UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 2

THE NEW SCHOOL,

Employer,

and CASE NO. 02-RC-143009

STUDENT EMPLOYEES AT THE NEW SCHOOL - SENS/UAW,

Petitioner.

THE NEW SCHOOL'S POST-HEARING BRIEF

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PRELIMINARY STATEMENT

This post-hearing brief is submitted by The New School ("The New School" or "Employer") to the Regional Director in connection with the hearings held in this proceeding which were directed to be had by the National Labor Relations Board ("NLRB" or "Board") in its Order, dated March 13, 2015 (Board Exh. No. 1(k)),[1] upon the petition filed by Student Employees At The New School–SENS/UAW ("Petitioner") on December 17, 2014. In that petition the Petitioner seeks to represent various categories of both graduate students and, in a few instances, undergraduate students, who serve as Teaching Assistants, Teaching Fellows, Course Assistants, Tutors, Research Assistants and Research Associates at The New School. See the petition, dated December 17, 2014, Board Exhibit No. 1(a).

First, it is clear, most respectfully, that nothing adduced in the form of testimony or documentary evidence during the hearings in this proceeding might, in any way, suggest a different result from that set forth in the previous Order of the Regional Director dismissing the petition, as the Regional Director correctly noted in that Order that the Board's decision in Brown University, 342 N.L.R.B. 483 (2004), the controlling precedent relating to the issues presented by Petitioner to the Regional Director, required the dismissal of the petition. Thus, in her February 6, 2015 Order (Board Exh. No. 1(i)) the Regional Director held as follows:

> "Although I recognize that the Petitioner is seeking to have the Board reconsider Brown, it is improper for me to ignore Board precedent. While the Petitioner's argument that the Board has remanded similar cases suggests that the Board would likely remand the instant case, I am, nonetheless, constrained by current Board precedent. In the event that the Board agrees with the Petitioner, development of an efficient and complete record would be facilitated by a remand from the Board setting forth the factors and evidence that they wish to be considered. As the Employer noted, reconsideration of current law is a decision for the Board."

[1] References in parentheses are to the exhibits or transcript references ("TR. __") at the hearings held in this proceeding before Region 2 Hearing Officer Gregory Davis.

Board Exh. No. 1(i) at 2. (emphasis added).

There was no intervening decision or order of the Board subsequent to the Regional Director's February 6, 2015 Order that disturbed the well-established principle that only the Board, and not the Regional Director, can overturn controlling precedent. Against that settled principle an "argument" was made by Petitioner that the Regional Director was empowered to "overturn" Brown, which argument is fanciful in the extreme, in that in its March 13, 2015 Order the Board included a footnote confirming that Brown had not been overturned by reason of its Order, thereby allegedly giving rise, the Petitioner argues, to an implication that the Regional Director was now authorized to do so. How Petitioner can arrive at the conclusion that the Regional Director was now somehow authorized by reason of the Board's footnote to overturn Brown is stunning, and defies logic, as the "implication" is directly to the contrary—words have meaning, and if the Board had chosen to either overturn Brown in its March 13, 2015 Order, or authorize the Regional Director to do so, it would have so stated. Moreover, it appears that the Petitioner has misread the footnote, as it is self-evident that it is not only two Members, but rather the full Board, which held that it was not overturning Brown in its decision, as the footnote reads as follows:

> "Members Miscimarra and Johnson note that the Regional Director properly dismissed the petition based on existing law, Brown University, 342 N.L.R.B 483 (2004), and the Board does not here decide whether or not existing law should be overruled."

Board Exh. No. 1(k). (emphasis added).

Thus, while two (2) Members had "note[d]" that the Regional Director had "properly dismissed the petition," it was obviously the full Board, and not two (2) Members speaking for it, which declared that "the Board does not here decide whether or not existing law should be overruled." Indeed, in her February 6, 2015 Order the Regional Director necessarily dismissed

the argument now made by Petitioner, as she stated that even if the "Board agrees with the Petitioner['s argument that Brown will be reconsidered] development of an efficient . . . record would be facilitated by a remand from the Board." (Board Exh. No. 1(i)). In short, the Regional Director was thereafter directed by the Board, as she had envisioned, to do nothing other than adduce evidence in a "hearing," and it will only be for the Board to decide whether to "reconsider" Brown.

The fact that the Regional Director should dismiss the petition, with the hearings having been concluded, is beyond dispute. Apart from the Regional Director's February 6, 2015 Order and the Board's March 13, 2015 Order, a previous concession to that effect had been made by the United Auto Workers ("UAW") (the affiliate of the Petitioner herein) in a different proceeding (relating to New York University ("NYU")) where, as here, the UAW was also the affiliate of the putative bargaining representative, and the proceeding pertained to the identical issue presented in this proceeding, i.e., whether graduate students are employees for purposes of the Act[2]. In the NYU Proceeding the UAW conceded, as noted by Member Hayes, dissenting:

> "The Petitioner here has sought a composed of 'all individuals enrolled in graduate level programs . . . who are employed to perform the functions of teaching assistants, research assistants and graduate assistants (regardless of job title).' The unit sought is not appropriate under the Board's decision in Brown University, 342 N.L.R.B 483 (2004). This is a fact which the Petitioner freely concedes. Thus, it notes that: 'It is undisputed that the Brown decision compels…[the dismissal of the petition].'"

NYU, 02-RC-023481, 356 N.L.R.B No. 7 (Oct. 25, 2010) at 2, 2010 WL 4386482, *3 (emphasis supplied).

[2] See NYU and GSOC/UAW, Case 02-RC-023481 (the "NYU Proceeding"), 356 N.L.R.B No. 7, 2010 WL 4386482, at *3.

Further, as also noted by Regional Director Alvin Blyer of Region 29 in dismissing the petition in Polytechnic Institute of New York University, Case No. 29-RC-12054, in his Decision and Order, dated August 30, 2011, at footnote 26:

> "Although the Petitioner argues that the Board's order in New York University (NYU II) 356 N.L.R.B No. 7 (2010) directs Regional Directors not to apply Brown in a categorical manner, that Order did not overrule the Brown decision. Thus, I am still bound by the holding in that decision."

Most respectfully, no difference obtains here, and the Regional Director must dismiss the petition, as had Regional Director Blyer after hearings, as there has been nothing adduced from the hearings in the instant matter which would, in any way, suggest that Brown is not the controlling precedent relating to the issues presented by the petition.

BROWN UNIVERSITY

As the Regional Director is aware, Brown holds that graduate research and teaching assistants at private universities are primarily students rather than "employees" within the meaning of NLRA section 2(3). As such, graduate students at Brown University were held by the Board to have no statutory right to unionize or to enter into collective bargaining negotiations with Brown University. As noted in Brown, the graduate students who were enrolled in a degree program were necessarily engaged in a course of study where research and/or a teaching assignment was concomitant with, or as a requirement for, the degree sought by the student. 342 N.L.R.B. at 488-489. In Brown the Board, expressly overruling its prior decision in New York University[3] and reestablishing well-established caselaw prior to New York University, held that the graduate students at Brown University were primarily students, rather than employees, and stated as follows:

[3] 332 N.L.R.B. 1205 (2000)(NYU)

> "[I]n light of the status of graduate students as students, the role of graduate student assistantships in graduate education, the graduate students' relationship with the faculty, and the financial support they receive to attend Brown, we conclude that the overall relationship between the graduate student assistants and Brown is primarily an educational one, rather than an economic one."

