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September 30, 2021

VIA E-PERB ONLY

Ronald Pearson, Esq.
Supervising Attorney
Public Employment Relations Board
Sacramento Regional Office
1031 18th Street
Sacramento, California 95811-4124

Re: ***Response to PERB Investigative Information Request
(PERB Regulation 51140(a))
Student Researchers United/UAW v. Regents of the University of California,
PERB Case No. SF-RR-1022-H***

Dear Mr. Pearson:

In response to the September 17, 2021 PERB Investigative Information Request (“Information Request”), please see the short answers of Student Researchers United/UAW (“Student Researchers United” or “Union”) below in addition to the attached declarations and exhibits.

The petitioned-for unit is appropriate. All of the declarations accompanying this submission collectively provide robust evidence in support of an appropriate unit with a strong community of interest. The proposed unit is comprised entirely of Graduate Students who perform research at the University. They all work at a UC campus under the direction and supervision of a Principal Investigator or faculty member. And, the type of work that they do is research, for which they receive remuneration. Indeed, SB 201 amended HEERA to provide PERB with the authority to grant representation rights to the very student employees at the heart of this matter. Thousands of Student Researchers across the UC system have already voiced their democratic will to be represented by the Union. The road has been paved, a super majority of support has been shown, and now PERB should exercise its given authority by certifying Student Researchers United as the exclusive bargaining representative for the proposed unit.

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The Union emphasizes that the parties must stay grounded on what is required under HEERA and not get sidetracked by a tangent fabricated by the University. In its September 2, 2021 response, the University has attempted to skew the focus of this matter to funding sources. Even setting aside the fact that GSRs are funded by many of the exact same funding sources as Trainees and Fellows, and the fact that, ironically, the UC argued just years earlier that the UAW must include non-W-2 Postdoctoral Scholars directly funded by external sources into the postdoc unit—funding source is not even a community of interest factor. While the legislature took great pains to explicitly list lengthy criteria to be considered when determining unit appropriateness, funding source is not listed, let alone decisive. (Gov. Code, § 3579(a)).

As emphasized in the Union’s Petition for Board Investigation, no reasonable doubt exists as to the appropriateness of the petitioned-for unit, and the Union’s request for recognition must be granted. (Gov. Code, § 3574(a)).

Verification of Student Researchers United’s September 8, 2021 Petition for Board Investigation

With regard to footnote 2 of the Information Request, please see attached the Declaration of Michael Miller and the Declaration of Robert Ackermann, which in addition to supporting the responses below, also verify the factual allegations made in the Union’s September 8, 2021 Petition for Board Investigation. The individual Student Researchers referenced in the Declaration of Molly Stuart in Support of Student Researchers United’s Petition for Board Investigation have also submitted individual declarations to verify factual allegations made therein and in support of the Union’s response to the Information Request. (See Declarations of Kate Bauman, Marcelo Francia, Elizabeth McCarthy, Karen Serrano, Jenna Tan, and Lorenzo Washington).

PERB Request For Information or Evidence – A:

Under Appendix A, Category 1, of the Request, the UAW seeks to include “any other Graduate Student appointed to a different academic student title and performing substantially similar work.” **UAW is requested to define, with specificity, the criteria used to establish this categorical description, including but not limited to, a discussion of the definition of “substantially similar work” and whether UAW’s Request is seeking to include titles, beyond the following:**

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1. GSAR-GSHIP, 3274
2. GSAR-NON GSHIP, 3273
3. GSR-FULL FEE REM, 3282
4. GSR-FULL TUIT & PARTIAL FEE REM, 3283
5. GSR-NO REM, 3266
6. GSR-PARTIAL FEE REM, 3276
7. GSR-TUIT & FEE REM, 3284
8. GSR-TUIT & FEE REM-UCSD-GRP B, 3285
9. GSR-TUIT & FEE REM-UCSD-GRP C, 3286
10. GSR-TUIT & FEE REM-UCSD-GRP D, 3287
11. GSR-TUIT & FEE REM-UCSD-GRP E, 3262
12. GSR-TUIT & FEE REM-UCSD-GRP F, 3263
13. GSR-TUIT & FEE REM-UCSD-GRP G, 3264

Response to PERB Request For Information or Evidence – A:

Category 1 of the Union’s Attachment A covers *Graduate Student Researchers* and *Graduate Student Assistant Researchers* at the UC. The UC does not contest that the student employees in Category 1 have a HEERA right to representation. (See UC Response at p. 2; Miller Decl. at ¶ 87).

The Union is currently unaware of any other Graduate Student “appointed to a different academic student title” and “performing substantially similar work,” other than the specific title codes already listed in Category 1 of the Union’s Attachment A. However, Student Researchers United reserves the right to include within Category 1 “any other Graduate Student appointed to a different academic student title and performing substantially similar work,” in case there are student employees working at the UC as Graduate Student Researchers and Graduate Student Assistant Researchers under modified title codes not listed above. (Miller Decl. at ¶ 88).

For example, title codes may vary slightly on different campuses and such variations should not preclude employees who are engaging in similar work as those in the enumerated title codes from being afforded representation. (Miller Decl. at ¶ 89).

Student Researchers United reiterates that the University has already acknowledged that the student employees in Category 1 have representation rights under HEERA. In response to Information Request A, however, the Union notes that “substantially similar work” would be work described within the University’s own Academic Personnel Manual as belonging to a *Graduate Student Researcher* or a *Graduate Student Assistant Researcher*. (Miller Decl. at ¶ 90).

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Thus, in short, by “substantially similar,” the Union seeks to include any “graduate student who performs research related to the student’s degree program in an academic department or research unit under the direction of a faculty member or authorized Principal Investigator,” (Miller Decl. at ¶ 91, Ex. E, APM-112-4-b-25 [definition of Graduate Student Researcher]); and any “graduate student who is trained in research techniques under the supervision of a Principal Investigator on a research project that is not necessarily related to the student’s degree program,” (Miller Decl. at ¶ 91, Ex. E, APM-112-4-b-24 [definition of Graduate Student Assistant Researcher]), who is appointed to a different academic student title than already enumerated in the Union’s Category 1. (Miller Decl. at ¶ 91).

For examples of student employees performing work as a Graduate Student Researcher or a Graduate Student Assistant Researcher, see Declarations of Kate Bauman, Marcelo Francia, Nora Harhen, Jessie Lopez, Jonas Kaufman, Elizabeth McCarthy, Pranee Pairs, Karen Serrano, Jenna Tan, and Tiffany Zhou.

PERB Request For Information or Evidence – B:

Under Category 2 of Appendix A of the Request, the UAW also seeks to represent “Research Assistants” as defined by Academic Personnel Manual 112-4-b-47. According to UC, there are no individuals serving as Research Assistants as defined by this provision and such title has not been used since approximately 2012. **UAW must confirm or refute whether this title exists, and whether it is seeking to include this title in the proposed unit. UAW must provide any additional relevant information supporting why this title should be included in the proposed unit.**

Response to PERB Request For Information or Evidence – B:

Academic Personnel Manual - 112, (see Miller Decl., Ex. E), which has a revision date noted as March 7, 2019, still includes a description for “Research Assistant” under APM 112-4-b-47. (Miller Decl. at ¶ 92). Thus, the Union confirms that the “Research Assistant” title still *exists* under APM 112-4-b-47, which is under the revision and control of the University. (Miller Decl. at ¶ 92).

The Union is not currently aware of anyone designated under that title. (Miller Decl. at ¶ 93). This appears to comport with the UC’s assertion that there are no individuals serving as Research Assistants as defined by this provision and such title has not been used since approximately 2012. (UC Response at p. 2; Miller Decl. at ¶ 93).

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While the University's description of "Research Assistant" is similar to that of GSRs and GSARs, the Union is not compelled to insist upon including any titles within the proposed bargaining unit that are now obsolete. (Miller Decl. at ¶ 94). The Union is concerned that although that title is currently not being used by the University, the University might choose to use it later to exclude student employees who should rightfully belong in the proposed unit. (Miller Decl. at ¶ 94). If, however, the UC removes the "Research Assistant" title under APM 112-4-b-47 and/or commits to not use it moving forward, then the Union will gladly remove Category 2 from the proposed unit. (Miller Decl. at ¶ 94). The Union, however, reserves its right to represent employees falling within "Research Assistant" title under APM 112-4-b-47 if the University chooses to use that title in the future. (Miller Decl. at ¶ 94).

PERB Request For Information or Evidence – C:

In Categories 3 and 4, the UAW seeks to include Graduate Students performing work "substantially similar" to the GSRs and receiving financial remuneration from institutional and individual training grants including but not limited to National Institutes of Health Institutional Training Grants T32, T35, T90/R90, D43, D71, National Institutes of Health Individual Training Grants (F30, F31, and F31-Diversity), Food and Agricultural Sciences National Needs Graduate and Postgraduate Fellowship, National Science Foundation Research Traineeship Program, National Science Foundation Program, National Defense Science and Engineering Graduate Fellowship Program, Department of Energy Computational Science Graduate Fellowship, National Aeronautics and Space Administration Space Technology Graduate Research Opportunities Fellowship. **UAW is requested to describe, with specificity, the criteria used to devise such categories, including but not limited to, a description of the definition of "substantially similar work," and the types of grant awards that UAW believes would (and would not) establish an employment relationship. Additionally, UAW is requested to describe the manner in which the UC processes or controls the funding awarded to the Graduate Students receiving the above remuneration/grants/fellowships. (Provide specific examples.)**

Response to PERB Request For Information or Evidence – C:

As stated above, by "substantially similar," the Union seeks to include any "graduate student who performs research related to the student's degree program in an academic department or research unit under the direction of a faculty member or authorized Principal Investigator," (Miller Decl. at ¶ 91, Ex. E, APM-112-4-b-25 [definition of Graduate Student Researcher]); and any "graduate student who is trained in research techniques under the supervision of a Principal Investigator on a research project that is not necessarily related to the student's degree program," (Miller Decl. at ¶ 91, Ex. E, APM-112-4-b-24 [definition of Graduate

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Student Assistant Researcher]). All Student Researchers who perform research under the direction of a faculty member or authorized Principal Investigator who is also under a training grant or a fellowship would fall within Categories 3 or 4. (See Miller Decl. at ¶¶ 43, 52).

GSRs and Trainees/Fellows are funded by many of the same agencies to do the same research work. (See Ackermann Decl. at ¶ 2; See Miller Decl. at ¶¶ 47-48). While the grant applicant may differ—PI as opposed to the Trainee/Fellow—that does not change the nature of the work, which is described by the grant, sponsored by the University, and under the direction of the PI. (See generally Ackermann Decl.).

The “substantially similar work” among the student employees in the petitioned-for unit is evidenced throughout the declarations of the Student Researchers included with this submission. Indeed, the work is so similar that GSRs, Trainees, and Fellows often work side-by-side with each other; a student employee can toggle from one classification to another while working on the same research project, in the same lab, and under the same PI; and some student employees are actually in two classifications concurrently. See the following declarations (collectively, “Student Researcher Declarations”):

- Bauman Decl. [concurrent GSR and Fellow];
- Diaz Decl. [Trainee working side-by-side with GSRs and other Trainees];
- Francia Decl. [GSR→Trainee];
- Harhen Decl. [GSR→Fellow];
- Hayes Decl. [Trainee working in same lab as GSRs, Fellows, and other Trainees, as well as a Postdoctoral Scholar also funded by a NIH T32 grant];
- Kaufman Decl. [Fellow→GSR]
- Lopez Decl. [GSR→Trainee→GSR];
- McCarthy Decl. [Trainee→GSR→Fellow];
- Pairs Decl. [Fellow→GSR];
- Serrano Decl. [GSR working side-by-side with a Fellow in the same lab on the same project];
- Tan Decl. [GSR→Fellow];
- Washington Decl. [Fellow working side-by-side with a GSR in the same lab on the same project]; and
- Zhou Decl. [GSR→Fellow]

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Moreover, other universities throughout the United States have recognized bargaining units with GSRs as well as those performing “substantially similar” work. (See Miller Decl. at ¶¶ 79-85). Therefore, adding such language is not novel and has not precluded other student researcher unions from being recognized.

The types of awards that the UAW believes would establish an employment relationship include those named in Categories 3 and 4. (See Ackermann Decl. at ¶¶ 6-10 [sponsoring institution/faculty required to provide supervision; NIH training grants explicitly allow the union dues to be deducted by the University upon trainee request]; Ackermann Decl. at ¶ 11 [many of the same training grants funding Postdoctoral Scholars, deemed employees with HEERA rights by the UC, are the same training grants funding those in the petitioned-for unit]; see Miller Decl. at ¶¶ 54-56).

As distinguished by the *Columbia University* case, the types of awards that would not establish an employment relationship would be non-training grant-financial aid or a scholarship that simply passes through without any service, work, or training requirement. (See Miller Decl. at ¶ 35, Ex. D). All the student employees within the petitioned-for unit perform research at the UC and receive remuneration for their service, which distinguishes them as student employees and not just students. (See Miller Decl. at ¶ 52).

