

BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

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

Case No. 02-RC-143009

**BRIEF OF THE PETITIONER TO THE REGIONAL DIRECTOR**

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## BRIEF OF THE PETITIONER TO THE REGIONAL DIRECTOR

### I. INTRODUCTION

An organization that has designated itself Student Employees at the New School – SENS, UAW (“the Petitioner,” “the Union,” or “SENS, UAW”) seeks to represent a bargaining unit composed of individuals who provide teaching and research services to the New School (“the Employer” or “the University”). Certain basic facts about these individuals are either undisputed or overwhelmingly established by the evidence on this record. First, these individuals provide services to the University that further the mission of the University and generate income for the University. Second, they receive financial compensation for performing these services. Finally, the parties agree that the employees 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 principal issue presented by this case is whether these individuals are nevertheless excluded from coverage as employees under the NLRA because they also happen to be students at the institution that employs them. The only precedent that would support depriving these student workers of the protection of the Act for the right to organize is the decision in Brown University, 342 N.L.R.B. 483 (2004). The Employer contends that this petition should be dismissed on the basis of Brown. The Regional Director should reject that contention and order an election in the petitioned-for unit.

As analyzed in greater detail below, the Board in Brown held categorically that “graduate student assistants are not employees within the meaning of Section 2(3) of the Act.” 342 N.L.R.B. at 493. That decision is inconsistent with a wide range of

precedent interpreting Section 2(3). In any event, that decision is not controlling in this case because the student employees at issue are not “graduate assistants” like the student employees in Brown and in New York University, 332 N.L.R.B. 1205 (2000) (NYU I), which was overruled by Brown. For most of the employees at issue in Brown and NYU I, admission to the university as graduate students carried with it a commitment to an exchange of services for money. Admission to the New School provides no assurances of selection for a teaching or research assistantship. Rather, creation of the employment relationship at the New School involves an application process and a hiring decision that are separate and distinct from the process of admission as a student. Thus, the student relationship is not intertwined with the employment relationship in the same manner as at NYU or Brown.

There are at least four reasons why the Regional Director should not follow Brown and dismiss this petition:

1. This case is factually distinguishable from Brown, in that the employment relationship between the New School and these employees is not closely intertwined with their status as students.
2. Brown should be narrowly construed and limited to the particular type of graduate employees involved in that case because Brown is inconsistent with other, applicable precedent regarding the definition of “employee.”
3. The Brown decision relied upon assumptions that collective bargaining might harm the mentoring relationship between students and their faculty advisors, and that collective bargaining might be harmful to academic freedom. An empirical study published since the Brown decision conflicts with those assumptions. Moreover, the second highest official in the Employer’s Human Resources department, responsible for dealing with unions for the Employer, testified that she did not know of any reason to believe that collective bargaining for the student employees at issue in this case would impinge upon academic freedom in any way (Tr. 181). Thus, the record of this case and other developments contradict the factual assumptions of Brown.

4. Finally, the decision of the Board reopening this case after it was previously dismissed on the basis of Brown establishes that the Board does not regard that decision to be valid precedent that is controlling on regional directors.

## II. PROCEDURAL HISTORY

On December 17, 2014, the Union filed this petition seeking to represent a unit of student employees who provide instructionally-related and research services for the Employer, specifically including Course Assistants, Teaching Assistants, Teaching Fellows, Tutors, Research Assistants, and Research Associates (Bd. Ex. 1(a)). By Order dated February 6, 2015, the Regional Director dismissed the petition, holding that she was “constrained” to follow Brown in this case (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 held that there were “compelling reasons for reconsideration of the decision in Brown University.” (Bd. Ex. 1(k)). The Board’s Order includes a footnote stating, “Members Miscimarra and Johnson note that the Board properly dismissed the petition based on existing law....” citing Brown. Significantly, the other three Board members did not join in this endorsement of the Regional Director’s Order dismissing this petition.

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.<sup>1</sup> The parties stipulated that the Employer is engaged in interstate commerce (Tr. 8). The parties agreed that individuals in the unit sought in the petition participate in the organization of the Petitioner, and that the Petitioner exists for the purpose of dealing with the Employer with respect to grievances, labor disputes, wages, rates of pay, hours

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<sup>1</sup> While this may seem protracted for a representation case hearing, this was remarkably efficient for a hearing concerning the status of graduate student employees.

of employment and conditions of work (Tr. 574-75). The Employer was unwilling to agree that the individuals sought in the petition are statutory employees, and for that reason the Employer was unwilling to agree that the Petitioner is a labor organization. However, the Employer did agree that, if the student employees are found to be statutory employees, then the Petitioner is a labor organization within the meaning of Section 2(5) of the Act (Tr. 8-9, 575-76).