342 N.L.R.B at 348. The underpinning of Brown is that, as noted by the Board, "the Act is designed to cover economic relationships" (see 342 N.L.R.B. at 488), and it is therefore mystifying that Petitioner might suggest that Brown should be overturned, or is somehow inapplicable, because the relationship of the putative categories of students in the petition allegedly is either "primarily an economic relationship" with The New School, rather than "primarily an educational relationship," or is a relationship where the student can be both a student and University employee at the same time. The overwhelming evidence adduced at the hearings confirms, to the contrary, that the relationship between The New School and its students in the putative categories is not only "primarily an educational relationship," but it is exclusively a relationship that completely falls within the tenets of Brown.

ARGUMENT

POINT I

PETITIONER'S MERITLESS ARGUMENT THAT THE REGIONAL DIRECTOR IS EMPOWERED TO OVERTURN BROWN

As noted above, Petitioner inappropriately claims, through its erroneous reading of the footnote in the Board's Order, dated March 13, 2015 (Board Exh. No. 1(k)), that Brown may be overturned by the Regional Director. Even if that were the case, which it is not, Brown was correctly decided. The Board's decision in Brown is consistent with the Board's long-standing recognition that the relationship between graduate assistants and universities is primarily an educational one, and not that of an employer and employee.

The correctly-decided underpinnings of Brown are decades–long precedent. Thus, in Adelphi Univ., 195 N.L.R.B 639, 640 (1972), the Board determined that graduate teaching and research assistants at the university were "primarily students" and were not to be included in the proposed bargaining unit of faculty. The graduate students at issue in Adelphi were: (i) expected to devote 20 hours per week to their assistantship duties; (ii) paid from $1,200 to $2,900 per academic year (depending on the degree toward which they were working and the subject area in which they were involved) plus free tuition for their courses; and (iii) generally enrolled in courses for up to 12 hours per week. Id. at 639-640. In holding that the graduate assistants were not employees of the university and rejecting their inclusion in a bargaining unit, the Board observed that, among other things, "graduate assistants are graduate students working toward their own advanced academic degrees, and their employment depends entirely on their continued status as such." Id. at 640. The Board further observed that "graduate assistants are guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned. In view of the foregoing, we find that the graduate teaching and research assistants here involved, although performing some faculty-related functions, are primarily students." Id. Each of those factors set forth in the Adelphi case is particularly apt to the facts adduced during the hearings in the proceeding.

The Board reaffirmed its analysis of the relationship between graduate and research assistants and universities two years after Adelphi in Leland Stanford Junior Univ., 214 N.L.R.B 621 (1974). In Leland Stanford, the Board decided that physics research assistants pursuing graduate degrees at Stanford University who performed various research tasks, both independently and under faculty supervision, and who received financial aid in the form of a living allowance, were not "employees" entitled to organize and bargain collectively under the

Act. 214 N.L.R.B. 621. In reaching that conclusion, the Board examined the relationship between the university and the research assistants, with emphasis on the economic aspects of the relationship. In particular, the Board noted that the "the payments to the [research assistants] are in the nature of stipends or grants to permit them to pursue their advanced degrees and are not based on the skill or function of the particular individual or the nature of the research performed." Id. at 621. The Board also noted that all the research assistants were Ph. D. candidates and were "seeking to advance their own academic standing and are engaging in research as a means of achieving that advancement." Id. at 622. For these reasons, and because the specific research tasks were performed in pursuit of a graduate degree, the Board held that those graduate research assistants were not employees covered by the Act. ." Id. at 623. Importantly, no greater manifestation of those factors was confirmed other than through the testimony of Dr. Michael Schober, which will be set forth in greater detail at pages 20 through 21, infra.

Finally, in San Francisco Art Institute, 226 N.L.R.B. 1251 (1976), the Board decided that undergraduate students working part-time as janitors for the university at which they attended class were not "employees" entitled to collective bargaining rights, and therefore the Board refused to certify a unit composed exclusively of such individuals. The students, many of whom were paid by either scholarship or work-study funds, were considered non-employees because their "campus employment at the institution they [] attend[ed] [was] incidental to their academic objectives," Id. at 1251, thus leaving them with only a "tenuous secondary interest" in their employment. Id. at 1252. In the end, the Board believed that classifying these individuals as employees would "not effectuate the policies of the Act" due primarily to "the brief nature of the students' employment tenure, [] the nature of compensation for some of the students, and [] the

fact that students are concerned primarily with their studies rather than with their part-time employment." Id. Against that precedent, therefore, any suggestion by Petitioner that Brown, which is consistent with the Board's analysis in each of Adelphi, Leland Stanford, and San Francisco Art Institute, should be overturned by the Regional Director or the Board would necessarily, and inappropriately, expand the National Labor Relations Act's ("Act") coverage by attempting to transform a student-teacher relationship into an employment relationship.

Similarly, in addition to the caselaw, the legislative and precedential foundation of both the text and purposes of the Act, as reflected in Brown, establish that individuals in a non-economic relationship with an employer are not employees. While Petitioner claims that Section 2(3) of the Act defines the word "employee" broadly so as to include "any employee, and shall not be limited to the employees of a particular employer . . ." (29 U.S.C. § 152(3) (1999)), that argument is unavailing under the facts presented in this proceeding. Thus, and as an example, the Board and the courts have repeatedly held that a number of categories of individuals (apart from the graduate students in Brown who were held to be "primarily students") did not qualify for "employee" status under the Act. See NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (managerial employees); Allied Chemical & Alkali Workers of Am., Local U. No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) (retirees); WBAI Pacifica Foundation, 328 N.L.R.B. No. 179 (1999) (unpaid staff); Goodwill Indus. of Tidewater, 304 N.L.R.B. 767 (1991) (disabled workers). In assessing whether or not a given group of individuals is properly classified as "employees" within the meaning of the Act, the Board and the courts have closely examined the nature of the relationship between the individuals and their purported employer against the backdrop of the Act's specific policies and purposes. See WBAI Pacifica Foundation, 328 N.L.R.B. No. 179 at *4 ("At the heart of each of the Court's decisions is the

principle that employee status must be determined against the background of the policies and purposes of the Act."). Thus, there is no question that Brown was correctly decided, as "resort must [] be had to economic and policy considerations to infuse § 2(3) with meaning." Allied Chemical, 404 U.S. at 168. As held in Allied Chemical, the existence of employee status is to be determined "by underlying economic facts, rather than technically and exclusively by previously established legal classifications." Id. at 166-67. In other words, "[t]he term 'employee' must be understood with reference to the purpose of the Act and the facts involved in the economic relationship." Id. at 167 (quoting NLRB v. Hearst Publications, 322 U.S. 111, 129 (1944) (internal quotations omitted)).

The Board routinely applied these principles to its analysis of the existence of employee status, and just as routinely excluded individuals from such status where the relevant economic facts and applicable policy concerns warranted such a result. See, e.g., WBAI Pacifica Foundation, 328 N.L.R.B. No. 179 (1999); Goodwill Indus. of Tidewater, Inc., 304 N.L.R.B. 767 (1991). Thus, because the Act's "vision of a fundamentally economic relationship between employers and employees is inescapable," the Board chose to exclude unpaid staff from the statutory definition of employees where "there [was] no economic aspect to their relationship with the Employer." WBAI Pacifica, 328 N.L.R.B. No. 179 at *4. Similarly, where an employer's relationship with the individuals at issue was not guided by economic business considerations, but rather was "primarily rehabilitative" with working conditions that are not typical of the private sector, the Board has refused to find employee status. Goodwill Indus., 304 N.L.R.B. at 768. It is this absence of a truly economic relationship, or a demonstrable interest in the economic aspects of the relationship, that traditionally caused the Board to exclude students performing services for the institution they attended from the Act's definition of "employee,"

particularly where those services were compatible or consistent with educational objectives. See Leland Stanford Junior University, 214 N.L.R.B. 621 (1974); San Francisco Art Institute, 226 N.L.R.B. 1251 (1976). In sum, and as set forth below, the facts pertaining to The New School and its relationship with its graduate students who serve in the putative categories of alleged "employees" are particularly consistent with the rationale underlying both Brown, and the predecessor Board decisions, that such students are not "employees" under the Act.