Please see the Ackermann Declaration for an explanation of institutional and individual grants and how they are processed and managed by the University.

Postdoctoral Scholars, who are currently in the bargaining unit represented by UAW Local 5810, are funded by some of the same external sources funding Trainees and Fellows. (Ackermann Decl. at ¶ 11; Miller Decl. at ¶¶ 54-55). Moreover, the UC had created title codes in the APM for Postdoctoral Scholar – Employees, Postdoctoral Scholar – Fellows, and Postdoctoral Scholar – Paid Directs, to address the requirements of different funding agencies. (Miller Decl. at ¶¶ 18-19, 31). Thus, funding source has not defeated the right to representation, and the UC and UAW have been able to successfully bargain over terms and conditions of employment for those with different funding sources. (Miller Decl. at ¶¶ 28-31).

GSRs, who the University acknowledges should be in the proposed unit, are generally funded by external sources just as Trainees and Fellows. Indeed, the UC acknowledges and tracks the external funding sources of GSRs. The difference is that generally the PI will apply for a grant, as opposed to the student researcher. (Ackermann Decl. at ¶ 2-3; Miller Decl. at ¶¶ 47-49).

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Generally, the University controls the disbursement of financial remuneration for those in the petitioned-for unit, including Trainees and Fellows. In other words, the University processes the award and disburses the funds to the student employees, whether that be through UCPath or through the Financial Aid Management System. (See Miller Decl. at ¶ 50; Ackermann Decl. at ¶¶ 8-11; see Student Researcher Declarations).

PERB Request For Information or Evidence – D:

According to the submissions in this case, there are approximately 3,943 individuals listed in the Request that are not GSRs and who do not have any of the listed grants or fellowships described in Section C, *supra*. **UAW is requested to describe the criteria used to establish this category.**

Response to PERB Request For Information or Evidence – D:

All the petitioned-for categories were described by the Union in Attachment A to the HEERA Petition for Representation filed on May 24, 2021. (August-Schmidt Decl. at ¶ 2). According to the University's September 2, 2021 submission to PERB, the University estimated a total of 12,798 employees in the proposed bargaining unit. (See UC Response at p. 4, fn. 6; August-Schmidt Decl. at ¶ 3). Although the University's calculation is 3,943 less than the 16,741 employees estimated by the Union in the proposed unit, the 3,943 employees comprising the difference are not in a separate "category" outside of those previously petitioned-for by the Union. (August-Schmidt Decl. at ¶ 4).

Rather, based on the Union's review of the GSR employee list provided in this matter, the discrepancy is likely just based on a difference between the Union's and the University's estimates and not an exclusion of 3,943 actual individuals from the unit. (August-Schmidt Decl. at ¶ 5).

As background, in its HEERA Representation Petition filed on May 24, 2021, the Union estimated that the number of employees in the proposed unit was 16,741. (August-Schmidt Decl. at ¶ 6). The Union calculated this estimate based on publicly available information through sources such as the University of California Information Center as well as on information gathered through interactions with thousands of student researchers. (August-Schmidt Decl. at ¶ 6). The Union had predicted that the unit would consist of approximately 13,700 GSRs. (August-Schmidt Decl. at ¶ 6).

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Pursuant to the University's September 2, 2021 submission to PERB, the University identified the following numbers for the proposed unit:

- 10,789 GSRs in the employee title codes enumerated in Appendix A, Category 1;
- 308 GSRA from Lawrence Berkeley National Laboratory;
- 1,701 *estimated* unique individuals receiving awards from the external grants and fellowships enumerated in Appendix A, Categories 3 and 4 (2,225 *estimated* receiving awards minus 554 already counted on the GSR list)

(See UC Response at p. 4, fn. 6; August-Schmidt Decl. at ¶ 7).

Thus, the University's estimated total is 12,798 employees in the proposed bargaining unit. (See UC Response at p. 4, fn. 6; August-Schmidt Decl. at ¶ 8).

Overall, while the University's estimated total is 3,943 less than the Union's estimated total, these potential remaining employees are not in a separate category apart from the categories listed in the Union's Attachment A. (August-Schmidt Decl. at ¶ 9). The difference appears to simply reflect the Union's greater initial estimate of GSRs compared to the actual number of GSRs on the University's employee list during the designated recognition payroll period. (August-Schmidt Decl. at ¶ 9).

If greater clarification is needed regarding a discrepancy in the number of workers in the proposed bargaining unit, then the University could supply its lists for each category, including those who fall under particular training grants and fellowships, so that the Union can audit whether the University's count accurately reflects all the petitioned-for classifications. (August-Schmidt Decl. at ¶ 10).

Significantly, the Union submitted proof of support for approximately 12,000 employees within the petitioned-for unit, well over the amount needed to obtain proof of majority support. (August-Schmidt Decl. at ¶ 11). The description of the proposed unit and the categories therein are accurate and reflect the group of workers seeking representation in this matter. (August-Schmidt Decl. at ¶ 12). Any potential discrepancy relating to the specific number of employees in the proposed unit does not justify any delay by the University in recognizing Student Researchers United. (August-Schmidt Decl. at ¶ 12).

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PERB Request For Information or Evidence – E:

With respect to ALL disputed categories (e.g., Fellows and Trainees), explain, in detail, the employer-employee relationship, including purported supervisory structure. Also, describe any similarities and differences in working conditions across all affected disciplines, academic departments, labs or research units. Include specific examples and organizational charts for all relevant departments, e.g., Political Science. Nutrition, Sociology, etc.

Response to PERB Request For Information or Evidence – E:

The University—not the funding agency—has an employment relationship with the Trainees and Fellows. Indeed, Trainees and Fellows are not employees of research agencies such as the NIH but rather employees of the UC for purposes of HEERA. (Miller Decl. at ¶ 56, Exhibit A at p. 12 [the UC previously acknowledging that when sponsoring agencies are either silent on the issue of employment status or specifically state that there is no employment status, the “University is the only employer.”]).

As noted, all of the student employees in the petitioned-for unit work under the direction and supervision of a UC faculty member or Principal Investigator. (See Miller Decl. at ¶¶ 42-43; see Ackermann Decl. at ¶¶ 7-10, 14; see Student Researcher Declarations).

The UC has control over the Graduate Student Trainees and Fellows. Such control includes, but is not limited to:

- Working conditions at the lab;
- Supervision and direction by a UC faculty member/PI;
- Pay, pay scales, minimum salary/stipends, supplemental pay, and pay increases;
- Access to benefits;
- Access to healthcare;
- Occupational health and safety policies and practices, including those relating to COVID-19;
- Equipment used for research;
- UC email and technology;
- Ability to terminate student status, and accordingly, the employment that is contingent upon student status;
- Coverage under Sexual Violence and Sexual Harassment policies under Title IX (see <https://policy.ucop.edu/doc/4000385/SVSH> at p. 9);
- And, in most cases, disbursement of remuneration.

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(Miller Decl. at ¶ 53; see Student Researcher Declarations).

The UC's current statements that it has "no control" and "the union has no standing to negotiate for wages, terms and conditions of employment" for individuals under grants and fellowships, (UC Response at p. 12), is disingenuous and belied by the UC's prior actions. Many of the training grants and fellowships funding the Trainees and Fellows at issue are identical to those received by the Postdoctoral Scholars. (Miller Decl. at ¶¶ 54-55; Ackermann Decl. at ¶ 11).

The UAW has been able to successfully bargain contracts with the UC involving Postdoctoral Scholars receiving postdoctoral training grants and fellowships, and thus the same training grants and fellowships should not be used as an excuse to deny representation rights for the Graduate Student Trainees and Fellows in the petitioned-for unit. (Miller Decl. at ¶ 55).

As referenced above with regard to "substantially similar work," the working conditions among the student employees in the petitioned-for unit are also evidenced throughout the declarations of the Student Researchers included with this submission. Indeed, the working conditions are so similar that GSRs, Trainees, and Fellows often work side-by-side with each other; a student employee can toggle from one classification to another while working on the same research project, in the same lab, and under the same PI; and some student employees are actually in two classifications concurrently. (See Student Researcher Declarations).

The UC's organization structure covers the Graduate Student employees in the petitioned-for unit. The University Office of the President (UCOP) has several divisions including the Division of [Academic Affairs](#). Within the Division of Academic Affairs of Affairs is the Department of Graduate, [Undergraduate and Equity Affairs](#), and under their auspice is the unit of [Graduate Studies](#) (<https://www.ucop.edu/index.html>). (Ackermann Decl. at ¶ 13). Per the UCOP Graduate Studies' site:

Graduate Studies promotes and advances graduate education at the University of California through strategic planning, analysis, outreach and coordination. We collaborate and coordinate with graduate and professional school leadership throughout the system and with staff at each campus and within the Office of the President. Graduate Studies works particularly close with the [Council of Graduate Deans](#) to facilitate and plan initiatives and programs across the University of California system. These efforts seek to:

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- Promote greater awareness of UC graduate education – quality, opportunities and benefits
- Highlight the impact of UC graduate research
- Develop graduate research and preparation opportunities
- Facilitate graduate student financial support efforts and analyses and advocate on behalf of this critical area
- Increase the diversity of graduate student and postdoctoral scholar populations at UC
- Promote or coordinate policy, planning and analyses of a wide range of graduate education issues in support of maintaining or enhancing the outstanding graduate education enterprise of UC.

(<https://www.ucop.edu/graduate-studies/about-graduate-studies.html>); Ackermann Decl. at ¶ 13).

On each campus the University has a Graduate Division as well. At the office of the President level these Grad Divisions interact through the Council of Graduate Deans (CoGD) which is comprised of graduate division deans from each of the ten UC campuses. Information on the CoGD and each campus Grad Division can be found <https://www.ucop.edu/graduate-studies/information-resources/index.html> As these sites reflect, the role and mission of each Grad Division is much the same. (Ackermann Decl. at ¶ 14).

As stated on the UC Berkeley Grad Division web site:

“The Graduate Division oversees graduate admissions, fellowships, grants, academic employment, preparation for teaching, mentoring activities, professional development, academic progress and degree milestones.”

(Ackermann Decl. at ¶ 14).

All of the petitioned for Student Researchers fall within the jurisdiction of the Grad Divisions with respect to policies and programs. (Ackermann Decl. at ¶ 14). On a daily basis however, they report to a Principal Investigator, who most often is a member of the Academic Senate. (Ackermann Decl. at ¶ 14).

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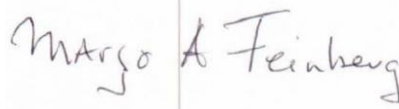
The LBL website (<https://lbl.referrals.selectminds.com/info/page3>) states:

Graduate Student Research Assistant (GSRA) - Registered graduate student of the University of California (UC), and eligible for a Graduate Student Researcher (GSR) appointment on their campuses. UC rules and regulations pertaining to graduate students in the various disciplines normally apply. GSRA's work a fixed-percentage schedule and receive a flat monthly salary in accordance with their campus department policies. They are also eligible to receive fee remissions, including health insurance benefits, and nonresident tuition as determined by UC policies and as implemented for GSRs on the individual campuses.

(Ackermann Decl. at ¶ 15). This further demonstrates that the policies are universal for these employees. (Ackermann Decl. at ¶ 15).

In light of all these similarities among the student employees in the petitioned-for unit, a community of interest binds them together, and the unit is an appropriate one.

Sincerely,
SCHWARTZ, STEINSAPIR, DOHRAMANN
& SOMMERS, LLP

A handwritten signature in black ink that reads "Margo A. Feinberg". The signature is written in a cursive style with a vertical line separating the first name from the last name.

Margo A. Feinberg

DECLARATION OF MICHAEL MILLER

DECLARATION OF MICHAEL MILLER
IN SUPPORT OF STUDENT RESEARCHERS UNITED'S
RESPONSE TO PERB'S INVESTIGATIVE INFORMATION REQUEST

I, MICHAEL MILLER, declare as follows:

1. I am an International Representative for The International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW"). One of my assignments in this position is to coordinate the Student Researchers United/UAW ("Student Researchers United" or "Union") organizing campaign. The UAW along with its Locals are the exclusive bargaining representative at the University of California ("UC" or "University") for the Academic Student Employees, Postdoctoral Scholars, and Academic Researchers, and at the University of Washington for the Academic Student Employees and Postdoctoral Scholars. I am familiar with Student Researchers United's HEERA Representation Petition and related filings submitted to the California Public Employment Relations Board ("PERB" or "Board"). This declaration verifies factual assertions made in the Union's September 8, 2021 Petition for Board Investigation as well as supports the Union's responses to PERB's September 17, 2021 Investigative Information Request. All links identified herein were verified by me as being active at the time of filing and many appear on UC or Federal Agency websites. If called to testify in this action, I could and would competently testify to the facts asserted in this declaration based on my own personal knowledge unless otherwise from information and belief based on my research.

