that work. Nevertheless, the Regional Director concluded that dismissal was mandated by Brown.

The Regional Director summarized the holding of Brown as follows:

In *Brown University*, 342 NLRB 483 (2004), the Board held that graduate students performing work related to their studies at an educational institution at which they are enrolled as students are not "employees" under Section 2(3) of the Act. The Board majority in *Brown* reasoned that the graduate student assistants have a predominantly academic, rather than economic relationship with their school.... To date, *Brown* remains controlling on the issue of graduate assistants as employees and I am compelled to follow that precedent.

(Dec. 18).

In Brown, a 3-2 Board majority overruled a unanimous decision issued just four years earlier in New York University, 332 N.L.R.B. 1205 (2000) (NYU I). Brown purported to return to earlier cases that supposedly had held that graduate assistants are not employees because they are "primarily students." However, the only case, other than Brown, to hold categorically that students working at an educational institution in which they are enrolled are not entitled to the protections of the Act was St. Clare's Hospital, 229 N.L.R.B. 1000 (1977). St. Clare's involved medical interns and residents, not graduate assistants. While it purported to establish a blanket rule that

students who “perform services at their educational institution which are directly related to their educational program” lack the right to organize,” 229 N.L.R.B. at 1002, that case was never applied to graduate assistants.

By the time Brown was handed down, St. Clare’s had been overruled in Boston Medical Center, 330 N.L.R.B. 152 (2000). Nevertheless, the legal reasoning of Brown was based almost entirely upon St. Clare’s. In St. Barnabas Hospital, 355 N.L.R.B. No. 39 (2010), the Board reaffirmed Boston Medical. Thus, Boston Medical continues to be good law. St. Clare’s, the only legal foundation for Brown, was overruled 15 years ago and has twice been rejected by the Board. Brown cannot be reconciled with Boston Medical and St. Barnabas. It should be overruled forthwith in order to bring the legal rights of graduate assistants into line with precedent applicable to other student employees.

**B. NYU I was Consistent with the Language of Section 2(3), Common Law and Precedent Interpreting that Section**

The decision in NYU I was built on a solid legal foundation that included the language of the statute, Supreme Court decisions and Board precedent. That foundation remains sound today. NYU I relied, first and foremost, on the broad definition of “employee” in section 2(3) of the Act and on Supreme Court decisions extending a broad reading to this statutory language. NYU I at 1205 (citing NLRB v. Town & Country, 516 U.S. 85, 91-92 (1995); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891-92 (1984); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185-86 (1941)). In Town & Country, a unanimous Supreme Court held, “The ordinary dictionary definition of ‘employee’ includes any ‘person who works for another in return for financial or other compensation,’” and the Act’s definition of employee as including “any employee”

"seems to reiterate the breadth of the ordinary dictionary definition." 516 U.S. at 90 (quoting American Heritage Dictionary 604 (3d ed. 1992)) (emphasis in original). In Sure-Tan, the Court held that the "breadth" of the definition of "employee" in section 2(3) "is striking: the Act squarely applies to 'any employee.' The only limitations are specific exemptions for agricultural laborers, domestic workers, individuals supervised by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA." 467 U.S. at 891. There is no exclusion in the statute for employees who are "also students" or "primarily students." Thus, the Board decision in NYU I was solidly grounded in the language of the statute and Supreme Court precedent defining that language.

The section 2(3) definition of "employee" is informed by the common-law master-servant relationship. Town & Country, 516 U.S. at 93-94. These student employees clearly fall within the common law definition of "employee." The Restatement (Third) of the Law, Employment, §§ 101(1) and 102 (2015) provides that an employment relationship exists where an individual acts "at least in part" to serve the interests of the employer, the employer consents to receive those services, the individual is not engaged in independent business to provide those services, and the work is not performed on a voluntary basis (i.e., the individual is paid by the employer). These criteria clearly fit the student employees of the New School. As discussed above in Part III F, the work they perform serves the interests of the University. The Employer consents to them performing their services, and they are certainly not involved in independent businesses. As they are paid for the work that they perform, they are not

volunteers. Thus, they fit the common law definition of “employee.” Indeed, comment g to section 1.02 provides that student assistants who are paid to perform work that benefits an educational institution have an employment relationship with that institution.