In one subdivision of the New School, the Parsons School, individuals who perform the duties of Research Assistants are given the title "Student Assistant 3" for payroll purposes (Tr. 69, 75-76). Accordingly, the Petitioner amended the petition to include Student Assistants at the Parsons School. As amended, the Petitioner seeks to represent the following employees ("the Unit"):

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).

Excluded: All other employees, Student Assistants at schools other than Parsons, guards and supervisors as defined in the Act.<sup>2</sup>

As discussed above, the Employer contends that these individuals are not "employees" under the Act because they are also students. The Employer also argues that no election should be ordered because, if these individuals are employees, they are temporary or casual employees. The Employer did not raise any issues regarding the scope of the unit or claim that these individuals lack a community of interest.

Thus, this case raises two issues:

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<sup>2</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).

1. Are the persons in the Unit employees within the meaning of Section 2(2) of the Act?
2. If they are employees, should they nevertheless be denied the opportunity to select a representative for the purposes of collective bargaining on the ground that they are temporary or casual employees?

This brief is submitted by the Petitioner in support of the proposition that these student employees are statutory employees entitled to an election to decide for themselves whether they would benefit from collective bargaining.

### 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). The New School was founded in 1918 by two professors from Columbia University who had been censured for opposing World War I. They joined with some distinguished intellectuals of the era to found a school that was principally devoted to providing continuing education for adults (Tr. 45-47, 186). In 1933, the New School offered a haven to 180 Germany scholars seeking an escape from Nazi oppression, which led to the establishment of graduate programs at the New School (Tr. 46, 187). Today, the continuing education program has been significantly reduced, and the New School is engaged primarily in offering more traditional degree programs (Tr. 47).

The New School is classified by the Carnegie Foundation as a doctoral/research institution (Er. Ex. 6; Tr. 58).<sup>3</sup> The Carnegie Classification System defines a “research university” as one that awards at least 20 research doctorates (Er. Ex. 6, 3<sup>rd</sup> page).

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<sup>3</sup> The Employer’s Vice Provost and Senior Vice President for Academic Affairs testified that the Carnegie Classification System is a generally recognized “convention” for describing institutions of higher education (Tr. 101).

That classification system recognizes three categories of research universities: Doctoral/Research universities, High Research universities, and Very High Research universities. Doctoral/research universities are distinguished from the other two categories based upon the greater amount of research activity conducted at High Research and Very High Research universities (Ibid, 1<sup>st</sup> and 3<sup>rd</sup> pages). Columbia and NYU fall into the Very High Research category (Tr. 58; Er. Ex. 6). This means that Columbia and NYU derive more of their annual revenues from research grants and other revenues generated through research (Er. Ex. 6, 2<sup>nd</sup> page; Tr. 64-65, 102-03). The New School, in contrast, derives 85% of its revenues from tuition (Tr. 102-03; Er. Ex. 6, 2<sup>nd</sup> page). Those revenues total approximately \$300 million per year (Tr. 42).

**B. The Organization of the University**

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).

The University’s overall operations are under the direction and supervision of the President, David Van Zandt, who reports to a board of trustees (Er. Ex. 4; Tr. 55-56). The Provost and Chief Academic Officer, Tim Marshall, reports to the President and sets all academic policies for the University (Er. Ex. 4; Tr. 42-43). Each of the schools

or divisions that comprise the University is headed by a Dean or a Director who reports to Marshall (Er. Ex. 4).<sup>4</sup>

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>5</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).

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 Associates 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).

The New School for Social Research is exclusively a graduate school (Tr. 183). All but 59 of the 550 doctoral students at the University are enrolled at the NSSR (Tr. 65-66, 187-88). Most of the original research conducted by the Employer is performed at the NSSR (Tr. 188). The NSSR offers doctoral programs in Anthropology; Clinical Psychology; Cognitive, Social & Developmental Psychology; Psychology; Economics;

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<sup>4</sup> The organizational chart offered by the Employer shows Mannes, the Drama School and the Jazz School as continuing to have their own Deans or directors reporting directly to the Provost.

<sup>5</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.