2. For nearly the past three decades, I have dedicated much of my professional life to working with and advocating for student and academic employees at the UC and across the United States who have collectively raised their voices to fight for basic workplace rights and protections. I have been actively involved in the organization and representation of UC

workers—from organizing some of the first UC campus bargaining units for student employees in the 1990s to filing the present petition for representation for Student Researchers United.

3. Thousands of Graduate Student employees have submitted authorization cards and evidenced well over a majority of support to show their democratic will to be represented by Student Researchers United. Based upon my experiences over the past three decades, my thorough knowledge of the Graduate Student employees in the petitioned-for unit and at universities across the country, and my personal knowledge of the University's prior statements made and actions taken regarding training grants and fellowships, it is my firm belief that the University has presented no reasonable doubt as to the appropriateness of the petitioned-for unit.

My Background with the UAW and in Advancing HEERA Representation Rights for Employees Throughout the UC

4. As background, in 1990, I enrolled in a PhD program at the University of California at Los Angeles ("UCLA"). As a Graduate Student at UCLA, I worked as a Teaching Assistant, a Reader, and a Tutor. I was also technically a Teaching Associate and a Teaching Fellow.

5. From January 1994 until October 1999, I served as organizer with the UAW. When I began as an organizer, most of the student employees within the UC system were unrepresented. In my role as an organizer, I helped to organize the first union of student employees at UCLA.

6. Although we were able to present to PERB proof of majority support, the University refused to recognize the union. I was actively involved in helping to present the case before PERB to support recognition for these student employees.

7. In 1996, Administrative Law Judge Tamm found that the Graduate Student Instructors, Special Readers, Readers, Remedial Tutors, Part-Time Learning Skills Counselors,

and Tutors at UCLA constituted employees within an appropriate bargaining unit; and in 1998, the Board adopted his findings and affirmed that those student employees indeed have a right to representation under HEERA. (*Regents of the University of California and Student Association of Graduate Employees, UAW*, PERB Decision No. 1301-H (1998)).

8. Beginning in October 1999, I became an International Representative with the International Union, UAW, and I currently remain in that position. As an International Representative, one of my main roles is to assist groups of workers who are currently unrepresented to form unions. I also assist workers who have already formed unions by bargaining contracts; enforcing those contracts through grievances, arbitrations, and collective actions; engaging in political action of all varieties; helping with union administration; and doing other related activities in support of the unions and their members. I have bargained first contracts and successor agreements, processed grievances, and enforced contracts.

9. During the course of my career, I have focused on unions that are in public sector academia, many of which represent academic student employees. As an International Representative, I currently work with:

- UAW Local 5810, which represents more than 11,000 Postdoctoral Scholars and Academic Researchers across the University of California;
- UAW Local 2865, which represents more than 19,000 Academic Student Employees such as Teaching Assistants, Graduate Student Instructors, Tutors, and Readers, across the University of California; and
- UAW Local 4121, which represents more than 4,500 Academic Student Employees such as Teaching Assistants, Research Assistants, Readers, and Tutors, as well as Postdoctoral Scholars across the University of Washington.

10. During my tenure as an International Representative, I have also serviced other UAW Locals such as UAW Local 4123, the union of Academic Student Employees, Teaching Associates, Graduate Assistants, and Instructional Student Assistants across the California State University (“CSU”) system. I coordinated the organizing and first contract campaign at the CSU system where the University Administration recognized UAW Local 4123 as representing a unit that included Graduate Student Research Assistants in the Graduate Assistant title after UAW Local 4123 demonstrated majority support through card check.

UAW Local 2865 Is Recognized as the Exclusive Representative of Academic Student Employees Across the UC System

11. As mentioned above, I was directly involved in organizing the Academic Student Employees at the UC. With the dedication of thousands of workers across the UC system and the support of the UAW, several years of organizing and striking for recognition led to a strike in December 1998 on all eight UC teaching campuses during finals for union recognition. As a result of the highly successful strike, State Assembly Speaker Antonio Villaraigosa and Senate President Pro Tem John Burton directed the UC and the UAW into a “cooling off period.” The ASEs went back to work with a University commitment to discuss the issue of recognition at a later date.

12. During that same timeframe, I was actively involved in the litigation before PERB, which ultimately found that “student employees in the GSI, reader, special reader, tutor, remedial tutor and part-time learning skills counselor positions at UCLA are employees under the HEERA.” (*The Regents of the University of California and Student Association of Graduate Employees, et al.*, PERB Decision No. 1301-H (1998), p. 2). The Board found that services performed by these student academic employees in dispute are vital to the University and must be performed without regard to whether they provide any educational benefit to student

employees. The ALJ found that employment in these positions is contingent on student status, and the Board concluded that HEERA coverage for these student employees would further the purposes of HEERA.

13. Thereafter, I played a leading role for UAW Local 2865 to bargain its first collective bargaining agreements with the UC, and I have continued in that role for every UAW Local 2865 collective bargaining agreement since then. Thus, I have thorough knowledge of the rights, benefits, compensation, and other terms and conditions of employment relating to Academic Student Employees pursuant to UAW Local 2865's collective bargaining agreement with the University. (The most recent UAW Local 2865/UC Collective Bargaining Agreement, August 2018 - June 30, 2022, is available at: <https://uaw2865.org/wp-content/uploads/2020/01/UAW-2865-UC-CBA-2018-2022-Final.pdf>).

14. The Tamm Decision and PERB Decision No. 1301-H, however, was under HEERA's old balancing test, which gave the Board authority to find employee status with regard to "student employees whose employment is contingent on their status as students" by analyzing services performed, educational objectives, and whether such a finding would further the purposes of the Act:

The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter. (See Gov. Code, §3562(f) [1979-1999]; Gov. Code, §3562(e) [2000-2017]).

15. Prior to SB 201, student employees had rights under HEERA only if the Board found that they satisfied this balancing test.

16. Given that framework, although UAW Local 2865 was able to successfully become the exclusive representative of the Academic Student Employees, the Board had found that "student employees in graduate student researcher (GSR) and tutor supervisor positions are

not employees under HEERA, and should be excluded from the bargaining unit.” (*The Regents of the University of California and Student Association of Graduate Employees, et al.*, PERB Decision No. 1301-H (1998), p. 2).

17. Thus, while I was pleased that the Academic Student Employees at the UC had collectively made their voices heard and achieved recognition, I and countless other student employees and union leaders were motivated by the decision by Administrative Law Judge Tamm in 1996 (which was later upheld by the Board in 1998), to continue organizing GSRs and other Graduate Student employees and to change HEERA so that all student employees could get the recognition rights that they deserve. I continued meeting with unrepresented student employees such as GSRs, Assistant GSRs, Trainees, and Fellows at UCLA and at other UC campuses. I spoke with them, saw the work that they did in the lab, and learned all I could about their work within the University and their positions within the UC system. Therefore, I have been immersed in the issues at the center of this present matter for approximately the last three decades.

UAW Local 5810 Is Recognized as the Exclusive Representative of Postdoctoral Scholars Across the UC System

18. Prior to the creation of Academic Personnel Manual-390, the employees who came to be known as Postdoctoral Scholar-Fellows and Postdoctoral Scholar-Paid Directs were not in the UC payroll system or in a UC title code. They were either remunerated by the UC through a “stipend” via accounts payable, financial aid, or other such system in the case of “fellows” or “paid directly” in the case of “paid directs.”

19. Nevertheless, in or around 2003, the University chose to create three title codes for the Postdoctoral Scholars: Postdoctoral Scholar – Employee, Postdoctoral Scholar – Fellow, and Postdoctoral Scholar – Paid Direct. The UC added those three title codes into the Academic

Personnel Manual as APM-390.

(<https://academicpersonnel.ucr.edu/sites/g/files/rcwecm1261/files/2019-03/apm-390.pdf>)

20. In 2008, the UAW filed a petition to recognize a unit comprised of Postdoctoral Scholars and Fellows. As an International Representative, I helped in filing the petition and was active in all the subsequent responses and filings with the University and PERB.

21. The UAW had petitioned for a unit comprised of Postdoctoral Scholar – Employees, Postdoctoral Scholar – Fellows, Postgraduate Researchers, and Visiting Postdoctoral Scholars. We did not seek in our petition at the time to include Postdoctoral Scholar – “Paid Directs,” who received remuneration directly from external funding agencies. In reply to our petition, the UC filed with PERB a response from its University Counsel at the time, Leslie L. Van Houten, rejecting the petitioned-for unit as not appropriate on the ground that it excluded the Postdoctoral Scholar – Paid Directs. (Attached hereto as Exhibit A is a true and correct copy of University Response to PRO/UAW Request for Recognition – PERB No. SF-RR-914-H, dated September 5, 2008 (“Van Houten Response”), p. 2 [originally included with the Union’s September 8, 2021 Petition for Board Investigation, Attachment B]).

22. The Paid Directs received income directly from external funding agencies and were not “W-2 employees” of the University. Nevertheless, the University argued that these Paid Directs have a community of interest with Postdoctoral Scholars – Employee and Postdoctoral Scholars – Fellow, and thus should be within the unit with those other two classifications. (See *id.* at p. 2).

23. The University directly advocated for the inclusion of these non-W-2 employees of the University within the petitioned-for bargaining unit. Although this was different than the unit we had initially petitioned for, we agreed with the UC’s acknowledgment that the Paid Directs had a community of interest with the other Postdoctoral Scholar Employees and Fellows.

24. The University in its Van Houten Response stated:

Paid Directs are very similar to the Fellows as both groups of Postdoctoral Scholars receive their funding from outside agencies. In the case of the Fellows, the funds are funneled through the University, and the Fellows receive either a paycheck or a payment from accounts receivable depending on campus practice. Paid Directs receive their pay, as the name aptly suggests, directly from the funding agency...the exclusion of the Paid Directs from the unit is an artificial one and not based on sound policy or legal grounds... [O]ther than the source of funding and in some instances eligibility for certain benefits, all of their terms and conditions of employment are the same. (*Id.* at pp. 3-4).

25. “[N]ot only is there a community of interest between the Fellows and the Paid Directs, there is a community of interest among the Employee Postdoctoral Scholars, the Fellows and the Paid Directs.” (*Id.* at p. 7). “All Postdoctoral Scholars perform the *same type of work, research*, and they all work toward the same goal—engaging in leading edge research.” (*Id.* at p. 10, emphasis added).

26. Many have different sources of funding throughout their postdoctoral experience. For example, one quarter a Postdoctoral Scholar may be appointed as an Employee Postdoctoral Scholar and the next year, she may be a Fellow and the following year, a Paid Direct. To further complicate matters, an individual may have a dual appointment as a Paid Direct and an Employee Postdoctoral Scholar at any given time. ***Thus, a Postdoctoral Scholar may stay in the same laboratory, working for the same PI, doing the same research and nothing will change except her source of funding.*** (*Id.* at p. 8, emphasis added).

27. The only apparent difference between the Paid Directs and the Employee Postdoctoral Scholars is that an outside agency supports the Postdoctoral Scholar. However, that fact is the same for the Fellows who also have their support originating outside of the University. Moreover, that distinction not only fails as a matter of fact, it fails as a matter of law.

As we know, the majority of sponsoring agencies are either silent on the issue of employment status or specifically state that there is no employment status. ***For the vast majority of the Paid Directs, the University is the only employer. The sponsoring agencies merely provide the money to support or help support the Paid Directs. Since the University controls all other terms and conditions of the appointments of Paid Directs, it is the employer.*** See Alameda County Board of Education, PERB Dec. No. 323 (1983) (finding the key inquiry in determining whether an entity is an employer under EERA is whether the alleged employer had “sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.”) (*Id.* at p. 12).

28. With the UC's arguments in favor of including researchers paid directly by external funding sources, the parties agreed that the Postdoctoral Scholar unit should include the Postdoctoral Scholars – Employees, Fellows, and Paid Directs. The University thus formally recognized the bargaining unit as an appropriate one represented by UAW Local 5810 in November 2008.

29. Thereafter, as an International Representative, I helped lead negotiations for UAW Local 5810 to bargain its first collective bargaining agreement with the UC, and I have continued in that role for every UAW Local 5810 collective bargaining agreement since then. Therefore, I have thorough knowledge of the rights, benefits, compensation, and other terms and conditions of employment relating to Postdoctoral Scholars pursuant to UAW Local 5810's collective bargaining agreement with the University. (The most recent UAW Local 5810/UC Collective Bargaining Agreement, October 17, 2016 – September 30, 2021, is available at: <https://uaw5810.org/postdoc-contract/>).

30. Prior to bargaining, as mentioned, some Postdoctoral Scholars did not receive wages from the University. The parties, however, were able to bargain over salary and stipend changes for the entire unit, changes which still exist today. (Attached hereto as Exhibit B is a true and correct copy of Article 4(A), Compensation, from the most recent UAW Local 5810/UC Collective Bargaining Agreement, October 17, 2016 – September 30, 2021). And, while some grants may have certain expectations or limitations, the parties were able to bargain to address those concerns—such restrictions did not bar those workers from being in the Postdoctoral unit. (See *id.* at Article 4(A)(2), Compensation).