POINT II

THE FACTS ADDUCED DURING THE HEARINGS

As set forth in Brown, each of the principles which prompted the Board to hold that the Brown graduate students acted "primarily" as students in their respective roles is present in the relationship between The New School and its students who have served in the six (6) putative categories of "employment" set forth in the petition: Teaching Assistants, Teaching Fellows, Research Assistants, Research Associates, Course Assistants and Tutors. In that regard, Brown emphasized that the petitioned–for individuals in that proceeding:

> "(1) were 'students and must first be enrolled ... to be awarded a TA, RA, or proctorship;'
>
> (2) were 'graduate student assistants' who spent only a limited number of hours performing their duties;
>
> (3) had their service as a graduate student assistant being either 'part and parcel of the core elements of the PH.D. degree,' or 'integral to the education of the graduate student;' and
>
> (4) received stipends or sums as 'financial support' which was provided to 'graduate students because they are students.'"

Brown University, 342 N.L.R.B. at 488. Each of those factors was overwhelmingly consistent in the relationship between The New School and the graduate students at issue in the proceeding.

A. The Individuals In The Putative Categories Are Students

Brown's holding emphasized the "simple, undisputed fact that all the petitioned–for individuals are students and must first be enrolled at Brown to be awarded a TA, RA or proctorship." Brown University, 342 N.L.R.B at 488. As testified without contradiction by each of the witnesses during the hearings, the individuals sought to be represented by the Petitioner at The New School are students, and necessarily so for good reason, as The New School has intentionally fostered the positions at issue to be a significant component of the students' efforts to attain either a Master's or Ph.D. degree. In that regard, and as testified by Deputy Provost Bryna Sanger, the aggregate amount of funds expended by The New School as financial support for the student assistants is approximately 4.9 million dollars per year, and

> "...the intention of these resources and the forms of mone[ies] is to spread it around as best we can to support our students as they go through toward completion of their degree."

(TR. 87, lines 5-6, 25; 85, lines 1-3). As a result, it is self-evident that the positions set forth in the petition are held by students, as the very purpose of fostering these positions is to assist students, and not to create employment opportunities. The documents provided by The New School to the graduate students who serve in the putative categories of the petition underscore the fact that the individuals serving as, for example, a Teaching Assistant:

> "...must be a full-time student in the semester you will be teaching. Most graduate students are considered full time when enrolled in 9 credits, except those in Parsons' MFA and March programs who are considered full-time when enrolled in 12 credits. Doctoral students who are maintaining status are considered full-time students"

(Employer Exh. 39). (emphasis added). It is noteworthy that The New School requires the student to be enrolled in the semester in which he or she is serving in one of the putative categories, as it confirms the fact that the stipend is a form of financial aid to the student who is

pursuing his or her studies at that very moment—on the other hand, if serving as a Teaching Assistant were an "employment" circumstance, for what reason would The New School require enrollment as a student? Enrollment as a student is, of course, irrelevant to the duties an employee might discharge, and only underscores the meritless nature of Petitioner's claim. In fact, while the Petitioner has suggested that a Teaching Assistant is akin to a "faculty member" the Petitioner will be unable to explain why a Teaching Assistant must be enrolled as a student at the moment he or she is serving, while neither a full-time nor part-time faculty member must be enrolled as a student — the only explanation, of course, is that serving as a Teaching Assistant is part and parcel of his/her status as a student and related to his/her effort to attain a degree.

B. The Graduate Student Serves Only A Limited Amount Of Time In Performing The Duties Of The Student Position

An additional feature noted in the Brown case as to why the petition's putative categories are not employment roles is that the graduate student serves only a limited amount of time in, as an example, the roles of Teaching Assistant or Research Assistant. That factor in Brown is precisely what The New School adheres to in designing each of the six (6) categories in the petition, and for good reason, as those roles are designed by The New School to assist the student, both financially and academically, rather than to create an employment relationship — in fact, if the student's serving in one of those roles at The New School was intended to be one of employer-employee it is obvious that The New School would choose to have the flexibility to require (not permit) the student to serve as many hours as it chose to mandate in order to have the Teaching Assistantship (as an example) be economically advantageous to The New School.

As is the case with The New School, the Board in Brown stated that:

> "students serving as graduate student assistants spend only a limited number of hours performing their duties, and it is beyond

> dispute that their principal time commitment at Brown is focused on obtaining a degree, and, thus, being a student."

Brown University, 342 N.L.R.B at 488.

The proof of the requirements that the student role be limited in either hours per week, or weeks per academic year, was uncontradicted during the hearings, and The New School established any number of protections to assist the student. Thus, as testified by Robert Kostrzewa, the Vice Dean for The New School For Social Research ("NSSR") of The New School:

> "...students should not be engaged in these roles [Research Associate] for more than 20 hours a week. It's a University accepted standard. I don't know whether it actually appears in any regulations, but we try to abide by it. And students and the University should know the effort that they are engaged in these roles, as opposed to other activities on their path to attain the degree, because they have a lot of other responsibilities as graduate students that they have to meet. That's why academic institutions don't allow students to engage in some of these efforts for more than 20 hours."

(TR. 245, lines 14-24). (emphasis supplied).

Once again, no reason other than to assist the student in attaining his or her degree is possible by limiting the number of hours one can serve, as the payment to the graduate student is ordinarily in the form of a stipend, and any employer would therefore seek to maximize the outcomes from an "employee," not limit it, if the relationship were truly one of employer-employee. In fact, The New School ordinarily restricts the weekly hours that a graduate student should expend to ten (10) hours per week if he or she serves as a Teaching Fellow or Teaching Assistant. The 2015-2016 University-Wide Call For Applicants for Teaching Fellowship Opportunities (Employer Exh. 46) provides that the "estimated time commitment is 10 hours per week." In the same vein, a Course Assistant at The New School For Public Engagement ("NSPE") is expected to provide eight (8) hours per week (Employer Exh. 53), and a Teaching

Assistant at NSPE is expected to work 8-10 hours per week (TR. 307, lines 14-16). As explained by Dr. Michael Schober, in response to a question from counsel for Petitioner:

> "Q. And can you tell us whether there is some expectation of hours to be expended in connection with these roles per week ...?
>
> A. It probably varies per course, but there is a maximum number of hours expected in those roles.
>
> Q. And what's the reason that there is some guidance or limitation on the hours that he or she might expend as a Teaching Assistant or Teaching Fellow?
>
> A. The PH.D. student is engaged in their own course work or if they've completed—and also their own research. And so there's a limit to how much time it makes sense to spend on those activities."

(TR. 353, lines 17-25; TR. 354, lines 1-3). (emphasis supplied). That explanation completely undercuts the Petitioner's suggestion that the graduate students are acting as "employees," for would an employer be concerned about an employee's completion of his or her degree requirements? Of course not, and each of the indicia of the student roles is completely consistent with those served by a student, and not by an "employee." The testimony indicated that even the best students, such as Ingrid Kvangraven, who is a Ph.D. student at NSSR, and who received full funding for the next three (3) years, was limited to serving as a Teaching Fellow for 20 hours per week (TR. 422, lines 20-23), again manifesting The New School's objective in ensuring that a graduate student fulfill all of the requirements for attaining a degree.

C. The Student Roles Are An Integral Part of The Attainment of A Degree

The third factor emphasized by Brown in holding that the graduate students were not employees within the meaning of the Act was that "teaching [was] also an important component of most graduate programs," and that the "[g]raduate student assistant positions are, therefore,

directly related to the core elements of the Ph.D. degree and the educational reasons that students attend Brown." Brown University, 342 N.L.R.B at 488-489.