Philosophy; Politics; and Sociology (Er. Ex. 5, 3<sup>rd</sup> page; Tr. 189-90). The 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). At the time of the hearing, the NSSR employed 72 full-time faculty members, 16 part-timers, a few faculty with appointments of one year or less, and some post-doctoral fellows (Tr. 188). Students enrolled in the NSSR perform instructional and research services in the positions sought in the petition in several schools throughout the University (Tr. 225, 317, 544). At the 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).

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). It is the only one of the divisions of the New School that does not offer graduate programs (Tr. 54-55, 318). Thus, while there are 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).<sup>6</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 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

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<sup>6</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).

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).

The Parsons School 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). Most of the students who provide these services at Parsons are Ph.D. students enrolled at other schools (Tr. 543-44).

Within the Performing Arts School, the Employer offered evidence that it offers Bachelor's programs and Master's and other graduate programs in music, instrumental performance, conducting, composition, and theory (Er. Ex. 5, 67). There are no Teaching Assistants, Teaching Fellows, Research Assistants, Research Associates, or Course Assistants at Mannes. The Employer does use Tutors to assist students in one class, Techniques of Music (Er. Ex. 67).

### **C. 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)).<sup>7</sup> 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). Full-time students generally require two or more years to complete a Master's degree (Tr. 194-95).

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 Anthropology and Psychology Departments admit only students who obtained their Master's from the New School, while other departments will consider applicants who obtained Master's degrees from other universities (Tr. 190-91). The University sends a very simple letter to applicants who are accepted, informing them of their admission (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 eight years to obtain a Ph.D., including the time to obtain the Master's degree. Some students are able to obtain the degree in less time, while others require longer. The University allows students to take up to ten years to complete the program, and it makes exceptions for students who require more time (Tr. 195).

Both Master's and Doctoral students sometimes receive merit based scholarships in varying amounts that can be applied toward the cost of tuition only (Er.

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<sup>7</sup> The Master's degrees in liberal studies, historical studies and creative publishing and critical inquiry at the NSSR are termed "terminal" degrees and do not lead to an opportunity to earn a doctorate. Master's level degrees at other schools are also often terminal degrees (Er. Ex. 5, 1<sup>st</sup> page).

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). The University does not require students to serve in any of these positions in order to obtain a degree (Tr. 119).

**D. 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.

*Course Assistants* assist classroom instructors by helping with grading, preparing class presentations, helping the instructor with presentations in the classroom, and generally supporting a faculty member in presenting the course to students (Tr. 80, 117, 328). *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 demonstrating the use of various pieces of equipment for the students in the class (Tr. 284).

*Teaching Assistants* (“TAs”) also provide support services to faculty members teaching classes (Tr. 77). 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). 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). The 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). 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).

The *Teaching Fellow* (“TF”) position is a more advanced teaching position entailing greater responsibility (Tr. 77-78, 111-12). 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). 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). 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 individual assistance to students who need help with their classwork (Tr. 79-80, 287, 288-89; Er. Ex. 56). 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). At Parsons, Tutors assist first year students to prepare their portfolios (Tr. 552).

## **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. 78-79, 116, 308).<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). The particular duties assigned can vary widely. For example, one professor sought a Research Assistant to, *inter alia*, help with the logistics and planning for the New York Climate March (Er. Ex. 50, 1<sup>st</sup> page, Assistant for Ana Baptista). More typically, Research Assistants collect and analyze data or literature related to a professor’s research (Tr. 113, 206). 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). Faculty members may assign Research Assistants to prepare materials to be presented at a conference or to help write a paper (Tr. 274, 326-27,

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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).

417). Some faculty members assign their Research Assistants to help with correspondence, maintain websites, and perform other administrative tasks (Tr. 274, 416). 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). Thus, for example, a Research Assistant who is interested in policing methods and plans to 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). 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). 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. 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). Several Research Associates worked on this project, including one who designed interactive dialog systems to be used in the surveys (Tr. 361, 362-63). The Employer contends that the work done by Research Associates is often related to their dissertation proposals (Tr. 79). That is undoubtedly true in many 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).

**E. 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). The University Provost 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). To be eligible, students must meet certain minimum academic standards (Tr. 512-13; Er. Ex. 46, 70). 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 authorize the Employer to conduct a background check (Pet. Ex. 24, p. 4).

The Provost then 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). After verification, the Provost transmits the applications to the faculty in the departments where the teaching positions are located (Tr. 514, 519). Those faculty members review the applications, interview applicants, and make their selections (Tr. 514, 519-20). 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).