31. The University's Academic Personnel Manual at APM-390 continues to describe title codes for Postdoctoral Scholar – Employee, Postdoctoral Scholar – Fellow, and Postdoctoral Scholar – Paid Direct:

390-8 Titles

The title of a Postdoctoral Scholar appointment is determined by the requirements of the funding agencies.

a. Postdoctoral Scholar – Employee

An appointment is made in the title “Postdoctoral Scholar – Employee” when (1) the agency funding the salary requires or permits the appointee to be an employee of the University, or (2) whenever General Funds, Opportunity Funds or other University discretionary funds are used to support the position.

b. Postdoctoral Scholar – Fellow

An appointment is made in the title “Postdoctoral Scholar – Fellow” when the Postdoctoral Scholar has been awarded a fellowship or traineeship for postdoctoral study by an extramural agency and the fellowship or traineeship is paid through a University account.

c. Postdoctoral Scholar – Paid Direct

An appointment is made in the title “Postdoctoral Scholar – Paid Direct” when the Postdoctoral Scholar has been awarded a fellowship or traineeship for postdoctoral study by an extramural agency and the agency pays the fellowship or traineeship directly to the Postdoctoral Scholar, rather than through the University. Such appointments shall have a “without-salary” status.

d. Postdoctoral Scholars may be assigned to more than one Postdoctoral Scholar title concurrently depending on University and extramural funding agency requirements.

(Attached hereto as Exhibit C is a true and correct copy of APM-390. APM-390 is also available at: https://ucop.edu/academic-personnel-programs/_files/apm/apm-390.pdf). The same three title codes and descriptions that the University chose to create back in 2003 still exist today, and as of 2008, all three categories have had collective bargaining rights with UAW Local 5810 as their exclusive representative.

The NLRB Decides in *Columbia University* that Graduate Student Employees Under Training Grants Are Entitled to Protections as Employees Under the NLRA

32. As mentioned above, the UAW, including myself, had continued working with student researchers with an eye toward changing HEERA so that all student employees could get the recognition rights that they deserve. Being a UAW International Representative and familiar

with the work and cases of my UAW colleagues, I sometimes supported their efforts on other organizing campaigns. For example, I helped organize at Columbia University in or around 2002 and again in 2014-2016. Additionally, I was aware that student researchers were being organized and recognized in other universities throughout the country. For example, in 2016, the National Labor Relations Board issued a decision supporting that student employees under training grants are entitled to protections as employees under the National Labor Relations Act. (Attached as Exhibit D is a true and correct copy of *The Trustees of Columbia Univ. in the City of New York & Graduate Workers of Columbia-GWC, UAW*, 364 NLRB No. 90 (Aug. 23, 2016)).

33. At Columbia, the union petitioned for a unit including “All Graduate Research Assistants (including those compensated through Training Grants).” (*Id.* at pp. 14-15, fn. 97).

34. On the record, Columbia’s counsel argued that, “students on training grants are simply not employees because they’re not employed in a University position, that they’re simply supported by the Government to be students and they don’t provide a service to the University.” (*Id.* at p. 15 fn. 98).

35. The NLRB, however, asserted that “The Board has the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they are compensated.” (*Id.* at pp. 1-2). The Board found that:

Students, when working as research assistants, are not permitted to simply pursue their educational goals at their own discretion, subject only to the general requirement that they make academic progress, as they would be in semesters where they were under some form of financial aid other than a research grant.

The funding here is thus not akin to scholarship aid merely passed through the University by a grantor without specific expectations of the recipients. ***Because Columbia directs the student research assistants' work and the performance of defined tasks is a condition of the grant aid, we conclude that the research assistants in this case are employees under the Act.***

Columbia argues that, even if research assistants generally are common-law employees, the research assistants funded by a specific form of grants known as training grants present unique circumstances and lack the characteristics of common-law employment. However, the record shows that Columbia, which receives revenue from these training grants, is charged with ensuring that research assistants thereunder receive appropriate training within a formalized program (consistent with the funder's goal of having a well-trained workforce in biomedical and behavioral research), and *accordingly it oversees and directs the research assistants who receive the grants*. Additionally, research assistants often receive funds from research and training grants simultaneously. Further, participation in specific training activities is a requirement for receipt of training grants; thus, *notwithstanding the grantor's statement that the grant aid is not salary, it is a form of compensation*. (*Id.* at p. 18, emphasis added).

SB 201 Is Enacted and Expands Collective Bargaining Rights for Student Employees

Under HEERA

36. Propelled by the unyielding efforts of student researchers, who, with the help of the UAW, fought for years to have the recognition rights they deserved under HEERA, the California Legislature initiated various bills to extend collective bargaining rights to student employees.

37. I played a direct role in helping to lobby for student employees to have collective bargaining rights under HEERA including communicating with legislators and assisting with the drafting, introduction, sponsorship, and consideration of various bills such as SB 259 (Hancock) in 2012, AB 1834 (Williams) in 2014, and SB 201 (Skinner) in 2017.

38. I kept apprised of the UC's responses to the efforts by the California Legislature to amend the definition of student employees under HEERA. The UC continued to oppose the efforts to amend HEERA. (See the UC's opposition letters to SB 259, AB 1834, and SB 201 at <https://studentresearchersunited.org/anti-union-communications/>). For example, the UC argued that SB 201 would fundamentally alter the relationship between faculty members and student researchers from one of mentor-mentee to employer-employee and argued that graduate research is not "work" in the traditional employment sense because that work is conducted as part of their

educational pursuits. (See August 31, 2017 Letter from Kieran Flaherty, Associate Vice President & Director, to the Honorable Lorena Gonzalez Fletcher, Chair, Assembly Appropriations Committee, re SB 201 (Skinner) at https://studentresearchersunited.org/wp-content/uploads/2020/08/SB-201.KJF_.bdk_.083117.pdf).

39. The California Legislature rejected the UC’s contentions and passed SB 201 over the UC’s opposition. On October 15, 2017, SB 201 amended Section 3562 of the Government Code, effective January 1, 2018, relating to higher education employees. In particular, the bill amended the definition of “Employee” or “higher education employee” to mean:

any employee, including student employees whose employment is contingent on their status as students, of the Regents of the University of California. . . . However, managerial and confidential employees and employees whose principal place of employment is outside the State of California at a worksite with 100 or fewer employees shall be excluded from coverage under this chapter. (Gov. Code, § 3562(e) (emphasis added)).

40. SB 201 made findings and declarations that “The Legislature intends to expand the definition of employee under the HEERA to include certain student employees previously denied collective bargaining rights.” (9/6/17 Assembly Floor Analysis at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB201#). In describing the need for the bill, the legislative analysis stated, “This bill amends the HEERA definition of ‘employee’ to specifically include student employees whose employment is contingent upon their status as students; and, removes statutory language that limits PERB from finding that student employees currently excluded by HEERA are ‘employees.’” (*Id.*)

41. Having been involved in these cases and participated in UAW’s efforts to get SB 201 passed, it my belief and understanding that the 2018 amendment to HEERA was meant to expand coverage to the very student employees at issue in this matter.

Student Researchers United

42. In preparing for the HEERA Representation Petition filed by Student Researchers United on May 24, 2021, I reviewed various UC documents describing the student employees in the petitioned-for unit, including but not limited to the University's Academic Personnel Manual. The University defines Graduate Student Researcher as follows: "A Graduate Student Researcher is a graduate student who performs research related to the student's degree program in an academic department or research unit under the direction of a faculty member or authorized Principal Investigator." (Attached hereto as Exhibit E is a true and correct copy of APM-112 available at <https://www.ucop.edu/academic-personnel-programs/files/apm/apm-112.pdf>, APM-112-4-b-25). The University defines Graduate Student Assistant Researcher as follows: "A Graduate Student Assistant Researcher is a graduate student who is trained in research techniques under the supervision of a Principal Investigator on a research project that is not necessarily related to the student's degree program." (*Id.* at APM-112-4-b-24).

43. Despite not currently being listed on the UC's APM, Trainees and Fellows perform the same job functions as the above Graduate Student Researchers and Graduate Student Assistant Researchers, who the UC acknowledges should be in the unit. They are Graduate Students who perform research related to the student's degree program in an academic department or research unit under the direction of a faculty member or authorized Principal Investigator.

44. Trainees and Fellows often work side-by-side with GSRs and/or Postdoctoral Scholars, who the University acknowledges have representation rights.

45. Indeed, I have spoken with thousands of Graduate Student Researchers, Trainees, and Fellows throughout my tenure at the UAW. I am well versed regarding the UC's title codes, Academic Personnel Manual descriptions, and requirements for various training grants and

fellowships. Even with all of this knowledge, however, it would be difficult if not impossible for me, let alone anyone else, to identify a Graduate Student Researcher from a Trainee or Fellow by observing their work in the lab. Indeed, I am aware of Trainees and Fellows performing the same work, on the same research project, in the same lab, with the same working conditions, and under the same faculty advisor as their Graduate Student Researcher counterparts.

46. In my position, I have spoken and interacted with many student researchers within all the classifications in the petitioned-for unit to know that the positions are fungible in that the same individual may toggle from being a GSR, Trainee, or Fellow from one quarter to the next, or even be classified simultaneously as part GSR and part Trainee or Fellow—all while doing the exact same work during the entire duration of their time at the University. My knowledge of the terms and conditions of employment of student researchers across the United States leads me to this understanding as well. The classifications in the petitioned-for unit are often fungible and student employees may hold various classifications while working on the same research project. The interchangeable nature of the research work performed by the student employees in the proposed unit supports a strong community of interest and, accordingly, unit appropriateness.

GSRs Are Mainly Funded by Federal Research Dollars

47. I am aware that the majority of research at the UC is supported by federal funding. In speaking with many Graduate Student Researchers and reviewing the types of information that they complete to apply for Graduate Student Researcher positions, it is my understanding that, although GSRs do not apply for funding themselves, GSRs at the University are funded by various external sources that are acknowledged and tracked by the University.

48. Thus, the University's attempt to exclude Trainees and Fellows from the proposed unit due to the source of funding appears completely arbitrary given that the sources of funding for the GSRs (who the UC acknowledges are appropriately in the unit) may be *exactly the same*.

Indeed, the vast majority of the Trainees and Fellows are funded by federal dollars from agencies such as the National Science Foundation and National Institutes of Health, just like a majority of the GSRs.

49. The UC encourages and helps facilitate Graduate Students to apply for prestigious fellowships and training grants, readily accepts revenue generated by the external funding successfully attained by Graduate Student Trainees and Fellows, and benefits from the hard work of these student employees.

50. In my interactions with Fellows and Trainees as well as in conversations with the University, it is my understanding that most Fellows and Trainees are paid directly by the University, which collects and remits their stipends to them. The UC generally disburses stipend payments to Trainees and Fellows through their billing and/or financial aid systems at each campus. Training grants have reporting requirements that the awardee institution (the UC in this case) must communicate to the funding institution. Similarly, fellowship funds are often provided to the UC, which is then responsible for disbursing them to the fellowship recipient. In cases where funds are provided directly from the funding institution to the student employee, they are required to have a UC faculty advisor who reports on the student employee's progress to the funding institution.

51. While the UC painstakingly tries to elaborate on funding source as a purportedly decisive element, I have not seen a funding source requirement anywhere in HEERA. To the contrary, I know that source of funding has *not* restricted other universities across the United States from acknowledging that student researcher Trainees and Fellows have a right to representation.

52. In working with Trainees and Fellows at the UC over the course of my tenure with the UAW, I know that they are not just students that happen to be on campus seeking

personal pursuits. Rather, they are students who work at the UC performing research and who receive remuneration for their services. Contrary to the UC's response, the Union is not trying to "convert all students into employees." (UC Response at p. 5). I recall that even the UC has acknowledged in its prior submissions to PERB that "research" is "work." (See Exhibit A at p. 10). The student employees in the petitioned-for unit are performing research under the direction of Principal Investigators or faculty at UC labs side-by-side on the same projects with GSRs and Postdoctoral Scholars, bringing research dollars and prestige to the UC, and publishing papers banner the UC's name. Under these appointments, they are working and providing a service to the University. Indeed, they provide the same service as GSRs—working with GSRs and often toggling back and forth under that classification or holding a split GSR position while also being a Trainee/Fellow.

53. Having bargained the UAW Local 2865 and UAW Local 5810 contracts with the UC, and having organized and interacted with Graduate Student Trainees and Fellows across the various UC campuses over the past three decades, I have seen firsthand the control that the UC holds over Graduate Student Trainees and Fellows. Such control includes, but is not limited to:

- Working conditions at the lab;
- Supervision and direction by a UC faculty member/PI;
- Pay, pay scales, minimum salary/stipends, supplemental pay, and pay increases;
- Access to benefits;
- Access to healthcare;
- Occupational health and safety policies and practices, including those relating to COVID-19;
- Equipment used for research;
- UC email and technology;
- Ability to terminate student status, and accordingly, the employment that is contingent upon student status;
- Coverage under Sexual Violence and Sexual Harassment policies under Title IX (see <https://policy.ucop.edu/doc/4000385/SVSH> at p. 9);
- And, in most cases, disbursement of remuneration.