Both of those significant factors were presented during testimony before the Hearing Officer and Petitioner's arguments to the contrary are unavailing. Petitioner has made the misplaced argument that not all students at The New School serve in the graduate student roles, and that serving in those roles is not a formal requirement to attaining the degree. Yet Brown noted only that "teaching" was important in most (but not all) programs and, more importantly, irrespective of the number of students serving as Teaching Assistants, Research Assistants, or otherwise, the number of students who serve does not change the fact that serving in those roles is a pedagogical technique assisting the student in attaining his or her degree. Nothing presented during the hearings detracted from the undisputed expressed intent of The New School to assist the student in "learning" the subject matter by "teaching" it, which was confirmed by Dr. Kathleen Breidenbach, the Vice Dean at NSPE:

> "Q. And this Teaching Fellowship role, has it been created at The New School in order to assist that graduate student in the attainment of his or her degree and if so in what way?
>
> A. Yes, it's very important for graduate students to have opportunities to be able to teach skills of material, understanding how people learn. They also — you know, what's the saying that if you really want to learn something, teach it. And so it provides excellent opportunities to — for graduate students to develop those skills and deepen their knowledge of their material."

(TR. 270, lines 12-21). Thus, it is irrelevant whether it is one student or hundreds of students in the putative categories, as the essential framework of the graduate student roles remains undisturbed. Those roles have been created by The New School to assist the student academically and financially in attaining his or her degree, and there was no testimony adduced by Petitioner whatsoever which undercut that uncontradicted fact. Indeed, the contrary assertion

of Petitioner leads to the illogical conclusion that unless all graduate students serve in one of the putative categories that fact, by itself, somehow verifies the Petitioner's misplaced claim that the student role must therefore be an "employment" role, which is a stunning claim too ill-conceived to be serious. Indeed, to confirm that the students serving as Teaching Assistants and Teaching Fellows do so for the benefit of their own education, Teaching Assistants and Teaching Fellows must attend courses and workshops, Introduction to Teaching Workshops (Employer Exh. 40) and Topics in Pedagogy (Employer Exh. 41), which are pedagogical exercises in which the Teaching Assistants and Teaching Fellows learn how to interact with the undergraduate students.

The New School's purpose of fostering the graduate assistant roles was verified by each of the witnesses including, perhaps unwittingly, the student witnesses called by the Petitioner. Dr. Sanger testified, as an example, that The New School was

> "committed to providing our students with the maximum amount of support and mentoring; and in a research-oriented kind of degree, that's critical; but also in an applied part of a degree it is as well. The application on the opportunity of a student to work with a professionally motivated faculty member and learn the way in which they work is critically important to their own experience, development, training."

(TR. 89, lines 16-23). Similarly, Vice Dean Kostrzewa testified that:

> "[I]n [the] case of research assistants and research associates you immerse yourself in what scholars are supposed to do... and these are integral to attainment of a doctoral degree... we advise all entering students to establish relationships with the faculty.... And to serve as a TA, TF, or RA or research associate [as it is] as close as you can get to a meaningful mentorship/relationship with your faculty."

(TR. 202, lines 11-25; 203, lines 1). Dean Kostrzewa's testimony was consistent with Brown, as the Board held in that case that because "the role of teaching assistant and research assistant is integral to the education of the graduate student Brown's faculty oversees graduate student assistants in their role as research or teaching assistant." Brown University, 342 N.L.R.B at 489

(emphasis supplied). In short, The New School's graduate assistants serve in virtually the same capacities, and for the same reasons, as the graduate students at Brown University.

Irrespective of the School or Division, the graduate student roles at The New School served those two (2) identical purposes, i.e., to provide financial aid and to assist the student academically in attaining a Master's Degree or Ph.D. Thus, in addition to NSSR, about which Vice Dean Kostrzewa testified, Dr. Breidenbach also testified, relating to the graduate Teaching Assistants at NSPE, that "faculty and program claims will review the application [of the students] most typically to try and identify who would be the best fit for that particular instructor of the course." (TR. 259, lines 25; TR. 260, lines 1-2). No such analysis would occur, of course, if a part-time faculty member were hired to teach a course, as the Teaching Assistantship envisions a close relationship between a faculty member and that graduate student.

Laura Copland, the Assistant Dean For Faculty Affairs at Eugene Lang College, testified that serving as a Teaching Assistant or Teaching Fellow is:

> "an integral part of their education in having them become more fervent in their discipline by being in a classroom for a TA, working with the faculty member and perhaps leading a discussion session, understanding how students receive the material, how they explain the material back in papers... It's vital for the graduate student in understanding his or her own discipline to have that kind of interaction."

(TR. 323, lines 17-25) (emphasis supplied). Adrienne Marcus, the Assistant Provost for University Curriculum, who coordinates the University-wide application process for Teaching Assistants and Teaching Fellows, identified the procedures that are undertaken in the Provost's office. See Employer Exhibits 70, 71, and 72. Pursuant to that process, according to Assistant Provost Marcus, each applicant for a Teaching Assistant or Teaching Fellow position must have a minimum GPA of 3.4 and be within the time limits required for earning a degree, including meeting the requirement of having completed 50 percent of the requirements for attaining a

Master's Degree (Tr. 513, lines 8-14). Those requirements underscore the fact that The New School recognizes the remaining obligations of the student to obtain a degree, such as research, attending class, and perhaps writing a dissertation, and The New School has therefore not only limited the hours one can expend in the role of teaching, as an example (10 hours per week), but it has taken the additional steps of ensuring that the student is in a sound position academically before he or she assumes one of the graduate assistant roles.

The testimony of the two (2) students called by Petitioner actually supported, in part, The New School's claim that the Teaching Assistantship role was distinct from the role of an employee, such as a part-time faculty member. Thus, Ingrid Kvangraven admitted that she became a Teaching Assistant in her "area of studies," that she was "hired" by the "faculty member" as it was a "good fit" with that faculty member, and that writing a paper with faculty member Reddy was "helpful" in ultimately writing her dissertation. (TR. 434, lines 20-22; Tr. 435, line 19, TR. 440, line 1). But the most significant testimony of Ms. Kvangraven was in connection with her role as a Research Associate for Professor Reddy:

> ". . . we are trying to come up with a theory of the purpose of global goals . . . we have some critical perspective on the way Global Goals are used in development [which is my] area of study."

(TR. 440, lines 7-16). In sum Ms. Kvangraven, ultimately on her way towards achieving a Ph.D, has been provided with financial aid by The New School as a Research Associate to enhance her learning, in her discipline of choice, by her interacting solely with a faculty member who is collaborating with her to prepare a paper unrelated to any alleged "employment" goal of The New School.

The testimony of graduate student Zoe Carey was equally instructive, and established, in part, that the petitioned-for roles of the graduate student do not create an employer-employee

relationship. Thus, Ms. Carey conceded that while acting as a Teaching Assistant she met with the instructor of record Michelle Jackson, along with 8-15 other Teaching Assistants, on a weekly basis, and that she was given guidance concerning the teaching of the course work. Additionally, Ms. Carey admitted that she enrolled at The New School to obtain an education, and obviously not to become employed: "There were specific faculty that I wanted to work with, but also just the fact that the sociology department was very, very strong." (TR. 489, lines 12-14; page 492, lines 18-23; page 493, lines 4-23). In fact, the stark difference between the prior "employment" enjoyed by the two (2) student witnesses and their matriculation for an education at The New School should not be understated. Ms. Carey was employed for "nine months [after undergraduate school] before [she] moved to Europe to start [her] graduate studies," but she "chose not to continue to work but rather to continue [her] education (Tr. 488, lines 5-16). Similarly, Ms. Kvangraven "worked for two years in Norway first, and then [she] wanted to go to The New School." (Tr. 429, lines 1-2). In sum, serving as either a Teaching Assistant or Research Associate for both students is nothing other than an academic ancillary as to why they are enrolled at The New School, not to be employed, but rather to obtain an education and, ultimately, their Ph.D. degrees.