NYU I was also consistent with established Board precedent interpreting the definition of employee. For example, in Sunland Construction Co, 309 N.L.R.B. 1224 (1992), in holding that paid union organizers are employees where they obtain jobs to try to organize other employees, the Board reaffirmed that the statute applies in the absence of an express exclusion. "Under the well settled principle of statutory construction - *expressio unius est exclusio alterius* - only these enumerated classifications are excluded from the definition of employee." Id. at 1226. The Board gave a similarly broad reading to the statutory definition of employee in Seattle Opera Association, 331 N.L.R.B. 1072 (2000), enfd 292 F.3d 757 (D.C. Cir. 2002), holding that auxiliary choristers at a non-profit opera company were "employees". Enforcing the Board's decision, the D.C. Circuit distilled the Supreme Court's and Board's broad reading of the statute and the common-law master servant relationship into a two-part test: "[I]t is clear that - where he is not specifically excluded from coverage by one of section 152(3)'s<sup>14</sup> enumerated exemptions - the person asserting statutory employee status *does* have such status if (1) he works for a statutory employer in return for financial or other compensation; and (2) the statutory employer has the power or right to control and direct the person in the material details of how such work is to be performed." 292 F.3d at 762 (internal citations omitted) (emphasis in original). The decision in NYU I is fully consistent with this definition.

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<sup>14</sup> Section 2(3) of the NLRA is, of course, codified at 29 U.S.C. Sec. 152(3).

Most significantly, the decision in NYU I is consistent with Boston Medical, holding that medical interns, residents and fellows are “employees,” despite the fact that they are also students. As in NYU I, the Board in Boston Medical based its decision on the broad language of section 2(3) and the Supreme Court decisions emphasizing that the definition encompasses anyone who works for an employer in exchange for compensation. Id. at 159-60. The Board relied upon the fact that there is no exclusion in section 2(3) for employees who are also students. The Board also pointed to section 2(12)(b) of the Act, which defines professional **employee** to include “any employee who (i) has completed the courses of specialized intellectual instruction ... and (ii) is performing related work under the supervision of a professional person....” Id. at 161. Like interns and residents, graduate assistants literally fit within this definition of professional employees: they have completed advance courses of instruction and they work under the direction of a faculty member in their field of study.

The Board in Boston Medical emphatically rejected the idea that there is some kind of inconsistency between being an employee and being a student, holding that interns’ and residents’ “status as students is not mutually exclusive of a finding that they are employees.” Id.

As ‘junior professional associates,’ interns, residents and fellows bear a close analogy to apprentices in the traditional sense. It has never been doubted that apprentices are statutory employees. . . . Nor does the fact that interns, residents and fellows are continually acquiring new skills negate their status as employees. Members of all professions continue learning throughout their careers . . . . Plainly, many employees engage in long-term programs designed to impart and improve skills and knowledge. Such individuals are still employees, regardless of other intended benefits and consequences of these programs.



Id. at 161 (citations and footnotes omitted). The holding of Boston Medical has not been questioned by the courts of appeals, has resulted in fruitful collective bargaining, and remains good law. St. Barnabas Hospital, *supra*. NYU I was entirely consistent with Boston Medical.