54. I am familiar with the various training grants and fellowships awarded to Graduate Students and Postdoctoral Scholars at the UC. Having personally been part of bargaining the Postdoctoral Scholar contract with the UC, I find the UC's current statements that it has "no control" and "the union has no standing to negotiate for wages, terms and conditions of employment" for individuals under grants and fellowships, (UC Response at p. 12), disingenuous and belied by the UC's prior actions. Many of the training grants and fellowships funding the Trainees and Fellows at issue are identical to those received by the Postdoctoral Scholars.

55. We were able to successfully bargain contracts with the UC involving Postdoctoral Scholars receiving postdoctoral training grants and fellowships, and thus the same training grants and fellowships should not be used as an excuse to deny representation rights for the Graduate Student Trainees and Fellows in the petitioned-for unit.

56. The University—not the funding agency—has an employment relationship with the Trainees and Fellows. Indeed, Trainees and Fellows are not employees of research agencies such as the NIH but rather employees of the UC for purposes of HEERA. (Exhibit A at p. 12 [the UC previously acknowledging that when sponsoring agencies are either silent on the issue of employment status or specifically state that there is no employment status, the "University is the only employer."])

The UC's Prior Arguments Regarding GSRs and the Findings in the Tamm Decision
Highlight the Flaws in the UC's Current Arguments Regarding Trainees and Fellows

57. I have interacted with the UC's labor relations and attorneys for many years regarding various representation issues. And, I am familiar with the UC's responses and arguments prior to its recognition of the Academic Student Employees now represented by UAW Local 2865.

58. Having directly participated in filing the HEERA Representation Petition for the Academic Student Employees and, in that context, litigated against the UC before PERB with regard to Student Researchers, I can see that the UC is now using the same arguments to exclude Fellows and Trainees that it had made to exclude Student Researchers back in the late 1990s. Significantly, the Tamm Decision highlights the similarities between GSRs and Fellows and Trainees, and yet the UC nevertheless continues to cling to the old balancing test and its prior arguments despite the fact that that standard no longer exists. With the passage of SB 201, the UC must acknowledge that such student employees who receive remuneration for their research work have rights.

59. I have listed a few comparisons between the UC's current arguments regarding Fellows/Trainees against the UC's prior arguments and the ALJ's findings regarding GSRs for PERB's convenience:

60. UC's Comment Regarding Fellows/Trainees:

“Any research is often directly related to satisfying degree requirements and/or their dissertation, and is designed to let a student focus on their own research and advancement.” (UC Response at p. 5)

61. UC's Prior Argument and ALJ's Finding Regarding GSRs:

[I]n most cases it is virtually impossible to distinguish between the time a student is performing paid work as a GSR from the time spent on non-paid status performing the student's own dissertation research. This is so simply because most GSRs are essentially paid by the University to perform their own research upon which they will base their dissertation. (PERB Decision No. 1301-H (1998), ALJ Decision at pp. 9-10).

62. UC's Comment Regarding Fellows/Trainees:

“A fellow/trainee has a mentee-mentor relationship with a faculty member, rather than an employee-employer relationship.” (UC Response at p. 5).

63. UC's Prior Argument and ALJ's Finding Regarding GSRs:

As part of their role as mentors, faculty will often co-author scholarly research papers, assist and/or encourage GSRs attendance and presentation at conferences and meet regularly with students to supervise their research and dissertation efforts. The

relationship between GSRs and their faculty mentors typically constitute a stronger bond and are more time consuming than relationships between other student academic employees such as GSIs and their supervising faculty members. (PERB Decision No. 1301-H (1998), ALJ Decision at pp. 9-10; see also pp. 76-77 [“The role of the faculty member in relation to the GSR is more like a patron than a typical supervisor.”])

64. UC’s Comment Regarding Fellows/Trainees:

“Students who are on fellowships and grants are advancing their own academic pursuits, and are not employees.” (UC Response at p. 5).

65. UC’s Prior Argument and ALJ’s Finding Regarding GSRs:

The duties performed by GSRs in half-time positions vary greatly, depending up on the field of student and the experience of the GSR. A newly admitted graduate student might first be assigned to perform research of a very basic nature. This has two primary purposes. One purpose is to assist faculty members, post doctoral researchers (post docs) or other most advanced students with research grunt work. A second and more important reason, however, is to provide the student with an opportunity to learn basic laboratory research skills. Acquiring these skills is essential for later success as a graduate student, and is done for the education of the GSR more than for the smooth operation of the lab. (PERB Decision No. 1301-H (1998), ALJ Decision at p. 8; see also p. 77 [“[T]he value of GSR positions accrue primarily to the GSRs and their educational objectives. The value of the services received by the University is not nearly as significant.”])

66. Having been involved in the recognition of the Academic Student Employees at the UC, I note that the factual findings in Tamm’s Decision regarding GSRs bear a striking similarity to the UC’s current descriptions of Trainees and Fellows. The fact that Trainees and Fellows, just like GSRs, are mentored by their PIs, have research related to their studies, and gain an educational benefit, does not detract from their employee status. As it is undisputed that GSRs are student employees, it follows that Trainees and Fellows are thus student employees as well.

The UC’s Demand to Include Postdoctoral Scholars Directly Funded by External Sources Contradicts Its Current Argument to Exclude Trainees and Fellows

67. Furthermore, having been involved in the recognition of the Postdoctoral Scholars at the UC, I immediately recognized that the University’s current position regarding the purported importance of funding source in determining community of interest directly

contradicts its prior stance. As discussed above, the University has shown that funding source is not a valid determinant in a community of interest analysis by arguing for the inclusion of and recognizing Paid Directs in the Postdoctoral Scholar unit.

68. Significantly, the University previously recognized Fellows and vigorously argued to include researchers with external funding sources into the Postdoctoral Scholar unit. The University previously argued, “The sponsoring agencies merely provide the money to support or help support the Paid Directs. Since the University controls all other terms and conditions of the appointments of Paid Directs, it is the employer.” (See Exhibit A at p. 14).

69. This history thus casts doubt to the reasonableness of the University’s position now that outside funding sources purportedly destroy the proposed unit’s community of interest, especially given that Postdoctoral Scholars (like GSRs) are funded by some of the same training grants and fellowships that fund the Fellows and Trainees at issue.

70. Just as one example, through the UAW’s research and my interactions with GSRs and Postdoctoral Scholars, I am aware that there are at least 13 NIH Institutional training grants at the UC used to employ both Graduate Student employees and Postdoctoral Scholars. Also, UAW Local 5810 includes those who are funded by NIH fellowships. Thus, there is a precedent within the history of employee representation at the UC to support their inclusion in the bargaining unit at issue.

71. The UC’s argument is illogical, creating situations where Postdoctoral Scholars and Academic Researchers are considered employees under HEERA while their Graduate Student counterparts being funded under the exact same training grants and fellowships, and often working in the same lab, are being denied employee rights.

Factors Supporting Unit Appropriateness

72. As a UAW International Representative, I have been able to successfully help bargain and enforce the contract between the Academic Student Employees and the UC. With the UAW's history of representing Academic Student Employees at the University, it is well-versed in the issues facing these employees, be it Graduate Student Health Insurance Plans, fee remission, childcare, or a safe and discrimination-free workplace.

73. Currently all Graduate Student employees in the proposed bargaining unit are unrepresented. Student Researchers United has obtained proof of support from the employees in the petitioned-for unit well above the 50% required. This includes proof of support of thousands of Trainees and Fellows evidencing a majority within the contested positions.

74. Having interacted with University's Labor Relations as well as UC attorneys in negotiating for UAW Local 5810 and UAW Local 2865, and having successfully agreed to and enforced these collective bargaining agreements, I am confident that the University representatives have the experience and resources to deal effectively with employee organizations representing statewide academic units.

75. It is my belief that this proposed unit will promote efficient operations. The UC already has infrastructure in place to bargain with statewide units that have employees funded by fellowships and training grants, such as the Postdoctoral Scholar unit and the Academic Researcher unit.

76. It is my belief that having a statewide unit will help resolve the many inefficiencies that currently exist for GSRs, Trainees, and Fellows. Based on my background and experiences, I believe the proposed unit will help increase consistency and efficiency for the University, eliminating the need for the many individualized determinations currently being made by PIs, payroll, and human resources. Given that the proposed unit is a statewide unit, the

employer will be able to efficiently meet and confer and bargain over terms and conditions of employment that will be consistent across the state without a concern that there will be fragmented groups or a proliferation of units.

77. I am aware that connections among GSRs, Trainees, and Fellows are already integrated within the UC. For example, at UC Davis, the Training Grant Support Services serves as a virtual unit linking staff in Graduate Studies and the Office of Research.

<https://gradstudies.ucdavis.edu/research-training-grant-programs>. It assists with training grants for Graduate Students and Postdoctoral researchers—indeed, they often work side-by-side with funding from the same grants.

78. The proposed unit totaling over 13,000 (according to the UC’s count) provides a significant number of student employees the right to effective representation throughout the state as intended by SB 201. The five categories of Graduate Students employed as Researchers, Assistant Researchers, Research Assistants, Trainees, and Fellows are described in Attachment A of the Union’s Representation Petition.

Fellows and Trainees Are Recognized at Other Universities Across the United States

79. As a UAW International Representative, I am aware of the actions and cases handled by my colleagues at universities throughout the United States. I know that many other higher education institutions have included Graduate Student Fellows and Trainees in their bargaining unit, and the description of performing “substantially similar” work has been found to be appropriate.

80. While the University claims to be “unaware of graduate student fellows and trainees being included in a bargaining unit at any other higher education institution,” (UC Response at p. 4), I am aware that many such universities do indeed exist. Moreover, although the University argues that a unit description including those who “perform substantially similar

work,” is “vague and would lead to endless litigation,” (UC Response at p. 11), I am aware that a number of universities have included such language in units found to be appropriate.

81. **University of Massachusetts Amherst**

Below is an excerpt from the collective bargaining agreement between Graduate Employee Organization Local 2322/UAW and the University of Massachusetts Amherst:

UAW and UAW Local 2322/GEO shall be the representative of and the bargaining unit shall consist of: Teaching Associates (TO), Teaching Assistants (TA), Research Assistants (RA), Project Assistants (PA), Assistant Residence Directors (ARD), and Graduate Interns employed by the University of Massachusetts Amherst, and ***University of Massachusetts Amherst Fellows and Trainees whose duties and responsibilities are substantially similar*** to those of TOs, TAs, RAs, PAs, ARDs, or Interns, for the purpose of good faith negotiations with the Administration on matters relating to employment policies and practices. (<https://www.geouaw.org/geo-contract/>; emphasis added).

82. **Harvard University**

Below is an excerpt from *President and Fellows of Harvard College and Harvard Graduate Students Union-UAW (HGSU-UAW)*, Decision and Direction of Second Election, NLRB Case No. 01-RC-186442 (2017). The case states that that Graduate Student union at Harvard University shall include:

All students enrolled in Harvard degree programs employed by Harvard University who provide instructional services at Harvard University, including graduate and undergraduate Teaching Fellows (teaching assistants, teaching fellows, course assistants) and all students enrolled in Harvard degree programs (other than undergraduate students at Harvard College) ***employed by Harvard University who serve as Research Assistants (regardless of funding sources, including those compensated through Training Grants)***. (<http://harvardgradunion.org/wp-content/uploads/2018/03/SPP.01-RC-186442.RD-Decision-on-Exceptions-Adopting-HOR.7-7-2017.pdf> and Notice of Second Election (Mar. 29, 2018), available at <https://www.nlr.gov/case/01-RC-186442>; emphasis added).

83. **University of Washington**

As a UAW International Representative servicing the University of Washington, I actively participated in filing the petition for recognition for the Graduate Student employees there, including all relevant filings with the State of Washington, Public Employment Relations Commission. Below is an excerpt from the State of Washington, Public Employment Relations Commission in 2004, which found as a conclusion of law that the following unit described “is an appropriate unit for the purposes of collective bargaining within the meaning of RCW 41.56.203”:

“ALL REGULAR PART-TIME STUDENT/EMPLOYEES ENROLLED IN AN ACADEMIC PROGRAM AT THE UNIVERSITY OF WASHINGTON AND WORKING IN ONE OR ANY COMBINATION OF THE FOLLOWING CLASSIFICATIONS...AND ***ANY OTHER STUDENT EMPLOYEES WHOSE DUTIES AND RESPONSIBILITIES ARE SUBSTANTIALLY EQUIVALENT TO THOSE EMPLOYEES***, WHO REMAIN ELIGIBLE FOR WORK IN ANY OR ALL OF THOSE TYPES....”