Serving As A Research Associate Cannot Constitute "Employment"

As set forth above, serving in one of the putative categories is "directly related to the … educational reasons that students attend" The New School. See Brown University, 342 N.L.R.B at 489. The testimony adduced during the hearings relating to serving as a Research Associate not only emphasizes that fact, but it is a particularly tremendous leap for Petitioner to claim that Research Associates are "employees," as it cannot possibly be suggested that their employer, under any circumstances, is The New School.

The Brown Board described the ordinary role of a Research Assistant at Brown, whereby a:

> "faculty member, referred to as a 'principal investigator', typically applies for the grant from the Government or private source, and funds are included for one or more RA's. The general process is for students to work with "or affiliate with" a faculty member, who then applies for funds and awards the student the RA. The student supported by the grant will work on one of the topics described in the grant. ... Although technically the principal investigator on the grant, the faculty member's role is more akin to teacher, mentor, or advisor of students."

Brown University, 342 N.L.R.B at 485.

Those factors, present for the Research Associate positions at The New School, describe several significant features of the role that cannot, in any manner, constitute employment. Thus: (1) it is not The New School, but rather a faculty member, who is supervising the student and determining the features of the research project; (2) the funding source for both the principal investigator and the Research Associate is not The New School, but rather the grantor, in many instances the United States Government; and (3) the outcome and research are authorized by the funding source and are, in the main, for the benefit of increasing knowledge, and not for the economic benefit of, in this instance, The New School.

The testimony of Dr. Michael Schober, a Professor of Psychology and Associate Provost for Research at NSSR, verified the lack of "employment" by a Research Associate with The New School, specifically with respect to a research grant he, along with collaborators from the University of Michigan, received from the National Science Foundation. See Employer Exhibits 63, 64 and 65. In short, the research pertained to surveys conducted on various devices or in different modes, and whether the outcomes might differ by reason of the mode and/or device utilized to conduct the survey. (TR. 359-360). Among other things, Dr. Schober testified that neither The New School nor any Administrator had a role in, or directed, the research as it

developed (TR. 362, lines 10-16), the stipend for the Research Associates was received from the United States Government (TR. 363, lines 13-15), and that there was extensive mentoring of the Research Associate by Dr. Schober:

> "[the] Research Associates ... joined in weekly and more than weekly team meetings ... in which we plotted ... the steps ... selected the survey items ... thinking through the logistics of doing text messaging interviews ... so there was every week multiple conversations and assignments of work. ..."

(TR. 361, lines 14-25, TR. 362, lines 1-9). Most importantly, and that which completely debunks the baseless claim that the Research Associate was "employed" by The New School, Dr. Schober testified as follows:

> "Q. And can you tell us whether there was in extensive amount of mentoring by you with the Research Associate?
>
> A. Extensive, absolutely. So this particular Research Associate I was mentoring is now about to defend her dissertation proposal ... which is using the data we collected here ... so her participation in the project led to her being able to propose this dissertation."

(TR. 364, lines 6-15). In view of that uncontroverted testimony, and the fact that the research will be used in the student's dissertation, it is inconceivable that the Petitioner can claim that a Research Associate is an "employee," but even if so, an employee of what or whom? Assuming, arguendo, that the Research Associate is a member of a collective bargaining unit and the Union, having failed to reach the terms of a collective bargaining agreement with The New School, "strikes" or engages in a "work stoppage" -- it may be asked from whom the Research Associate is withholding her services? Is she "striking" as an "employee" against the United States Government, who "paid" her, or is it Dr. Schober, who mentored her, or is she striking against "herself," as she is failing to continue the very research that she will use, in part, in her dissertation. On the other hand, for Petitioner to claim that that Research Associate is striking

against The New School defies logic, as it neither "paid" her nor expects to receive any "work product" or outcome from her.

In addition, it is not only Brown that stands in the way of the petition with respect to Research Assistants, or Research Associates, but the Board, in advance of Brown it its earlier decision in NYU, 332 N.L.R.B 1205 (2000) ("NYU I") excluded from the bargaining unit research assistants in science departments who were funded by external grants. The Board held that because these students were not providing services to the university, they were not employees under the Act. In so holding, the Board relied on long-standing principles adopted in Stanford University, 214 N.L.R.B 621 (1974), and affirmed the Regional Director's express rejection of the same contention apparently made by the Union here, i.e. that Research Assistants are employees because they allegedly provide services to the University by assisting the University, and its Principal Investigator, in performing those obligations required under research grants. 332 N.L.R.B at 1220 n. 50. Thus, even if the Regional Director were to somehow conclude that the alleged facts pertaining to Research Assistants and Research Associates working on grant-funded projects in the instant matter somehow renders this case distinguishable from Brown, the status of those graduate assistants would be controlled by Stanford and NYU I, which were consistent with Brown, and which would require the exclusion of similarly-situated Research Assistants and Research Associates at The New School as non-employees for the same reasons.

In sum, the essential framework created by The New School in establishing the graduate student roles is to enhance the education of those students, one of the signal benchmarks set forth in Brown, and why the petition should be dismissed, particularly as to the application of Brown, and NYU I to the Research Associates and Research Assistants at The New School.

D. The Stipends Are Intended to be Financial Aid

The fourth factor emphasized by Brown's holding that the graduate students in the petitioned-for positions were "students" was the fact that the monetary assistance provided to them was a form of financial aid. Thus, the Board in Brown held as follows:

> "... some incoming students are told in their award letters that if they maintain satisfactory progress toward the PH.D. [they] will continue to receive some form of financial aid in [their] second through fourth years of graduate study ... most probably as a teaching assistant or research assistant."

Brown University, 342 N.L.R.B at 485. No difference obtains with respect to the sums provided by The New School to its graduate students serving in one of the petitioned-for categories, as it is undisputed that the stipends are meant to be a form of financial aid.

Apart from the expressed intent by The New School to provide financial support to the graduate students, which was testified to at length during the hearings by any number of witnesses, there are a number of inferences to be garnered from the relationship The New School has with its graduate students. First, and most importantly, while The New School would not eliminate the graduate assistant positions, several witnesses testified that those positions are unnecessary to the functioning of The New School and that they had been created solely to assist the students academically and financially. Thus, Dr. Sanger testified that the Teaching Fellowship is thought of as being "of critical importance to the professional development of our doctoral students," but:

> "we could, in theory, replace them with part-time faculty members, easily. We wouldn't want to do that. ... We want to get as much aid to students as we can ... we don't look upon this as an employment situation."

(TR. 91, lines 3-7). In the same vein, Nadine Bourgeois, the Dean for Academic Planning of Parsons, which has approximately 5,000 of the 10,000 students at The New School, confirmed

the University's intent of providing financial aid to the students by creating the student assistant positions.

> "Q. If these five out of the six roles that are at Parsons, all except course assistants, were not a form of financial aid, would it be necessary at Parsons to provide these services?
>
> A. No, it would not.
>
> Q. Could Parsons ... provide these services less expensively?
>
> A. Absolutely. ... The programs require a fair amount of administrative oversight in order to implement."

(TR. 553, lines 3-16).

Common sense dictates the result – with thousands of part-time faculty and 420 full-time faculty (TR. 43, lines 17-25), for what reason would any university and, more specifically, The New School, create such positions if it were not to assist the students both academically and financially? Yet one need not "assume" The New School's purpose, as the testimony adduced at the hearings confirms that the University has gone to great lengths in the last several years to increase its aid to the graduate assistants. In that regard, Dean Bourgeois testified that she was actively engaged with the Provost's office in the development of a faculty support fund:

> "... The program was established ... to give students more financial support to their educational experience and also to provide faculty support in the form of student research assistants and engagement. So the program was rolled out about three years ago, and the faculty and students have gained tremendously from that direct work."