**C. NYU I was also Consistent with Decisions Finding Apprentices to Be Employees**

As the Board recognized in Boston Medical, there is simply no logical, rational basis to conclude that one cannot be both a student and an employee. Indeed, the Board has a long history of recognizing that apprentices are employees, entitled to the protections of the Act. Apprentices, by definition, are required to work as a part of their training for a craft or trade. Apprentices typically work for an employer while taking classes to learn the craft. This work provides on-the-job training that is critical to learning the craft. Apprentices generally must complete a certain number of hours of classroom training and a specified number of years of work in the field in order to qualify as journeymen. Despite the fact that the work of apprentices is thus part of their training for a career, the Board has consistently treated apprentices as employees.

As far back as 1944, the Board held that apprentices who attended a school as part of a 4 or 5 year training program and worked under the supervision of training supervisors for 2½ years while learning shipbuilding skills were employees within the meaning of the Act. Newport News Shipbuilding & Dry Dock Co., 57 N.L.R.B. 1053, 1058-59 (1944). Similarly, in General Motors Corp., 133 N.L.R.B. 1063, 1064-65 (1961), the Board found apprentices who were required to complete a set number of hours of on-the-job training, combined with related classroom work in order to achieve journeyman status, to be employees. See also Chinatown Planning Council, Inc., 290

N.L.R.B. 1091, 1095 (1988) (describing apprentices “working at regular trade occupations while receiving on-the-job training”), enfd, 875 F.2d 395 (2d Cir. 1989). All of these apprentices were students and employees at the same time. Their work was related to their schooling. They learned while working and earning money. The Board has never suggested that, in order to find an apprentice to be an employee, it was necessary to weigh the educational benefit that he received from working with a journeyman against the economic benefit his employer derived in order to decide whether the relationship was “primarily educational.” “[I]t has never been doubted that apprentices are statutory employees” because there is no inconsistency between working and learning. Boston Medical, 330 N.L.R.B. at 161.

Like apprentices, graduate student workers are engaged in education while simultaneously performing services for an employer designed to prepare them for their post-graduation careers. The Board’s apprenticeship cases further demonstrate that a worker can be a student engaged in a course of study at the same time as he or she is an “employee” under the Act. See id.

Thus, NYU I was built on a solid legal foundation. The finding that one can be both a student at an educational institution and an employee of that same institution is consistent with the broad, sweeping definition of “employee” in the NLRA and with Supreme Court and Board precedent generally interpreting that definition. Finding graduate students to be “employees” is also consistent with the common law meaning of the term. NYU I was consistent with the long history of Board cases finding apprentices to be employees, including apprentices who received schooling in their trade from their employer. The section 2(12)(b) definition of “professional employee” as

including a person who has received specialized intellectual instruction and is working under the supervision of a professional person precisely describes many graduate assistants and 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. Finally, the decisions in Boston Medical and St. Barnabas are inconsistent with the reasoning and legal basis of Brown. Brown is clearly an outlier, a decision that cannot be reconciled with the language of the statute or any applicable precedent.

**D. There is No Precedent to Support Brown**

Brown, by contrast to NYU I, represents a sharp departure from existing precedent, and is inconsistent with the language of the statute and Supreme Court precedent. At the outset, it is astonishing that the Board in Brown ignored the broad scope of the definition of employee in section 2(3) of the Act. This is contrary to the most fundamental principle of statutory construction. In interpreting the meaning of any statute, "[w]e start, as always, with the language of the statute." Williams v. Taylor, 529 U.S. 420, 431 (2000); Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) ("[I]n all cases involving statutory construction, our starting point must be the language employed by Congress . . .") (quotation and citation omitted). The Brown majority disregarded this most basic tenet of statutory interpretation.

The majority claimed to return to what it characterized as the status of the law before NYU I. As support for that proposition, the majority cited two decisions which, it claimed, stood for the proposition that graduate assistants are "primarily students" and therefore not employees within the meaning of section 2(3) of the Act. Neither of these

cases lends any support for the proposition that graduate assistants cannot also be employees.