(<https://decisions.perc.wa.gov/waperc/decisions/en/item/175394/index.do?q=State+of+Washington%2C+Public+Employment+Relations+Commission%2C+Decision+8315-B+>; emphasis added).

I also served as a negotiator bargaining the contract between the Graduate Student Employee Action Coalition, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (GSEAC/UAW), AFL-CIO, and the University of Washington, available at <https://www.uaw4121.org/member-center-2/know-your-rights/contract/#article15> and know that the contract provides for representation of certain Trainees:

Article 15 – Job Titles and Classifications, Section 1, states:
“Effective Autumn Quarter 2004, ASEs will be placed into titles and pay classifications based on the nature of job duties and qualifications as follows....”
and includes:

Title/Pay Classification - ***Stipend Grad Trainee C***
Occupation Code - 10859

Salary – Stipend per Grant
Job Duties – Research
Standard Qualifications – Graduate

(Emphasis added).

84. **University of Connecticut**

Attached hereto as Exhibit F is a true and correct copy of the Award, *In the Matter of Grievance Arbitration Between Graduate Employee Union, Local 6950 – International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (GEU-UAW) and University of Connecticut Board of Trustees, Grievance: Failure to Include Graduate Student Training Fellows in Bargaining Unit* (2020), p. 14.

The Arbitrator found that the University of Connecticut violated the collective bargaining agreement by failing to include Nexus Training Fellows when they had a functional relationship with the University that was substantially identical to that of Graduate Assistants. Specifically, the Award states:

As reflected in the Connecticut State Board of Labor Relations Case #30888, the University recognizes the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local Union, Graduate Employee Union-UAW Local 6950 (GEU-UAW Local 6950), as the exclusive bargaining representative for employees in the bargaining unit. The bargaining unit shall include all University of Connecticut Graduate Assistants (GAs), including Teaching Assistants (TAs), Research Assistants (RAs) and other Graduate Assistants who are not TAs or RAs. ***The bargaining unit shall also include graduate students whose functional relationship to the university is substantially identical to GAs even if another term is used by the University to describe their position.***

(Emphasis added).

85. Therefore, while the UC regrettably continues to deny Trainees and Fellows their proper status as student employees for purposes of collective bargaining, other universities throughout the nation have embraced it.

86. No reasonable doubt exists as to the appropriateness of the petitioned-for bargaining unit. The balancing test apparently still used by the University is obsolete. Whatever educational objectives are met by the research performed by Trainees and Fellows does not nullify the fact that they perform work at UC labs that benefits the University, and they receive financial remuneration for those services. They are student employees under HEERA. Therefore, I request the Board to deem the Union's petitioned-for unit as appropriate and certify Student Researchers United as the unit's exclusive representative.

87. Category 1 of the Union's HEERA Representation Petition, Attachment A, covers Graduate Student Researchers and Graduate Student Assistant Researchers at the UC. Based on the UC's September 2, 2021 response to PERB, the UC does not contest that the student employees in Category 1 have a HEERA right to representation.

88. The Union is currently unaware of any other Graduate Student "appointed to a different academic student title" and "performing substantially similar work," other than the specific title codes already listed in Category 1 of the Union's Attachment A. However, Student Researchers United reserves the right to include within Category 1 "any other Graduate Student appointed to a different academic student title and performing substantially similar work," in case there are student employees working at the UC as Graduate Student Researchers and Graduate Student Assistant Researchers under modified title codes not expressly listed in Category 1.

89. For example, title codes may vary slightly on different campuses and such variations should not preclude employees who are engaging in similar work as those in the enumerated title codes from being afforded representation.

90. The University has already acknowledged that the student employees in Category 1 have representation rights under HEERA. In response to Information Request A, however, the

Union notes that “substantially similar work” would be work described within the University’s own Academic Personnel Manual as belonging to a Graduate Student Researcher or a Graduate Student Assistant Researcher.

91. Thus, in short, by “substantially similar,” the Union seeks to include any “graduate student who performs research related to the student’s degree program in an academic department or research unit under the direction of a faculty member or authorized Principal Investigator,” (Ex. E, APM-112-4-b-25 [definition of Graduate Student Researcher]); and any “graduate student who is trained in research techniques under the supervision of a Principal Investigator on a research project that is not necessarily related to the student’s degree program.” (Ex. E, APM-112-4-b-24 [definition of Graduate Student Assistant Researcher]).

92. Academic Personnel Manual – 112 (attached hereto as Exhibit E), which has a revision date noted as March 7, 2019, still includes a description for “Research Assistant” under APM 112-4-b-47. Thus, the “Research Assistant” title still *exists* under APM 112-4-b-47, which is under the revision and control of the University.

93. The Union is not currently aware of anyone designated under that title. This appears to comport with the UC’s assertion that there are no individuals serving as Research Assistants as defined by this provision and such title has not been used since approximately 2012. (UC Response at p. 2).

94. While the University’s description of “Research Assistant” is similar to that of GSRs and GSARs, the Union is not compelled to insist upon including any titles within the proposed bargaining unit that are now obsolete. The Union is concerned that although that title is currently not being used by the University, the University might choose to use it later to exclude student employees who should rightfully belong in the proposed unit. If, however, the UC removes the “Research Assistant” title under APM 112-4-b-47 and/or commits to not use it

moving forward, then the Union will gladly remove Category 2 from the proposed unit. The Union, however, reserves its right to represent employees falling within “Research Assistant” title under APM 112-4-b-47 if the University chooses to use that tile in the future.

I, the below signatory, declare under penalty of perjury that the statements herein are true and complete to the best of my knowledge and belief. Executed on September 29, 2021 at Santa Monica, California.


MICHAEL MILLER

By signing and submitting to PERB this declaration, I agree that my electronic signature is the legal equivalent of my handwritten signature on all documents submitted to PERB for filing. I further agree that my signature on this document (hereafter referred to as my “electronic signature”) is as valid as if I signed the document in writing. I also agree that no certification authority or other third-party verification is necessary to validate my electronic signature, and that the lack of such certification or third-party verification will not in any way affect the effect or enforceability of my electronic signature. I am also confirming that I am the individual authorized to sign the document filed with PERB. For purposes of this consent, “electronic signature” means an electronic sound, symbol, or process attached to, or logically associated with, an electronic record and executed or adopted by a person with the intent to sign the electronic record. I further understand that I may withdraw my consent at any time.

EXHIBIT
“A”

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
OFFICE OF THE GENERAL COUNSEL

SEP 09 2008



1111 Franklin Street, 8th Floor • Oakland, California 94607-5200 • (510) 987-9800 • FAX (510) 987-9757

Charles F. Robinson
VICE PRESIDENT AND GENERAL COUNSEL

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September 5, 2008

Regional Director Anita Martinez
Public Employment Relations Board
1330 Broadway, Suite 1532
Oakland, CA 94612-2514

Re: University Response to PRO/UAW Request for Recognition - PERB No. SF-RR-914-H

Dear Ms. Martinez:

This letter is the University of California's (the "University") response to the petition for representation, Case No. SF-RR-914-H, filed on July 1, 2008, by the Postdoctoral Researchers Organization/United Auto Workers ("PRO/UAW" or the "Union"). The University files this response pursuant to PERB Regulation 51080.

Pursuant to that Regulation, the University responds as follows:

Format B: Denial of Recognition

- (1) Name, address and telephone number of the employer, and name, address and telephone number of the employer agent to be contacted:

University Counsel Leslie L. Van Houten
Office of the General Counsel
Regents of the University of California
1111 Franklin Street, 8th Floor
Oakland, CA 94607
(510) 987-9800

Executive Director Howard Pripas
Labor Relations
University of California
Office of the President
300 Lakeside Drive
Oakland, CA 94612
(510) 987-0196

- (2) Attach a copy of the request for recognition: (See attached);

Regional Director Anita Martinez
September 5, 2008
Page 2

- (3) Reasons for Denial of Recognition: The University denies the request for recognition on the grounds that the unit petitioned for is not appropriate.

I. INTRODUCTION

The PRO/UAW has petitioned for the following unit:

All Postdoctoral Scholars and Postdoctoral Fellows in title codes including but not limited to:

Postdoctoral Scholars - Employee (Title Code 3252);

Postdoctoral Scholars – Fellow (Title Code 3253);

Postgraduate Researcher – FY (Title Code 3240);

Postgraduate Researcher – AY State Funds (Title Code 3243);

Postgraduate Researcher – AY Extramural Funds (Title Code 3245); and

Visiting _____ - Postdoc (Title Code 3370)

in a statewide unit at all University of California campuses, research programs and units.

SHALL EXCLUDE:

Postdoctoral Scholars – Paid Direct; employees defined by HEERA as managerial, supervisory and/or confidential; student employees whose employment is contingent on their status as students; and all employees of Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory and Los Alamos National Laboratory.

The University objects to the unit on the grounds that one of the titles sought to be excluded, the Postdoctoral Scholar - Paid Direct, Title Code 3254 ("Paid Directs"), is properly within the unit. As will be shown below, the Paid Directs have a community of interest with the two petitioned

for titles, the Postdoctoral Scholars - Employee, Title Code 3252 ("Employees") and Postdoctoral Scholars - Fellow, Title Code 3253 ("Fellows").¹

It is not clear why the Union excluded the Paid Directs from the unit. This choice is particularly interesting because the Paid Directs are very similar to the Fellows as both groups of Postdoctoral Scholars receive their funding from outside agencies. In the case of the Fellows, the funds are funneled through the University, and the Fellows receive either a paycheck or a payment from accounts receivable depending on campus practice. Paid Directs receive their pay, as the name aptly suggests, directly from the funding agency. Additionally, the University urges PERB to take judicial notice of the representation petition filed by the Union in 2006, SF-RR-888-H. In that petition, the Union considered the Paid Directs to be appropriately within the unit.

The discussion below will establish that the exclusion of the Paid Directs from the unit is an artificial one and not based on sound policy or legal grounds.

II. THE EMPLOYEE POSTDOCTORAL SCHOLARS, THE FELLOW POSTDOCTORAL SCHOLARS, THE PAID DIRECT POSTDOCTORAL SCHOLARS

A. Policies

In July 2003, the University promulgated a new policy covering the Postdoctoral Scholars throughout the University. APM 390 states:

390-0 Policy

This policy defines and sets forth terms and conditions relating to the appointment of Postdoctoral Scholars. It applies to both (1) Postdoctoral Scholars who are employees of the University and (2) Postdoctoral Scholars who are appointed as fellows and are paid stipends by extramural agencies either directly or through the University.

The policy acknowledges that there are three different types of Postdoctoral Scholars and the difference is their source of funding. However, other than the source of funding and in some

¹ Please note that four of the petitioned for titles, 3370 (Visiting Postdoctoral Scholar) and 3240, 3243 and 3245 (Post Graduate Researchers) are being phased out and the titles will be eliminated in 2010. There are no incumbents in 3243 and 3245. No one new has been appointed to 3240 or 3370 since 2004. For purposes of this response, the University will refer to the petitioned for titles as only the Employee and Fellow Postdoctoral Scholar titles. However the University does not dispute that title code 3370 and 3240 belong in this unit with the understanding that those titles will be eliminated in 2010. (See APM 390, Transition Guidelines, No. 5.)

instances eligibility for certain benefits, all of their terms and conditions of employment are the same.²

390-8 Titles

The title of a Postdoctoral Scholar appointment is determined by the requirements of the funding agencies.

a. **Postdoctoral Scholar – Employee**

An appointment is made in the title “Postdoctoral Scholar – Employee” when (1) the agency funding the salary requires or permits the appointee to be an employee of the University, or (2) whenever General Funds, Opportunity Funds or other University discretionary funds are used to support the position.

b. **Postdoctoral Scholar – Fellow**

An appointment is made in the title “Postdoctoral Scholar – Fellow” when the Postdoctoral Scholar has been awarded a fellowship or traineeship for postdoctoral study by an extramural agency and the fellowship or traineeship is paid through a University account.

c. **Postdoctoral Scholar – Paid Direct**

An appointment is made in the title “Postdoctoral Scholar – Paid Direct” when the Postdoctoral Scholar has been awarded a fellowship or traineeship for postdoctoral study by an extramural agency and the agency pays the fellowship or traineeship directly to the Postdoctoral Scholar, rather than through the University. Such appointments shall have a “without-salary” status.

² All total there are approximately 5,500 Postdoctoral Scholars in these three titles. There are approximately 4,600 Employee Postdoctoral Scholars; approximately 600 Fellows and approximately 300 Paid Directs. Some of the Paid Directs have a dual appointment and hold an Employee Postdoctoral Scholar title as well. These employees are in both titles because it is the University’s policy to ensure that all Postdoctoral Scholars receive the same pay. Thus, if a Paid Direct’s stipend is not sufficient to meet the University’s salary scale, the Paid Direct will receive the difference and be appointed to the Employee title at an appointment rate based on the salary differential. (See APM 390-18d.)

- d. Postdoctoral Scholars may be assigned to more than one Postdoctoral Scholar title concurrently depending on University and extramural funding agency requirements.