When students apply for positions within the school in which they are enrolled, the Provost's office may not be involved. For example, applications for employment by students at NSSR 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). 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 an appointment (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).

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:

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

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.

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. Nevertheless, the Employer contends that it does not consider the relationship established by this series of transactions to be an "employment" relationship.

The words used by representatives of the Employer to describe this relationship belie that claim. Until recently, Carolyn Comiskey held the position of Director of Assessment and Curricular Support in the Provost's office, where she was responsible for the selection process for Teaching Assistants and Teaching Fellows. In January of

this year, as she was leaving that position, she wrote a memorandum to the Assistant Provost describing what she called the “hiring process” (Tr. 526-27; Pet. Ex. 41). That memorandum refers to this selection process as the “TA/TF Hiring Process.”

Throughout the memo, establishing a TA or TF relationship with a student is referred to as “hiring.” Increases in compensation for TAs and TFs are characterized as “raises.” Hiring is coordinated with the HR office. The faculty members who select TAs and TFs are described as the “Hiring Faculty” (Pet. Ex. 41, 5th page). Other official documents similarly refer to students selected for these positions as “new hires” (Pet. Ex. 17), and the selection process as “hiring” (Er. Ex. 46, 47). Personnel forms and e-mail correspondence from hiring faculty describe these positions as “jobs” (Pet. Ex. 24, 4<sup>th</sup> page; Pet. Ex. 26, 2<sup>nd</sup> page; Pet. Ex. 27), and the duties performed by these individuals as “work” (Pet. Ex. 14; 42, text at the bottom of the chart; 43; Er. Ex. 53). Finally, the offer letters from the Provost’s office quoted above state that these positions constitute “student employment” (Pet. Ex. 38; Er. Ex. 39, 48). Thus, the words used by the Employer’s representatives reflect its understanding that it is creating an employment relationship.

**F. 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). This “financial aid” is provided to the student employees, “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).

**G. 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). The work performed by the student employees in the petitioned-for unit help the University to fulfill this mission.

Student employees in all of the instructional classifications help to fulfill the teaching mission of the University. Teaching Fellows, as described 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 all of these 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>10</sup>

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 Employer has established a fund from which faculty members may draw up to \$5,100 per year to hire student employees to assist with their research (Tr. 78-79). The Dean for Academic Planning at Parsons testified that this program was established both to provide financial aid for students and “to provide faculty support in the form of Research Assistants...” (Tr. 554). 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.

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<sup>10</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 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>11</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

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<sup>11</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.

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).

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). Much of this money must be applied 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). 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). Thus, the work of Research Associates contributes to the finances of the University as well as to its research mission.

#### **H. 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).

#### **I. Length of these Appointments**

The Employer emphasizes that most of these appointments are for a single semester (Tr. 84). According to the Employer, student employees who wish to continue in a position must reapply for a second appointment (Tr. 522), and the Employer’s policy is to distribute these positions among a wide range of students (Tr. 520). This may represent the Employer’s official policy, but in practice, faculty members retain the assistance of teaching and research assistants who do a good job. For example, Ingrid Kvangraven will be serving as a TA in the same class for the third consecutive semester in the coming Fall (Tr. 409-13; Pet. Ex. 19-22). After each semester in the job, the course instructor, Professor Fukuda-Parr, simply e-mailed Kvangraven and invited her to continue (Pet. Ex. 20, 22).

Zoe Carey, a Sociology student as NSSR, has served repeatedly as a TA in a course at Parsons called Global Issues in Design and Visuality, beginning with the Fall of 2013 (Tr. 463-74, Pet. Ex. 30-35). During the Fall Semester, an administrator at

Parsons, Scott Amen, wrote to “everyone” who was serving as a TA, “Assuming you will all be continuing next semester as grad students, I would like to offer your sections for Spring on a first come first serve basis” (Pet. Ex. 32, 2<sup>nd</sup> page, Nov. 6, 2013 e-mail). Carey and other student employees continued to serve as TAs in that class in the Fall of 2014, even though the course instructor changed (Tr. 470-71). Amen wrote to the TAs during the summer of 2014, before a new instructor had been selected for the class, offering them positions. “I have no word on a faculty leader however, I am going to start scheduling the TAs now anyway” (Pet. Ex. 33, 2<sup>nd</sup> page). Carey continued as a TA through both semesters of the recently concluded academic year. She served as a TA for either one or two recitation sections, depending upon the need for TAs as determined by enrollment and the number of other TAs who continued with the class (Tr. 468-69, 476; Pet. Ex. 33, 35). Thus, she served as a TA for a total of four semesters in the same class, even when the instructor of the class changed.