In the first of those decisions, Adelphi University, 195 N.L.R.B. 639 (1972) the Board did hold that teaching and research assistants were “primarily students.” There is not the slightest suggestion in that decision, however, that the Board believed that this was somehow inconsistent with employee status. Rather, the Board held that student status distinguished teaching assistants from regular faculty members, so that they lacked a community of interest with regular faculty members. “[W]e find that the graduate teaching and research assistants here involved, although performing some faculty-related functions, are primarily students and **do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit.**” 195 N.L.R.B. at 640 (emphasis added). NYU I, by finding a separate unit of student employees to be appropriate, was entirely consistent with Adelphi. The Board, in Brown, did not “return” to Adelphi’s holding. Instead, it distorted the holding of a case that actually supports finding graduate assistants to be employees who have a separate community of interest from other employees.

Similarly, the other case relied upon by the Brown majority, Leland Stanford Junior University, 214 N.L.R.B. 621 (1974), did not hold that a graduate student could not be simultaneously a student and an employee.<sup>15</sup> Rather, the Board found that a specific group of graduate students were not employees because they were not paid by the university for providing services to the university. The Board found that the tax-exempt stipends received by the students from outside funding agencies were not

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<sup>15</sup> The Board in St. Clare’s did read Leland Stanford to hold that graduate assistants could not be employees. Leland Stanford, however, does not stand for that proposition, and St. Clare’s has been overruled.

payment for services performed for the university. “Based on all the facts, we are persuaded that the relationship of the RA’s (sic) and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer.” 214 N.L.R.B. at 623. This finding stands in sharp contrast to the findings of the Regional Director that the petitioned-for individuals do receive compensation for doing work to fulfill the mission of the New School (Dec. 12). There is nothing in Leland Stanford to support the proposition that student employees who are paid to perform tasks for the benefit of the university cannot be employees within the meaning of section 2(3) of the Act.

The Board in Brown cited Adelphi and Leland Stanford as support for what it characterized as a “fundamental”: “the Act is designed to cover economic relationships.” 342 N.L.R.B. at 488. As the record in this case demonstrates, student employees **do** have an economic relationship with their university. Apparently recognizing that this economic relationship is inherent in a student assistant position, the Board majority in Brown went on to find that student employees are not statutory employees because their relationship to the university is “primarily” educational. As discussed above, there is nothing in either Adelphi or Leland Stanford that would support a holding that an individual cannot have an economic relationship with a university because he also has an educational relationship with the university. Neither of those cases even suggests that one cannot be both student and employee. Indeed, this false dichotomy between working and learning was forcefully rejected by the Board in Boston Medical and is inconsistent with the decades of case law finding apprentices to be employees.

The Brown majority relied almost entirely on St. Clare's to provide support for the exclusion of an entire class of employees from the protections of the Act, notwithstanding that St. Clare's had been expressly overruled in Boston Medical, 330 N.L.R.B. at 152. Despite this rather glaring flaw in the precedential value of the case, the Brown majority proceeded to construct their rationale for the decision around St. Clare's, quoting extensively from that decision. 342 N.L.R.B. at 489-90. The majority relied exclusively upon St. Clare's for the proposition that there is some inconsistency between an academic relationship and an employment relationship. Based solely on St. Clare's, without citation to any other authority, any evidence or any academic research, the Board concluded that collective bargaining could harm the academic relationship between students and faculty and could infringe on academic freedom. Thus, the entire foundation for the Brown is a case that had been overruled. A decision so totally lacking a foundation should not be permitted to frustrate student employees' efforts to organize.

**E. The Record in This Case Contradicts the Assumptions Upon Which Brown Rests**

One of the propositions for which the Brown majority cites St. Clare's is that there is an inconsistency between the academic relationship that a student has with her university and the economic relationship that she has with her employer. The record in this case reveals the fallacy of this assumption. At the New School, the status of a student enrolled for an education is clearly distinguishable from her status as an employee. The roles of Tutors, Course Assistants, TAs, TFs, Research Assistants, and Research Associates as employees of the New School are separate and distinct from the roles of these individuals as students. Admission to the New School does not carry

with it an automatic opportunity to work in one of the jobs at issue in this case. Students are first admitted into the New School and later may or may not be hired to work at the New School.