(TR. 554, lines 3-9). Additionally, and in the face of a lack of need by The New School for those positions, she also testified that the "programs that the provost office has established ... have radically increased the number of graduate students in general and also at Parsons receiving financial support." (TR. 553, lines 17-20). In short, apart from the uncontradicted testimony, it

is illogical for Petitioner to assume, or argue, that these graduate assistant roles have been created as a form of employment.

It is also of moment that The New School, with its limited resources, particularly as compared to the great research institutions, has chosen to distribute its limited resources to as many graduate students as is possible, once again validating its intent to have the stipends or hourly sums serve as financial aid. Indeed, Dr. Sanger testified that the intent of The New School was to "spread" the aid as widely to its students as it could (TR. 85, lines 1-5), an "intent" which is totally incompatible with the Petitioner's claim that the graduate students are somehow "employees." That intent also prompts The New School to ordinarily provide the aid after a student is enrolled, as it will be disbursed after applications are received from the students which, of course, precludes offering the aid prior to enrollment. Whether offered prior to enrollment, as in Brown, or after enrollment is obviously a distinction without a difference.

The testimony and documents verify that The New School has, in fact, carried out its intent by distributing its financial aid widely, and Employer Exhibit 7 indicates that there were 1,455 students who received payments as graduate student assistants in the two years between Summer 2013 and the conclusion of the Spring, 2015 semester. As indicated by the appointment letters and the testimony introduced during the hearings, a graduate student who serves as a Teaching Assistant ordinarily receives approximately $4,125 per semester, while a Research Assistant receives approximately $5,100 per academic year. See the testimony of Vice-Dean Kostrzewa, TR. 229, lines 24-25; TR. 230, lines 1-13. See also Employer Exhibits 31 and Employer Exhibit 7. Significantly, not only has The New School chosen a higher amount to provide to Teaching Assistants than would be earned by a part-time faculty member, e.g., $4,125 as opposed to $4,000 to teach a course (Testimony of Dean Nadine Bourgeois, TR. 563, lines 2-

6), but the Teaching Assistant is not the instructor of record, and he or she is only assisting the faculty member, full-time or part-time, who is the actual instructor of record, and who will be receiving compensation for teaching that course. See Dean Bourgeois' testimony as to the role of a Teaching Assistant:

> "TA's.....conduct recitation or breakout sessions related to a large lecture...They...meet with a smaller group of students to conduct conversations...to support peer to peer learning between the students." (emphasis added)

(TR. 544, lines 11-16). As a result, no greater manifestation of The New School's intent to provide financial aid to its graduate students may be found than in the fact that it is providing $4,125 to a graduate assistant, which might be more than a part-time faculty member might earn for teaching that course.

Petitioner has argued that not all graduate assistants receive financial aid at The New School, thereby allegedly undercutting it similarity with Brown, where a large majority of incoming students at Brown had received a commitment that they would receive such aid "in the future." Brown University, 342 N.L.R.B at 485. Yet The New School's effort to expand its modest ability ($300,000,000 in annual revenues, largely tuition driven)[4] to provide financial aid to its graduate assistants, when measured against vast resources available to the large research institutions (which derive most of their revenue from government grants[5]), only validate The New School's articulated position that the graduate assistants are not employees, and that the stipends provided to them are necessarily a form of financial aid – obviously, no "employer" would reach widely to provide scarce funds to a graduate assistant if, as described during the hearings, the alleged employer did not need the services of that individual as an "employee." In

[4] Testimony of Dr. Sanger, TR. 42, lines 15-19.
[5] Testimony of Dr. Sanger, TR. 64, lines 21-25; TR. 65, lines 1-10.

sum, it is clear that The New School is providing financial aid, and not compensation to its graduate student assistants.

It is equally important that the stipends provided to the graduate assistants are not determined by the number of hours expended by the student, and he or she receives a fixed sum irrespective of the hours that are expended in the graduate student's role. In fact, and similar to the circumstances in Brown, the stipend is also paid by The New School during period when no services are performed by the graduate assistant. As attested by graduate student Ingrid Kvangraven, when describing the services she expended as a Research Assistant to Professor Reddy, and her concomitant receipt of a stipend of $5,100:

> "Q. Did there come a time in a week or two weeks where ... you didn't do Research Assistant work?
>
> A. ... I don't know that I do work for him every single week of the year. There was probably a seven-day period that I didn't do anything at all.
>
> Q. Okay, did you receive this bi-weekly payment for that period of time as well?
>
> A. Yes."

(TR. 445, lines 18-25; TR. 446, lines 1-8). Thus, as in Brown, where it was emphasized that students serving as graduate assistants might receive aid irrespective of whether they "performed services as a TA", The New School is also not "compensating" "its students (albeit on a much different and smaller scale), as it neither records the time expended nor is concerned with whether "services" are performed on a daily, or weekly, basis by the graduate assistant. See Brown, 342 NLRB at 488, and the transcript, page 491, lines 5-25, where student Zoe Carey testified that no time sheets were maintained, the hours she served as a Teaching Assistant varied, and that no individual was "tracking" her hours. In sum, these payments are, of course, financial aid, and not compensation to an "employee."

POINT III

THE NEW SCHOOL KNOWS QUITE WELL WHAT AN EMPLOYEE IS

While perhaps unnecessary to the Regional Director's determination which, most respectfully, should result in a dismissal of the petition, it is also important to indicate that The New School has uniformly treated its graduate student assistants as "students", and not as "employees." Thus, as attested to by Stephanie Basta, The New School's Senior Director for Labor Relations, The New School has consistently distinguished its employees, both union and non-union, from its graduate students serving in the six (6) categories of alleged "employment" set forth in the petition.

Thus, in addition to the fact that the Office of Student Services, the Dean's office, or The Office of the Provost administer policies relating to the graduate assistants (TR. 159, lines 21-25), rather than the Human Resources Department, there are numerous policies that only pertain to students, or only to employees, but not to both. In that regard, and as illustrated by Ms. Basta, the following policies apply to its graduate students, even while serving in one of the six (6) petitioned-for roles:

(a) Policy on Recognized Student Organizations (Employer Exhibit 22);

(b) Student Code of Conduct (Employee Exhibit 21);

(c) Principles and Procedures Governing University Financial Aid (Employer Exhibit 23);

(d) Family Educational Rights and Privacy Act (Employer Exhibit 24);

(e) Expungement of Student Disciplinary Records (Employer Exhibit 25);

(f) Non-academic Disciplinary Procedures (Employer Exhibit 26); and

(g) Academic Policies (Employer Exhibit 7).

Ms. Basta also testified that no 403(b) contribution is made into an account by The New School arising out the payments to graduate students, while "employees" can make, and have made on their behalf by The New School, such "pension" contributions. No less important is the fact that tuition waivers are only available to employees and not students. See the testimony of Stephanie Basta, transcript pages 157-166.

As a result, Petitioner's claim that by reason of The New School's use of the terms "hiring" or "compensation" in its various applications that it treats its graduate student assistants as "employees" is incorrect. Not surprisingly, The New School, having entered into any number of collective bargaining agreements with unions which represent employees of the university, including its part-time faculty, is quite cognizant of the terms and conditions of employment of its "employees." See Employer Exhibits 8 through 16 which were identified by Stephanie Basta and admitted into evidence during the April 23, 2015 hearing. Moreover, Ms. Basta identified any number of policies which pertain to the terms and conditions of employment of its non-union employees. See Employer Exhibits 17 and 18.