The Employer introduced a chart showing the names of student employees and the semesters during which they received compensation for work in one of the petitioned-for classifications during academic years 2013-14 and 2014-15 (Er. Ex. 7). The information for this chart was compiled by the Employer’s Human Resources Department and drawn from the Employer’s payroll records (Tr. 67, 73-74; Er. Ex. 77, para. 1). The Employer also introduced summaries of these charts, compiled by the Human Resources Department (Er. 75, 76, 77). The summaries show, *inter alia*, that, even though most appointments are for only one semester, most students worked in more than one semester during the two-year period covered by the chart (Er. Ex. 75). Specifically, the summary shows that 1,454 students were paid for working in at least

one of the classifications during those two academic years. Of those, 523 worked in only one semester, meaning that 931, or 64%, worked at least two semesters during this period.

These figures grossly understate the extent to which students work more than one semester. Of the 523 students who worked only one semester in this two year period, many or most of them may have either worked in prior years or may be selected to fill one of these position in the upcoming academic year. The Employer offered a statement that, of these 523 student employees who worked for only one semester, 326 continued as students for at least one additional semester after the semester in which they were employed (Er. Ex. 77, para. 3). It follows, of course, that the remaining 187 left school immediately after working in one of the jobs in question. Without data as to whether they had worked in previous years, they cannot be counted as having worked only one semester. If these 187 are eliminated from the calculations, then only 326 of 1,267,<sup>12</sup> or 26%, worked for only one semester out of the two year period. This figure remains inflated because it does not account for students who were not enrolled at the beginning of the two year period. Even with these flaws, the Employer's records show that the overwhelming majority of students who obtain jobs in one of the job classifications at issue work for more than one semester, and a substantial portion work more than two semesters. The Employer's summary also reflects that 45% worked two consecutive semesters (and, again, undoubtedly more if the previous year were to be included) (Er. Ex. 75).

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<sup>12</sup> 1,454 total - 187 who left school after one semester of employment equals 1,267 who remained in school.

**J. Other Employees of the University**

The Employer introduced collective bargaining agreements and personnel policies applicable to other employees and policies relating to students in their capacity as students (Er. Ex. 8 – 27). These documents demonstrate that student employees are treated differently from other employees and have different interests and terms and conditions of employment. Nevertheless, the Human Resources and Payroll departments are involved in matters related to the employment of students (Tr. 73-4, 168, 171-73, 244). The fact that they are treated differently from other employees and have different terms and conditions of employment demonstrates that student employees have a separate community of interest and constitute a separate appropriate unit. The fact that they have different terms and conditions of employment does not mean that they are not employees.

One collective bargaining agreement that the University introduced is relevant because it involves academic employees. 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.

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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.

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).

#### IV. **ARGUMENT**

##### A. **The Regional Director should not Dismiss this Petition**

##### 1. ***The Student Employees fit the Statutory Definition of "Employee"***

There can be little dispute that the individuals in the classifications at issue in this case meet the literal definition of an "employee" under Section 2(3) of the Act, as that term has generally been interpreted by the Board and the Supreme Court. In NLRB v. Town & Country, 516 U.S. 85 (1995), 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). These student employees work for the University in furtherance of its mission, and in return, they receive financial compensation. Thus, they fit this definition.

In Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984), 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. None of these statutory exceptions apply to this case.

Similarly, the Board gave a broad reading to the statutory definition of employee in Seattle Opera Association, 331 N.L.R.B. 1072 (2000), enf'd 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). Accord, Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 189-90 (1981); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185-86 (1941); Boston Medical Center, 330 N.L.R.B. 152, 160 (1999).

The record in this case leaves little doubt that the student employees at issue fall within this broad definition. They perform services for the Employer. Those services help to fulfill the purpose and objectives of the institution and to generate income for the University. The student employees are compensated for performing these services, through a payroll account, with taxes deducted. Student employees must provide I-9 documentation in order to fill any of these positions. It is undisputed that the University controls the means and manner in which the student employees perform their duties.

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

Thus, they are employees within the statutory definition and the cases interpreting section 2(3).