Other than APM section 390-8, there are no sections of APM 390 that treat Paid Directs differently from Postdoctoral Fellows. There are policy distinctions between Postdoctoral Employees on the one hand and Postdoctoral Fellows and Paid Directs on the other, as follows:

390-18 Salary and Stipend

- g. The effective date of merit increases shall be established by the campus. Increases to "Postdoctoral Scholars – Fellow" and "Postdoctoral Scholars – Paid Direct" should be provided in accordance with the provisions of the extramural funding agency.

390-60 Sick Leave

- a. "Postdoctoral Scholars – Employee" are eligible for paid sick leave of up to twelve days per twelve-month appointment period. Unless the extramural funding agency has different sick-leave requirements, "Postdoctoral Scholars – Fellow" and "Postdoctoral Scholars – Paid Direct" are also eligible for paid sick leave of up to twelve days per twelve-month appointment period.
- b. For "Postdoctoral Scholars – Employee," unused sick leave shall be carried forward to subsequent Postdoctoral Scholar appointments. Unless the extramural funding agency has different requirements, the unused sick leave of "Postdoctoral Scholars – Fellow" and "Postdoctoral Scholars – Paid Direct" shall be carried forward to subsequent Postdoctoral Scholar appointments.

390-61 Time Off

Postdoctoral Scholars do not accrue vacation. "Postdoctoral Scholars – Employee" are expected to take time off each academic year in the intersession and recess periods (which constitutes about four weeks, excluding University holidays) between the beginning of Fall Term and the end of Spring Term.... Unless the extramural funding agency contains provisions to the contrary, "Postdoctoral Scholars – Fellow" and "Postdoctoral Scholars – Paid Direct" are eligible to take time off under these same conditions. Postdoctoral

Scholars will remain on pay status during intersession and recess periods or their alternatives.

390-62 Childbearing, Parental and Family and Medical Leave

- a. Postdoctoral Scholars are eligible for childbearing leave, parental leave, and active service-modified duties as provided in APM - 760 and for family and medical leave as provided in APM - 715. ...
- c. Childbearing, parental, and family and medical leave policies for "Postdoctoral Scholars – Fellow" and "Postdoctoral Scholars – Paid Direct" are subject to the requirements of the Postdoctoral Scholar's extramural funding agency.

390-75 University of California Retirement Plan Membership

"Postdoctoral Scholars – Employee" contribute to the University of California Defined Contribution Plan as Safe Harbor participants and are not eligible for the University of California Retirement Plan. "Postdoctoral Scholars – Fellow" and "Postdoctoral Scholars – Paid Direct" are not eligible for either plan.

Furthermore, there are numerous sections that deliberately treat Paid Directs as equivalent to and no different from the other two types. Examples include:

390-17 Terms of Service

- b. The total duration of an individual's postdoctoral service may not exceed five years, including postdoctoral service at other institutions.

390-18 Salary and Stipend

- f. Except as provided in APM - 390-18-e for salaries paid above scale, the sum of stipend and salary may not exceed the maximum of the scale and must be consistent with campus criteria for determining the appropriate pay level of an individual Postdoctoral Scholar. [The exception in "18-e" is that Chancellors may approve above-maximum salaries for any Postdoctoral Scholar.]

390-19 Appointment Percentage

- a. Appointments to the Postdoctoral Scholar title are full time, based on the expectation that the Postdoctoral Scholar will be fully involved in scholarly pursuits. In special cases, upon written request of the appointee and concurrence of the mentor, an exception may be granted.

When a reduced-time appointment has been approved, the mentor and Postdoctoral Scholar shall sign a written agreement specifying the reduction in hours of work and concomitant responsibilities.

390-21 Notice of Appointment

A Postdoctoral Scholar shall be provided a written notice of appointment.

390-40 Grievances

- a. A Postdoctoral Scholar may present a grievance according to the following procedures.

390-50 Corrective Action and Dismissal

- a. The University may impose corrective action or dismissal when, in its reasoned judgment, the Postdoctoral Scholar's performance or conduct merits the action.

Interestingly enough, as this policy review establishes, there is much in common between the Fellows, who the Union has determined should be in the unit, and the Paid Directs, who the Union has excluded from the unit. As will be established below, not only is there a community of interest between the Fellows and the Paid Directs, there is a community of interest among the Employee Postdoctoral Scholars, the Fellows and the Paid Directs.

B. What Is a Postdoctoral Scholar?

A Postdoctoral Scholar, be she an Employee Postdoctoral Scholar, a Fellow or a Paid Direct, is a recently-minted Ph.D. who is electing to receive further training prior to going into an academic and/or research career. All Postdoctoral Scholars must have a Ph.D.

All Postdoctoral Scholars conduct research under the direction of faculty advisors. The faculty advisor is doing research which is compatible with the Postdoctoral Scholar's areas of research

interest. The faculty advisor is generally the Principal Investigator (PI) on a grant and runs the laboratory or research project where the Postdoctoral Scholar pursues her research and where she works.

Postdoctoral Scholars work in the PI's laboratory or on the research project with other University employees including faculty and other research staff. Many actually supervise other staff working in the laboratory or on the project. Postdoctoral Scholars are expected to publish and otherwise participate in the research life of the University.

Many have different sources of funding throughout their postdoctoral experience. For example, one quarter a Postdoctoral Scholar may be appointed as an Employee Postdoctoral Scholar and the next year, she may be a Fellow and the following year, a Paid Direct. To further complicate matters, an individual may have a dual appointment as a Paid Direct and an Employee Postdoctoral Scholar at any given time. Thus, a Postdoctoral Scholar may stay in the same laboratory, working for the same PI, doing the same research and nothing will change except her source of funding.

C. The Paid Directs

The Paid Directs all have sponsoring agencies which fund their postdoctoral experience. The following are some the representative agencies currently supporting Postdoctoral Scholars at the University: UC Mexus-Conacyt, the Fulbright Foreign Scholarship Board, the Hewitt Foundation, the Japan Society for Promotion of Science, Duetche Forschungsgemeinschaft, the National Science Foundation, Ben Gurion University, National Academies, European Molecular Biology Organization (EMBO), the Swiss National Science Foundation, Wellcome Trust, International Human Frontier Science Program (HFSPO), University Corporation for Atmospheric Research (UCAR), the National Science Foundation, the Natural Sciences and Engineering Research Council for Canada (NSERCC) and the China Scholarship Council.

Some sponsoring agencies are very specific about the relationship between them and the Postdoctoral Scholar.³ Some state that the Postdoctoral Scholar is not an employee of the sponsoring agency. For example the EMBO form notes: "The fellow is not, therefore, an employee of EMBO which cannot accept liability for his/her actions, liability, health, safety or research expenditures." The Wellcome Trust's documents also contemplate that there will be an employer-employee relationship between the University and the Wellcome fellow. The operative document notes: "Dr. x's full employment costs: these compromise the Fellow's basic salary as determined by the Host Institution, . . . It is a condition of the award that the Fellow should be granted the status and prerogatives of other academic staff. . . ." The HFSPO also

³ And for some, we cannot tell because we do not have translations of the operative documents.

disclaims any employer relationship. Its documentation notes: The fellowship should not be considered as a "work contract between HFSP0 and the holder of the fellowship."

A few others actually note that there is some kind of continuing employment relationship between the sponsoring institution and the Postdoctoral Scholar. The Kosin University College of Medicine in its affidavit of financial support notes: "[The postdoctoral scholar] is presently associate professor at Department of Neurology. Dr.[x] will receive his regular salary. . . ." It also appears that the UCAR contemplates an employer-employee relationship as its letter to the postdoctoral scholar says: "UCAR offers a comprehensive benefits package including group health, dental, life insurance, sick leave, paid time off (PTO) and mandatory participation in the UCAR TIAA/CREF retirement plan."

This random sampling of the Paid Directs' sponsoring institutions' operative documents reveals that the vast majority are silent on the issue of any employment relationship between them and the Postdoctoral Scholars they sponsor. Others disavow any employment relationship and still others make it clear that the Postdoctoral Scholar retains an employment relationship with the sponsoring institution. However, none of these relationships impair the ability of the Union to bargain with the University about the terms and conditions of employment within the control of the University even if the Postdoctoral Scholar has an employment relationship with a sponsoring institution.

III. LEGAL ANALYSIS

A. Community of Interest

Government Code section 3579 sets forth the criteria to be examined when making unit decisions. The criteria for examining the community of interest are set forth in section 3579(a)(1).⁴

1. The Extent to Which Employees In Question Perform Functionally Related Services or Work Towards Established Goals

All Postdoctoral Scholars, Employees, Fellows and Paid Directs, are involved in doing the research of the University. While the subject matters and the research itself vary, the service all

⁴ Government Code Section 3599(a)(1) says:

The internal and occupational community of interest among the employees, including, but not limited to, the extent to which they perform functionally related services or work toward established common goals, the history of employee representation with the employer, the extent to which the employees belong to the same employee organization, the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements, and the extent to which the employees have common supervision.

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All Postdoctoral Scholars, Employees, Fellows and Paid Directs, are involved in doing the research of the University. While the subject matters and the research itself vary, the service all

⁴ Government Code Section 3599(a)(1) says:

The internal and occupational community of interest among the employees, including, but not limited to, the extent to which they perform functionally related services or work toward established common goals, the history of employee representation with the employer, the extent to which the employees belong to the same employee organization, the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements, and the extent to which the employees have common supervision.

Postdoctoral Scholars perform is research related. As the University of California, Office of the President's website states:

The University of California's reputation as a research powerhouse is built not only upon the strengths of its faculty researchers and scholars, but is due in large measure to the achievements of its students, both graduate and undergraduate. In addition, post-doctoral researchers play key roles in many laboratories, departments and research units, generating much of the leading-edge research that helps to keep California in the forefront of science and technology.

<http://www.ucop.edu/research/ucres.html> (Emphasis added.)

All Postdoctoral Scholars perform the same type of work, research, and they all work towards the same goal – engaging in leading edge research.

2. The History of Employee Representation With the Employer/The Extent to Which the Employees Belong to the Same Employee Organization

Other than the representation petition filed by the Union in 2006, there is no history of representation for any of the three titles at issue.

3. The Extent to Which the Employees Have Common Skills, Working Conditions, Job Duties, or Similar Educational or Training Requirements

The Postdoctoral Scholars, Employees, Fellows and Paid Directs, all have the same background requirements. The following is from the University of California, Berkeley website, <http://vspa.berkeley.edu/#postdoc>, and is typical of the requirements at other University campuses. Please note that the same requirements apply regardless of the Postdoctoral Scholar's title.

Postdoc Definition

Applicants must satisfy all of the following specifications:

- possess a Ph.D. or foreign equivalent conferred *less* than five years ago (however, extenuating circumstances, including health and family care, will allow for exceptions to this requirement);
- proposed appointment may not total more than five years of service including previous postdoctoral experience at other institutions;

- have an institutional source of funding, e.g., fellowship, traineeship, or equivalent external support;
 - pursue a program of research and training under the direction of a faculty member with approval of an academic department or organized research unit (ORU) and registration with the VSPA Program;
 - may not have been employed as an assistant professor, associate professor, or professor; and
 - the appointment term must be at least one month in duration.
4. The Extent to Which Employees Have Common Supervision

Since each Postdoctoral Scholar is assigned to a faculty mentor, each will have a different faculty advisor who also serves as the supervisor. The common thread is that each Postdoctoral Scholar has a faculty supervisor and this is the same for all Postdoctoral Scholars regardless of their title.

To determine whether a community of interest exists among employees, the Public Employment Relations Board ("PERB" or the "Board") considers, among other things, the qualifications, training and skills, contact and interchange with other employees, and job functions. (San Diego Community College District (2001) PERB Decision No. 1445; Rio Hondo Community College District (1979) PERB Decision No. 87; Office of the Santa Clara County Superintendent of Schools (1978) PERB Decision No. 59.) In considering whether a community of interest exists, "PERB eschews the use of a checklist approach and instead considers the totality of circumstances." (San Diego Community College District, supra, PERB Decision No. 1445, citing Monterey Peninsula Community College District (1978) PERB Decision No. 76.) The focus of the inquiry concerns whether employees share "substantial mutual interests." (Id.) Because the only essential difference between a Paid Direct and the other two titles is the fund source, when all of these factors are examined, there can be no doubt that the Paid Directs share a "substantial mutual interest" with the two other Postdoctoral Scholar titles.

Additionally, the other tests for unit appropriateness are met. For example, it will be more efficient for the University to have one set of terms and conditions of employment for all the Postdoctoral Scholars. Furthermore, having all the Postdoctoral Scholar titles in one unit will avoid fragmentation of a homogeneous employment group. See Government Code Section 3579 (a) (2)-(5). This is especially important for two reasons: (1) many of the Postdoctoral Scholars move from title to title as their source of funding changes, and (2) many Postdoctoral Scholars hold dual appointments as Employee and Paid Direct, Postdoctoral Scholars. It would be unworkable to have an individual doing one body of work covered by different terms and conditions of employment. Inclusion of the Paid Directs in the unit is consistent with the HEERA unit determination criteria.