As a result, Petitioner's reference to The New School's use of the term "hiring" or "compensation" is of no moment, as The New School has never characterized its graduate student assistants, or treated them, as employees.

POINT IV

THE FAILURE TO DISMISS THE PETITION WILL INFRINGE UPON ACADEMIC JUDGMENTS

In his oral summation, counsel for Petitioner stated that there was no evidence as to how the granting of the petition would infringe upon the University's exercise of its academic judgment relating to the services that are provided by the graduate student assistants. In fact, and

to the contrary, Petitioner's own witness, Ms. Zoe Carey, actually confirmed the very essence of why the petition should be dismissed. Moreover, when coupled with the terms of a collective bargaining agreement between New York University and International Union, UAW, and Local 2110, UAW (Petitioner's Exh. 29) the point is dramatically proven.

The NYU Agreement relating to its graduate students provides, in pertinent part, at Article VIII B, as follows:

> "Consistent with program guidelines, Graduate Employees shall have reasonable latitude, where appropriate, to exercise their professional judgment within their area of expertise in deciding how best to accomplish their assignments within the scope of the directions given by the individual supervisor as well as fiscal and time constraints. In addition, graduate employees shall receive appropriate acknowledgement of their projects or contributions to projects in such instances in which acknowledgement is customarily publicly given by the University."

In short, that provision necessarily implies that when acting as, among other positions, a Research Associate, who has received funding from the United States Government the graduate student "employee" is entitled to "exercise [his or her professional judgment] within their area of expertise in deciding how best to accomplish their assignments within the scope of the directions given by the individual supervisors . . ." Against that collective bargaining provision the testimony of Ms. Carey must be measured when she responded to a question upon cross-examination, as follows:

> "Q. Now if you are serving as an RA with Holland, Professor Holland, and you and he -- is it a he?
>
> A. He.
>
> Q. And you and he were to have a disagreement over some aspect of the research position, would you adhere to what he told you?
>
> A. I'm not sure.

Q. Are you saying, therefore, even though he told you to do it in a particular way, that you might not abide by what his guidance is intentionally?

A. I think it depends on the context.

Q. Let's assume he's dead wrong.

A. About?

Q. Some aspect of the research that's being engaged in. And you say in writing a paper or conducting the research, but, Professor Holland, that's just absolutely incorrect and I believe we're going to do it this way, this is what I'm going to write in one half of the paper or in the complete paper, and he says, no, I would prefer that you do it this way, would you do what he said?

A. I think it depends on what the issue is.

Q. Let's assume there were a good faith disagreement between you and him, and perhaps even you were right because he mis-recalled some facts or learning and you were right, how would you resolve that? Would you need a third party to resolve that for you or the chairperson of the department?

A. Possibly."

(TR. 501, line 21-25, 502, lines 1-22). In sum, it is perfectly reasonable for the Union, together with Ms. Carey, to arbitrate a claim concerning her refusal to adhere to the directions given to her, or judgments exercised by, the principal investigator upon a research grant. Thus, her testimony, coupled with the NYU Collective Bargaining provision, provides an avenue for her to delay, or hinder, the implementation of a research project by reason of her allegedly exercising her "professional judgment." That infringement upon the academic judgments of either The New School or, more appropriately, a faculty member who has received the grant, is self-evident.

Moreover, expert testimony adduced at Congressional hearings verifies the reason why the petition must be dismissed. Thus, before the United States House of Representatives at the Joint Hearing before the Subcommittee on Health, Employment, Labor, and Pensions and the

Subcommittee on Higher Education and Workforce Training of the Committee on Education and the Workforce, on September 12, 2012, Dr. Peter Weber, the Dean of Brown University, stated as follows:

> "What I do know is that in private universities such as Brown engaging in collective bargaining about the core of the academic curriculum would wreak havoc with academic freedom. It makes no sense for a university like Brown to have to bargain over the terms and conditions of service by students who teach or research as an integral part of their academic training. Are we to bargain about course selection, course content, course length, the number of exams or papers in a course, the year in which a student serves as an assistant? What if a student performs poorly as a teaching assistant? Are we to bargain over the just cost for the discipline imposed? These are very legitimate concerns when one contemplates that a curriculum may be transformed into a job merely because that curriculum requires students to learn how to teach and engage in academic research."

(September 12, 2012 Hearing Transcript pages 10-11). This sentiment was echoed by Walter Hunter, a shareholder of Littler Mendelson, P.C., who also testified that: "Collective bargaining is an inappropriate model to resolve broad academic issues with graduate students, such as class size, financial aid, who, what, when and where to teach or conduct research. Collective bargaining is also an inappropriate model to govern the relationship between faculty members and the students whom they mentor." (September 12, 2012 Hearing Transcript, page 25). Mr. Hunter also observed:

> "So what would be covered in a contract? Another principle that we have to deal with if there is a union present is that if a union represents individuals, it represents employees. It is the exclusive representative with respect to all wages, hours and working conditions. Direct dealing isn't permitted between the organization and those, quote—''employees.'' So, for example, in situations where you would be able to work one-on-one—a faculty member dealing with two students, a department dealing with three students—in the absence of a collective bargaining relationship that direct dealing is perfectly permissible. . . Needs can be met individually with each student, and address their needs as would be appropriate for the institution and those students. Now, clearly, a

> union can waive its right to insist that there not be direct dealing. But as a matter of law, direct dealing with students, if they were deemed to be employees, on wages, hours and working conditions wouldn't be permissible absent waiver or absent having the union involved in that discussion. And sometimes the interests of the union might not be aligned with the interests of the people who are trying to work out a deal with their university."

(September 12, 2012 Hearing Transcript, page 22). Moreover, on May 8, 2014, Judge Ken Starr provided testimony at the House Education and Workforce Committee, concerning the Regional Director's decision in Northwestern University. Judge Starr noted the issues which would arise if student-athletes were recognized as "employees," including among other things:

> "[T]he Regional Director's decision will likely leave in its wake years of litigation with respect to the appropriate scope of bargaining as to "wages, hours, and other terms and conditions of employment." In view of the threshold requirement of student status, that status would seem to constitute a bedrock condition of employment subject to mandatory bargaining.
>
> For example, a student-athlete must maintain the proper grade point average and make satisfactory progress toward receiving an academic degree. Because these requirements could well be considered "conditions of employment" under the Regional Director's decision, those requirements would likely fall within the scope of mandatory bargaining. If such fundamental academic issues do indeed fit within mandatory bargaining's scope, then academic hours and hours of athletics could all become compensable and thus lead to bargaining about (or statutory entitlement to) employment benefits impacting the academic setting. If some student-athletes could unionize and bargain about academic issues that constitute "conditions of employment," it will predictably create division and friction within the student body, inasmuch as the university (by definition) will be required to treat some students differently than others.
>
> As a further example, if maintenance of "student" status is a condition of employment as a student-athlete, then all rules relating to student status may become negotiable (with respect to student-athletes). For example, while student conduct administration has historically been viewed rightly as an internal process, it is foreseeable that issues of misconduct, including academic and honor code violations, may become negotiable for some (but not the vast majority of) students. In short, in light of the Regional

> Director's decision, it appears that institutions would be required to treat student-athletes differently as students, not just as "employees."
>
> It would also appear that such basic issues as the length of practice sessions and the season schedule itself may likewise fall within the scope of mandatory bargaining. Even more troubling, the ultimate tools of the employee-employer bargaining relationship are the strike and lockout. Not only that, schedules may be disrupted because of impasses reached during the course of the bargaining process. Additionally, the most traditional academic activities of a student-athlete may be threatened. For example, would student-athletes on strike sit out of classes and avoid other university-related functions? Would they be protected in doing so?"