**2. *The Exception to the Broad Definition of “Employee” Created in Brown Should be Narrowly Construed***

The Board in Brown University, 342 N.L.R.B. 483 (2004), created an exception to the broad statutory definition, holding that “graduate student assistants are not employees within the meaning of Section 2(3) of the Act.” 342 N.L.R.B. at 493. That holding should be narrowly construed for several reasons. First, it is inconsistent with other cases that broadly define the term “employee”. Second, this decision created an exclusion that is not among those enumerated in the statute. Third, the Board has found students to be employees in numerous circumstances. St. Barnabas Hosp., 355 N.L.R.B. No. 39 (2010) (interns and residents); Boston Medical Center, supra (interns and residents); Research Foundation of the State University of New York, 350 N.L.R.B. 197 (2007) (research assistants working for a non-profit corporation administering research programs for the university where the students are enrolled); Chinatown Planning Council, 290 N.L.R.B. 1091 (1988) (apprentices); Newport News Shipbuilding and Dry Dock Co., 57 N.L.R.B. 1053, 1058-58 (1944) (apprentices). Thus, the mere fact that these employees are also graduate students is an insufficient basis to deny them the right to organize. They should be denied the right to an election only if they are clearly “graduate student assistants” within the meaning of Brown.

The Board’s decision reopening this case signifies that the Board does not intend for the Regional Director to be bound to follow Brown merely because the employees at issue in this case are also students at the New School. In responding to the Regional Director’s Order to Show Cause, the Petitioner argued that the Regional Director should

not dismiss this case for several reasons. The Petitioner argued that the Regional Director should not apply Brown because the Board has repeatedly issued orders stating that there are compelling reasons to reconsider Brown, because Brown is inconsistent with other Board precedent, and because this case is factually distinguishable from Brown (Board Ex. 1(f)). The Regional Director nevertheless dismissed this case, finding that she was “constrained by current Board precedent” to follow Brown (Board Ex. 1(i)). The Petitioner requested review, arguing that Brown lacks any legal foundation, that it is an aberrant decision that cannot be reconciled with other precedent or the language of the statute, and that it is based upon the logical fallacy that there is some inconsistency between being a student and being an employee at the same institution (Bd. Ex. 1(j)).

The Board granted review, unanimously holding that the Request for Review raises substantial issues warranting review and citing NYU II. In NYU II, the Board held that there were compelling reasons to reconsider Brown, including that Brown overruled a decision issued less than four years earlier, and that Brown was based upon policy considerations extrinsic to the Act. The Board in NYU II also held that the growth of collective bargaining among graduate student employees and expert evidence regarding the policy considerations upon which Brown purported to be based would also be relevant. By citing NYU II, the Board thus directed that these factors be considered after this case had been reopened. The Regional Director should weigh those factors rather than assume that Brown is controlling.

In addition, the decision reopening this case included a footnote stating, “Members Miscimarra and Johnson note that the Regional Director properly dismissed

the petition based on existing law [citing Brown], and the Board does not here decide whether or not existing law should be overruled.” The fact that only two members of the Board joined in this footnote compels the conclusion that a majority of the Board rejected the proposition that the Regional Director is obligated to follow Brown in deciding this case. As there are significant differences between this case and Brown, the Regional Director is not compelled to dismiss this petition.

**3. *This case is Factually Distinguishable from Brown***

Service as a graduate student assistant at Brown University was much more closely intertwined with admission as a student than is service in the instructional or research positions at the New School. At Brown, admission to the graduate program was directly linked to service as a Teaching Assistant or Research Assistant. Upon admission, graduate students were informed of their service requirements. Thus, the Board at the outset noted that graduate student assistants were “admitted into, not hired by, a university....” 342 N.L.R.B. at 483. The vast majority of graduate students received financial support from Brown. 342 N.L.R.B. at 485. This support included tuition remission in addition to a stipend. 342 N.L.R.B. at 489. The amount of the payments received by the student assistants was “generally” the same, regardless of the nature of the duties performed. 342 N.L.R.B. at 486. Most were required to serve in one of these positions in order to earn their degrees. 342 N.L.R.B. at 488. Thus, the Board concluded that service as a student assistant “is an integral part of being a graduate student, and cannot be divorced from the other functions of being a graduate student.” 342 N.L.R.B. at 489.

The roles of Tutors, Course Assistants, TAs, TFs, Research Assistants, and Research Associates at 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. Rather, graduate students wishing to work in one of these positions must go through a separate and distinct hiring process, which includes filling out job application forms and going through an interview designed to assess their qualifications. They are first admitted into the New School and later may or may not be hired to work at the New School. Only about half of the doctoral students receive any form of financial aid (Tr. 196-97). 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 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. Unlike Brown, admission to the New School is a separate transaction from being hired into one of the jobs in the petitioned-for unit.