Graduate students wishing to work in one of the petitioned-for classifications must go through a separate and distinct hiring process, which includes job application forms and an interview designed to assess qualifications. Student employees often seek out their own employment opportunities, without any involvement by their academic advisors (Dec. 14-15). The Employer repeatedly offered evidence that students do not apply for admission to the New School in order to obtain jobs or to make money. That is undisputable. Students come to the New School to study because the University meets their academic needs. They apply for jobs in the petitioned-for job classifications, on the other hand, because they need money to live on and to pay their expenses (Tr. 306, 373, 442, 472-73). Admission as a student creates an academic relationship, while selection for one of these jobs creates an economic relationship.

The letters sent by the Provost's office to Teaching Fellows emphasizes both the employer-employee relationship and the distinction between being hired as a TF and being admitted as a student. "[T]his assignment may be modified or terminated for poor performance or conduct without notice or entitlement right to further compensation or participation within the program" (Pet. Ex. 38). The letter says nothing about "poor performance or conduct" affecting academic standing. The letter thus informs TFs that keeping the job and receiving pay is contingent upon performance in the job, separate from the academic relationship. On the other hand, poor performance in the job does

not affect academic standing. Thus, the record of this case establishes that the employment relationship can be distinguished from the academic relationship. Accordingly, the Union and the Employer can engage in collective bargaining with respect to the employment relationship without affecting the academic relationship.

F. **Brown is Based Upon Untoward Assumptions Contradicted by Empirical Research**

The majority in Brown relied upon conjecture about possible damage that collective bargaining might cause to graduate education. This conjecture was not supported by experience, academic research or any other evidentiary basis. Rather, the majority relied upon the overruled decision in St. Clare's to justify this conjecture. The majority speculated that collective bargaining might undermine student-faculty relationships or threaten the academic freedom of universities. These supposed concerns have now been contradicted by a study recently published in the ILR Review, the official journal of the Cornell University Industrial and Labor Relations School.

The authors of the study surveyed graduate student employees at public universities where the graduate assistants are represented by a labor organization, comparing their answers with graduate student assistants at similar non-union public sector universities.<sup>16</sup> "Effects of Unionization on Graduate Student Employees: Faculty - Student Relations, Academic Freedom, and Pay," Rogers, Eaton and Voos, 66 ILR Review 485 (4-15-2013). The study contradicts the assumptions made by the majority in Brown and even suggests that collective bargaining might improve student-faculty relationships. The authors concluded:

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<sup>16</sup> The comparison had to be conducted at public sector universities because the Board decision in Brown has frustrated organizing attempts by graduate student assistants in the private sector.



While the NLRB in the *Brown* decision ... emphasizes the potential for a negative impact on faculty-student relationship, our results support other theoretical traditions that suggest unionization might have no impact or even a positive impact on those relationships. In the unionized departments we surveyed, students reported better personal and professional support relationships with their primary advisors than were reported by their nonunion counterparts. Our data do not permit us to conclude with certainty the reason for the positive impact.... Either way, we find no support for the NLRB's contention in the *Brown* decision that union representation would harm the faculty-student relationship.

Also contrary to the Board in *Brown*, ample reason exists to think that unionization might actually strengthen the academic freedom of graduate students; however, we found only scant evidence of a positive effect.... We did find some support, albeit weak, for a positive impact of unionization on the overall climate of academic freedom (both departmental and university-wide). Again, no support was found for the NLRB's contention in *Brown* that GSE<sup>17</sup> unionization would diminish academic freedom.