(May 8, 2014 Hearing Transcript, Starr Testimony, pp. 4-5). The testimony at these hearings merely serves to highlight and confirm the negative impact that collective bargaining will have upon the ability of universities to engage in academic judgments and exercise their academic freedoms.

POINT V

IN ANY EVENT, THE GRADUATE STUDENT ASSISTANTS WOULD BE TEMPORARY OR CASUAL EMPLOYEES EVEN IF THE PETITION WERE NOT DISMISSED.

While, as set forth above, the Regional Director is not authorized to overturn Brown, even if she were to do so, and hold that various of the graduate student assistants were "employees," those employees would be casual or temporary employees and not entitled to collective bargaining unit rights. The evidence adduced during the hearings, both in the form of testimony and documentation, including the occasions upon which graduate students served in one of the putative categories of "employment," confirms that there was absolutely no expectation of serving continuously in that role, either by The New School or by the graduate student assistants.

In San Francisco Art Institute, 226 N.L.R.B. No. 204 (1976) the Board held in refusing to direct an election in a unit consisting of student janitors only, as follows:

> "Upon close consideration of the matter, we are of the opinion that it will not effectuate the policies of the Act to direct an election in a unit consisting of student janitors only. We are influenced in our decision chiefly by the brief nature of the students' employment tenure, by the nature of compensation for some of the students, and by the fact that students are concerned primarily with their studies rather than with their part-time employment. In our view, the student janitors are best likened to temporary or casual employees, whose certification would predictably present unusually vexsome problems. For instance, owing to the rapid turnover that regularly and naturally occurs among student janitors, it is quite possible that by the time an election were conducted and the results certified the composition of the unit would have changed substantially."

San Francisco Art Institute, 226 NLRB No. 204 (1976). No difference was manifested during the hearings which would somehow construe the graduate students to be either "employees," and surely not "employees" whose service in a continuing role in the putative category was assured. In that regard, Dr. Sanger testified as follows:

> "These tend to be courses that have technical components where we need to help students progress through the courses. And so, generally speaking, we budget for either TA's or Teaching Fellows for these kinds of courses ahead of time; and so we know within the budgets of divisions of the University, they would budget separately for these kinds of resources which then go to students in the form of this kind of financial aid."

(TR. 85, lines 14-20). Similarly Vice Dean Kostrzewa also testified that there would be no expectation of continuing service as follows:

> "The opportunities generally are offered for one to two semesters. We -- every spring we make announcements about those opportunities and we, together with faculty, select the candidates for these opportunities. So there's no expectation that they will continue."

(TR. 218, line 3-7). Associate Provost for University Curriculum, Adrienne Marcus, confirmed that there was no expectation of recurring service by the graduate students:

"A. There is a desire to spread the availability of these positions out to as many graduate students as possible. The reason reflects on my other response, which is that we want as many students as possible to have the experience of instructing, being a classroom, because it aids in their learning and also because it serves as aid for them.

Q What's the ordinary length of time based on your experience that one serves as a teaching assistant or a teaching fellow?

A. Well, each teaching assistantship and fellowship lasts for an academic semester, so that's usually 15 weeks."

(TR. 520, line 16-25, page 521, line 1). Finally, although others testified similarly, Dean Bourgeois testified as follows:

"Q. Now at Parsons, does the TA have an expectation that he or she will continue in that role beyond the one semester?

A. No.

A. Yes, that program is used to identify and award teaching fellows.

Q. Ordinarily, for what period of time is the teaching fellow appointed?

A. Ordinarily, one semester.

Q. Does there ever come a time that possibly a teaching fellow is retained or is serving in that role for less than a semester?

A. Yes. At Parsons, the one difference would be in a boot camp program that we offer in the summer that is a compressed, so a bit shorter. It's an intensive program. The teaching fellows are used in that program."

(TR. 545, lines 10-12, 548, lines 3-14).

The documentary evidence confirmed that there was no expectation to be had by a graduate student assistant that he or she would serve in one of the putative categories on a repeated basis. Employer Exhibit 75, which was prepared by Shawn Ogiba, Director of Human Resources Systems, Reporting and Analysis, starkly presented the expectation that one would not

serve in one of the putative categories on a repetitive basis. Thus, as set forth in Employer Exhibit 75, which was for the six semesters or sessions during the period from the summer of 2013 through the Spring of 2015, of the 1,455 students who served in these roles 523 served in only one semester, 59 students served in two semesters (non-consecutive) and only 659 students (45%) served in two consecutive semesters during those six consecutive semesters.

Employer Exhibit 76, which separates the services performed by the graduate assistants into the putative categories, dramatically emphasizes the point. As noted in footnote 1 of Employer Exhibit 76, the categories shaded in purple are Research Assistants, although characterized differently, so that the exhibit refers to each of the six (6) categories, and the services provided by the graduate student, during the six (6) semesters between Summer, 2013 and Spring, 2015 (including Summer), or by excluding Summer in both 2013 and 2014.

By referring to the schedule set forth in Employer Exhibit 76 which includes the summer sessions, so that <u>each</u> consecutive summer or session is addressed, the sporadic, casual and non-recurring roles of the students becomes obvious. In that regard, the number of position titles in which students served during those six (6) semesters (perhaps more than once during the six semesters) in either only <u>one</u> semester or in merely two consecutive semesters reflects the fact that the student service is pointedly casual:

	1 Semester Only	2 Consecutive Semesters
1. Course Assistants	127 out of 180	40 out of 180
2. 8 categories of Research Assistants (including the 7 categories shaded in purple)	495 out of 1097	436 out of 1097
3. Research Associate	42 out of 84	22 out of 84

4. Teaching Fellow	99 out of 173	57 out of 173
5. Teaching Assistant	178 out of 436	233 out of 436
6. 2 categories of Tutors	52 out of 128	60 out of 128

In sum, slightly more than 50% of the positions was served by an individual student in only one of the six consecutive semesters, and only 40% of the positions was served by a student in two (2) consecutive semesters.

As a result, and as articulated in St. Thomas, set forth below, the graduate student assistants at The New School are clearly temporary employees, if they are somehow construed to be employees by the Board. Thus, the Board held in that case, as follows:

> "It is established Board policy that a temporary employee is ineligible to be included in the bargaining unit.... The critical inquiry on this date is whether the "temporary" employee's tenure of employment remains uncertain. . . . [The] "date certain" eligibility test for temporary employees . . . does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired."

St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992). The proffer made by The New School concerning the testimony of Valerie Feuer, Employer Exhibit 67, confirms the casual nature of the positions inasmuch as at Mannes, which offers various programs in music, faculty members are choosing the tutors and, because they are hourly appointments, there necessarily cannot be any expectation of the duration of the appointment, as there can be no guarantee that the appointment will last on a weekly or semester basis. Moreover, by reason of a faculty

member choosing the tutor to work with a student the expectation of a continued role diminishes further, as either the faculty member or the tutored student may determine that the need for the tutor's service is no longer necessary. That fact, consistent with the testimony of the other academics and administrators of The New School, debunks any claim that there could be a recurring "employment" of tutors. Finally, even if Brown had not held that the graduate student assistants at issue herein are "primarily students" and not employees, Region 2 had already held, in any event, that the characteristics of the students serving in the putative categories should be excluded from collective bargaining.

Thus, in NYU I, graduate students working as graders and tutors were excluded from the unit as temporary employees, where they worked for varying periods of time (from one week to one semester) and had no substantial expectancy of continued employment in those jobs. 332 N.L.R.B. at 1221. As a result, under any circumstance, even if the petition is not dismissed, any determination that the graduate student assistants are employees would necessarily result in the appropriate finding that they are "temporary employees."

CONCLUSION

For all the foregoing reasons, the petition should be dismissed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served a copy of the employer The New School's Post-Hearing Brief on the following parties by electronic mail on June 1, 2015:

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