There are other distinctions from Brown which support the conclusion that these student employees are not “graduate student assistants” within the meaning of that case. The compensation paid to Course Assistants, TAs, TFs, Tutors, and Research Assistants does not include tuition remission. Service in these positions is not required for any degrees. The Employer’s records of the employment of student employees list the School where the employees worked, not the School in which they are enrolled as students (Er. Ex. 7). The amount of compensation paid to student employees at the New School varies depending upon the number of hours of work anticipated, 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; Pet. Ex. 42). Service in these positions is not “an integral part of being a graduate student,” and service in these jobs can readily be divorced from the other aspects of being a graduate student.

These factual distinctions are substantive, going to the heart of the Brown decision. To the extent that Brown has any logic, it is based upon the fear that collective bargaining for graduate student employees will impinge upon academic matters related to their education. That fear, in turn, is premised upon the Board’s finding that employment as a graduate assistant at Brown was inseparable from enrollment as a student. The distinctions between this case and Brown go to the heart

of that finding. While enrollment as a student is a prerequisite for employment in one of these positions, that is where the similarity to Brown ends. Status as a graduate student at the New School is separate from service in one of these positions. The separate hiring process and the factors that go into setting rates of compensation show that these individuals have an economic relationship with the Employer that is distinct from the educational relationship that they have as students enrolled at the University. They are not “graduate student assistants” as that phrase is used in Brown. Therefore, Brown is not controlling. Because these student employees have a separate economic relationship, they should be permitted to vote on whether to be represented by the Petitioner with respect to the terms and conditions of that relationship.

#### ***4. Additional Factors that Undermine Brown***

The majority in Brown relied upon conjecture about possible damage that collective bargaining might cause to graduate education. The majority speculated that collective bargaining might undermine student-faculty relationships or threaten the academic freedom of universities. This conjecture is contradicted by a study recently published in the ILR Review, the official journal of the Cornell University Industrial and Labor Relations School. That study reported on a survey of graduate student employees at public universities where the graduate assistants are represented by a labor organization, compared with answers offered by graduate student assistants at similar non-union public sector universities.<sup>15</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

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<sup>15</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.

assumptions made by the majority in Brown and even suggests that collective bargaining might improve student-faculty relationships. The authors concluded:

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>16</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.

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<sup>16</sup> "Graduate Student Employee".

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).

The Board in NYU II, cited by the Board in reopening this case, stated that one factor to consider would be 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). 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 is an additional basis for concluding that Brown is an aberration and should be read narrowly.

5. ***Conclusion Regarding the Application of Brown to this Case***

The student employees at issue have a clear economic relationship with the Employer that is separate and distinct from their academic relationship. They are hired to do work for the Employer in a transaction that is separate from their matriculation as students. The compensation that they receive is related to the amount, nature and value of the work that they perform. Finding them to be employees is consistent with the language of the statute, the broad reading of that statute in Board and Supreme Court precedent, and cases finding student employees to be protected by the Act in other circumstances. The student employees at the New School are not graduate assistants within the meaning of Brown because their employment is not part and parcel of their education. Brown should be applied narrowly because it is inconsistent with

other precedent, out of step with national developments in collective bargaining for student employees, contradicted by academic studies, and undermined by the record in this case.

For all of these reasons, the Regional Director should find that the student employees at the New School are statutory employees and order an election in this case.<sup>17</sup>

**B. The Student Employees Should not be Denied the Right to Vote on the Ground that they are Temporary Employees**

The Employer argues that these employees are not entitled to an election because they are appointed for a limited period of time and are therefore “temporary employees.” There is no support in Board precedent for that proposition. The Board has long recognized that employees hired for a limited period of time with a defined endpoint have the right to organize. See, e.g., Berlitz Sch. of Languages, Inc., 231 N.L.R.B. 766 (1977) (on call teachers); Avis Rent-a-Car Sys., Inc., 173 N.L.R.B. 1366 (1968) (employees hired to drive rental vehicles from one rental car center to another); Hondo Drilling Co., 164 N.L.R.B. 416 (1967) (employees of an oil drilling company); Daniel Constr. Co., 133 N.L.R.B. 264 (1961) (construction industry); Pulitzer Publishing Co., 101 N.L.R.B. 1005 (1952) (camera operators and sound technicians<sup>18</sup> at a television station). The Board recently reaffirmed the right of temporary employees to organize in Kansas City Repertory Theater, 356 N.L.R.B. No. 28 (2010).