66 ILR Review at 507.

The experience at the New School with part-time faculty confirms that collective bargaining is not a threat to academic freedom. The University is heavily reliant upon part-time faculty to provide instructional services, with 2,300 part-time faculty, but only 420 full-time faculty (Tr. 43-44). The Employer's Senior Director of Labor Relations testified that collective bargaining with respect to part-time faculty had not damaged academic freedom (Tr. 180). The parties included language in their first collective bargaining agreement to preserve academic freedom, and that language has been renewed twice without change in two subsequent collective bargaining agreements (Er. Ex. 8, 9, 10). The Senior Director of Labor Relations could not think of any reason that collective bargaining for graduate student employees would cause any harm to academic freedom (Tr. 181).

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<sup>17</sup> "Graduate Student Employee".

### **G. The Growth of Collective Bargaining in Higher Education**

The Board in NYU II stated that another factor to consider is the growth of collective bargaining for graduate student employees in the public sector. This record includes twelve collective bargaining agreements covering graduate student employees at public universities (Pet. Ex. 1-12). In addition, New York University, in the private sector, has voluntarily recognized the UAW as the collective bargaining representative for graduate student employees, and the parties successfully negotiated a collective bargaining agreement (Pet. Ex. 29). The expansion of collective bargaining among graduate student employees shows that student employees understand that they have an economic relationship with the employer. They seek to exercise their right as employees to organize. Brown is an aberration that is holding back that movement.

### **V. CONCLUSION**

The student employees in the petitioned-for bargaining unit should be afforded an opportunity to decide whether they wish to be represented by the Petitioner. They are “employees” within the literal language of section 2(3) of the Act and within the meaning of that term under Supreme Court, NLRB precedent and the common law. They also fit the definition of “professional employee” under the statute, which explicitly includes individuals who are working under the supervision of an experienced professional while learning the profession. They are apprentices working in an intellectual field. Brown overruled NYU I almost entirely on the basis of one decision that has been thoroughly discredited. Brown is contradicted by academic research and by the record of this case. Student employees in the public sector are actively engaged in organizing and collective bargaining. Their counterparts in the private sector seek to

do the same. The NLRB should fulfill its statutory mission to encourage collective bargaining by these employees rather than serving as an impediment.

The Board should act forthwith to grant review and overrule Brown. When this case was before the Board earlier this year, the Board granted review within a matter of weeks. Similar expeditious action is again called for. The record is more than adequate to enable the Board to decide this question promptly. The issue has been extensively briefed, including nine *amicus* briefs submitted in New York University, Case No. 2-RC-23481. Those briefs remain available for the Board to consider. Student employees have been waiting for five years, since NYU II, to engage in collective bargaining. There is no reason to delay further before overruling Brown and returning to the well-reasoned decision in NYU I.

This Request for Review should be granted, Brown should be overruled, and an election directed forthwith.

ON BEHALF OF THE PETITIONER,  
STUDENT EMPLOYEES AT THE NEW  
SCHOOL-SENS, UAW

By: 

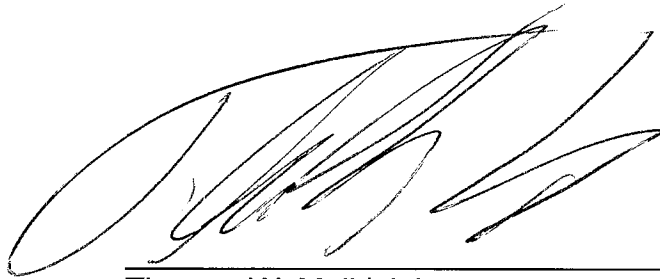
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Petitioner's Request for Review of Supplemental Decision and Order Dismissing Petition was sent via email, on this 13<sup>th</sup> day of August, 2015, to the following:

Douglas P. Catalano, Esquire  
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Karen Fernbach, Regional Director  
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A handwritten signature in black ink, appearing to read 'T. Meiklejohn', is written over a horizontal line. The signature is stylized and cursive.

Thomas W. Meiklejohn