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<sup>17</sup> Consistent with the stipulation of the parties, the Regional Director should find that, as these student employees are statutory employees, the organization that they have formed for the purpose of collective bargaining, SENS, UAW, is a labor organization within the meaning of the Act.

<sup>18</sup> Then known as cameramen and soundmen.

It is true that the Board routinely excludes temporary employees from units of full-time and regular part-time employees. The reason for this exclusion is that temporary employees lack a community of interest with regular employees because the term of their employment is different from that of regular employees. As the Board explained in Kansas City Repertory, temporary employees are customarily excluded from units of full-time and regular part-time employees because they have different interests resulting from their temporary status. That is, they are excluded from the bargaining unit because they lack a community of interest with employees whose employment is indefinite and ongoing, not because they do not have the right to engage in collective bargaining.

The fact that the duration of employment of student employees is limited is not a basis to deprive them of the right to engage in collective bargaining. As the Board stated in Kansas City Repertory, “the Act vests in such employees, rather than in the Board, the decision whether they will benefit from collective bargaining.” 356 N.L.R.B. No. 28 at 1. Since the student employees at the New School are employees within the meaning of the Act, they should also be afforded the opportunity to decide whether they will benefit from collective bargaining.

**C. The Regional Director should Direct an Election in the Unit Sought in the Petition**

The Employer did not raise any issues with respect to the scope of the unit sought in the petition. That unit is clearly appropriate. The employees have a substantial community of interest based upon the following factors:

1. They are all enrolled students and therefore have the same dual relationship with the Employer.

2. They all report to and are supervised by faculty members.
3. They all contribute to the educational and/or research mission of the University.
4. There is frequent interchange of student employees between the job classifications sought in this petition (Er. Ex. 7, 76).
5. They all are hired for a similar semester to semester or occasionally a one-year basis.
6. They are subject to different policies from other employees at the Employer.

Thus, the petitioned-for unit is appropriate for purposes of collective bargaining.

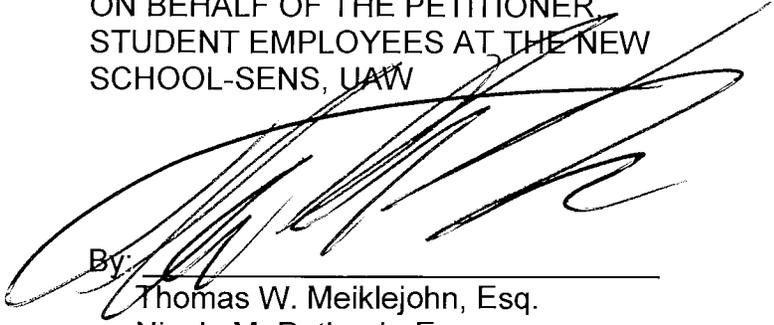
**V. CONCLUSION**

The Regional Director should direct an election in the following unit:

**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).

**Excluded:** All other employees, Student Assistants at schools other than Parsons, guards and supervisors as defined in the Act.

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

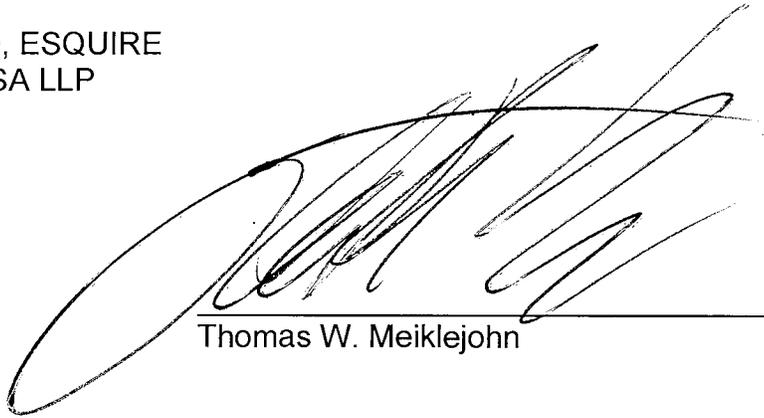
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Brief of the Petitioner to the Regional Director was sent via email, on this 1<sup>st</sup> day of June, 2015, to the following:

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