B. Other Legal Issues

To reiterate, the University does not know why the PRO/UAW now seeks to exclude the Paid Directs from the unit when in 2006, the Union considered them to be part of the unit. The only apparent difference between the Paid Directs and the Employee Postdoctoral Scholars is that an outside agency supports the Postdoctoral Scholar. However, that fact is the same for the Fellows who also have their support originating outside of the University. Moreover, that distinction not only fails as a matter of fact, it fails as a matter of law.

As we know, the majority of sponsoring agencies are either silent on the issue of employment status or specifically state that there is no employment status. For the vast majority of the Paid Directs, the University is the only employer. The sponsoring agencies merely provide the money to support or help support the Paid Directs. Since the University controls all other terms and conditions of the appointments of Paid Directs, it is the employer. *See Alameda County Board of Education*, PERB Dec. No. 323 (1983) (finding the key inquiry in determining whether an entity is an employer under EERA is whether the alleged employer had "sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.")

It appears that there are a few agencies which maintain an employment relationship with Postdoctoral Scholars. PERB has adopted the following test to determine joint employer status: "where two or more employers exert significant control over the same employees -- where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment -- they constitute joint employers." *United Public Employees v. Public Employment Relations Board*, 213 Cal. App. 3d 1119, 1128 (1989); *NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982). "A finding that companies are 'joint employers assumes in the first instance that companies are 'what they appear to be' -- independent entities that have merely 'historically chosen to handle jointly . . . important aspects of their employer-employee relationship.'" *Browning-Ferris*, 691 F.2d at 1122. Thus for the Postdoctoral Scholar who maintains his academic position with the Kossuth University and for the UCAR Paid Directs, some of their terms and conditions of employment are controlled by their host institutions and others, such as control of their day to day work, are controlled by the University. These Paid Directs are joint employees of their sponsoring institution and the University, and the University and the sponsoring agency are joint employers.

However that joint employment relationship does not defeat the argument that these Paid Directs should be in the unit. California public sector labor law is clear on this point. In joint employment relationships, employees have more than one employer setting his or her terms and conditions of employment. *Unified Public Employees v. Public Employment Relations Board*, 213 Cal. App. 3d at 1128. Consequently, more than one bargaining relationship may exist covering the employees of joint employers or the employees of the joint employers may be

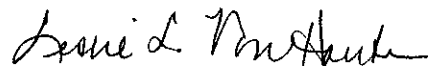
Regional Director Anita Martinez
September 5, 2008
Page 13

unrepresented with respect to certain terms and conditions of employment. This does not mean that they cannot be represented. In such a situation, each employer is charged with bargaining over only those employment terms it controls. Even when one employer falls under PERB jurisdiction and the other does not, the public employer still has a duty to bargain. See *Fresno Unified School Dist.*, PERB Decision No. 82 (1979); *The Regents of the University of California*, PERB Order No. Ad-293-H; *Engineers & Architects Assn.*, Unfair Practice Case No. LA-CE-12-M (2002) (overturned on other grounds in PERB Decision No. 1637-M). Thus, even if the sponsoring agency controlled some of the terms and conditions of the Paid Directs' appointments, it would not prevent the Union from bargaining with the University over the other terms and conditions of employment.

IV. CONCLUSION

The University respectfully requests that the Paid Directs be included in the proposed unit. Their inclusion is in concert with the HEERA unit determination, criteria and the Paid Directs share a "substantial mutual interest" with the Fellows and Employee Postdoctoral Scholars. There is no good factual, policy or legal reasons to exclude them from the proposed unit.

Very truly yours,



Leslie L. Van Houten
University Counsel

la

cc: Dennis Dudley
Myron Okada
Howard Pripas
Mark Westleye

179753.1



HEERA REPRESENTATION PETITION

DO NOT WRITE IN THIS SPACE Case No.:

Dated Filed:

INSTRUCTIONS: A request for recognition or intervention is to be filed with the appropriate Higher Education employer. A petition for certification must be filed with the appropriate PERB regional office. Proper filing includes concurrent service and proof of service of the HEERA Representation Petition as required by PERB regulations 51030, 51040 and 51100. Attach additional sheets if more space is required.

1. EMPLOYER (Name, address and telephone number) Employee's agent to be contacted: Leslie L. Van Houten

Regents of the University of California Title: University Counsel

1111 Franklin Street, 12th Floor Address and telephone, if different:

Oakland, CA 94607 1111 Franklin Street, 8th Floor

Oakland, CA 94607

(510) 987 - 9220 Ext. _____ (510) 987 - 9800 Ext. _____

2. TYPE OF PETITION (Check all that apply) DATE FILED:

REQUEST FOR RECOGNITION (RR) June 30, 2008

PETITION FOR CERTIFICATION (PC)

INTERVENTION

SEVERANCE (Filed as PC)

SEVERANCE (Filed as RR)

3. PROOF OF SUPPORT

Filed with: PERB Third Party*

Majority support 30% support 10% support

*Attach name, address & telephone number of third party, if applicable:

4. DESCRIPTION OF PROPOSED UNIT (Including class code and geographic location if other than a statewide unit is proposed)

Shall INCLUDE:
Please see Attachment A.

Shall EXCLUDE:
Please see Attachment A.

5. NUMBER OF EMPLOYEES IN PROPOSED UNIT:
5,000

6. IF A CURRENT MEMORANDUM OF UNDERSTANDING (MOU) EXISTS COVERING ANY EMPLOYEES PETITIONED FOR, INDICATE:

MOU EFFECTIVE DATE: _____

MOU EXPIRATION DATE: _____

NO AGREEMENT IS IN EFFECT

7. ORGANIZATION(S) RECOGNIZED OR CERTIFIED AS THE EXCLUSIVE REPRESENTATIVE OF OR KNOWN TO HAVE AN INTEREST IN REPRESENTING ANY OF THE EMPLOYEES COVERED BY THIS PETITION:

<u>Name of Organization</u>	<u>Address</u>	<u>Date of Recognition/Certification (if any)</u>
<u>N/A</u>		

8. PETITIONER (Name, address and telephone number) Petitioner's agent to be contacted: Maureen Boyd

Postdoctoral Researchers Organize (PRO/LAW); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America

6500 South Rosemead Blvd. Title: UAW International Representative

Pico Rivera, CA 90660 Address and telephone, if different:

(415) 538 - 0844 Ext. _____ (_____) _____ Ext. _____

DECLARATION

I declare that the statements herein are true to the best of my knowledge and belief.

PETITIONER'S AUTHORIZED REPRESENTATIVE: Maureen Boyd (Signature)

Title: UAW International Representative Date: 6/30/08

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
(213) 736-3127

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
(510) 622-1016

NOTICE OF REQUEST FOR RECOGNITION

PERB CASE NUMBER: SF-RR-914-H

DATE NOTICE WAS POSTED: _____

ON July 1, 2008 THE Regents of the University of California
(Date) (Employer)

RECEIVED FROM UAW International
(Employee Organization)

A REQUEST TO BE RECOGNIZED AS THE EXCLUSIVE REPRESENTATIVE OF EMPLOYEES
IN THE UNIT DESCRIBED ON THE REVERSE OF THIS NOTICE.

THE REQUEST IS BASED ON THE CLAIM THAT A MAJORITY OF THE EMPLOYEES IN THE
PROPOSED UNIT WISH TO BE REPRESENTED BY THE ABOVE NAMED EMPLOYEE
ORGANIZATION.

NOTICE IS HEREBY GIVEN THAT ANY OTHER EMPLOYEE ORGANIZATION DESIRING TO
REPRESENT ANY OF THE EMPLOYEES IN THE UNIT DESCRIBED IN THIS REQUEST FOR
RECOGNITION HAS THE RIGHT, WITHIN 15 WORKDAYS FOLLOWING THE DATE OF
POSTING OF THIS NOTICE, TO FILE WITH THE EMPLOYER AN INTERVENTION SUPPORTED
BY AT LEAST 30% OR AT LEAST 10% OF THE EMPLOYEES IN THE UNIT REQUESTED OR
OF THE EMPLOYEES IN A UNIT CLAIMED TO BE APPROPRIATE.

THE LAST DATE FOR FILING AN INTERVENTION IS: _____

SEE THE REVERSE OF THIS NOTICE FOR THE NAMES, ADDRESSES AND TELEPHONE
NUMBERS OF THE EMPLOYER, THE INCUMBENT EXCLUSIVE REPRESENTATIVE (IF ANY),
AND THE PETITIONER.

THIS NOTICE MUST REMAIN POSTED UNTIL: _____

BY: _____
(SIGNATURE OF EMPLOYER'S AUTHORIZED AGENT)

PERB Regulation 51035 requires that this Notice be conspicuously posted on all employee bulletin boards in each facility of the employer in which members of the proposed unit are employed. The Notice should be posted as soon as possible but in no event later than 10 days following receipt of the petition. The Notice must remain posted for at least 15 workdays.
PERB-4105 (02/01)

ATTACHMENT A
DESCRIPTION OF PROPOSED UNIT

SHALL INCLUDE:

All Postdoctoral Scholars and all Postdoctoral Fellows in titles and title codes including but not limited to:

Postdoctoral Scholars – Employee (Title Code 3252);

Postdoctoral Scholars – Fellow (Title Code 3253);

Postgraduate Researcher – FY (Title Code 3240);

Postgraduate Researcher – AY State Funds (Title Code 3243);

Postgraduate Researcher – AY Extramural Funds (Title Code 3245); and

Visiting _____ - Postdoc (Title Code 3370)

in a statewide unit at all University of California campuses, research programs and units.

SHALL EXCLUDE:

Postdoctoral Scholars – Paid Direct; employees defined by HEERA as managerial, supervisory and/or confidential; student employees whose employment is contingent on their status as students; and all employees of Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory and Los Alamos National Laboratory.

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Alameda,
State of California. I am over the age of 18 years and not a party to the within entitled
cause. The name and address of my residence or business is 2855 Telegraph Avenue, Suite 305
Berkeley, CA 94705

On June 30th, 2008, I served the HEERA Representation Petition, including
(Date) (describe document(s))

Attachment A and Cover Letter

on the parties listed below (include name, address and, where applicable, fax number) by (check
the applicable method or methods):

placing a true copy thereof enclosed in a sealed envelope for collection and delivery
by the United States Postal Service or private delivery service following ordinary business
practices with postage or other costs prepaid;

personal delivery;

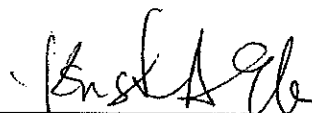
facsimile transmission in accordance with the requirements of PERB Regulations
32090 and 32135(d).

Regents of the University of California
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607

510 - 987 - 9800
510 - 987 - 9220

I declare under penalty of perjury that the foregoing is true and correct and that this
declaration was executed on June 30th, 2008, at Berkeley, California

Kristin Eborra
(Type or print name)


(Signature)

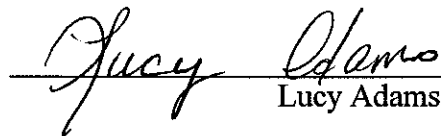
2 DECLARATION OF SERVICE BY MAIL

3
4 I, the undersigned, say: I am over the age of 18, employed in Alameda County,
5 California, in which county the within-mentioned mailing occurred, and not a party to the subject
6 cause. My business address is 1111 Franklin Street, 8th Floor, Oakland, California 94607-5200. I
7 served the attached: UNIVERSITY RESPONSE TO PRO/UAW REQUEST FOR
8 RECOGNITION by placing a copy thereof in a separate envelope for each addressee named
9 hereafter, addressed to each such addressee respectively as follows:

10 Margo A. Feinberg, Attorney
11 Schwartz, Steinsapir, Dohrmann & Sommers
12 6300 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90048

13
14 Each envelope was then sealed and, with the postage thereon fully prepaid,
15 deposited in the United States mail at Oakland, California on the date set forth below.

16 I declare under penalty of perjury under the laws of the State of California that the
17 foregoing is true and correct: Executed September 5, 2008 at Oakland, California.

18
19 
20 _____
Lucy Adams

21
22
23
24 93702.1

EXHIBIT
“B”

**ARTICLE 4
COMPENSATION**

A. GENERAL PROVISIONS

The provisions of this section apply only when the referenced terms are implemented.

1. Nothing shall preclude the University from providing compensation to Postdoctoral Scholars at rates above those required in this Article. Such rates may be provided on appointment, reappointment, anniversary date, and/or as a merit increase.
2. The provisions of this Article shall not apply to any Postdoctoral Scholar appointed on a grant (e.g., Einstein Fellows, Hubble Fellows) that restricts that Postdoctoral Scholar's remuneration to only the pay received by the grant.
3. For implementing salary/stipend changes in accordance with NIH updates to the NRSA Scale, the UC Postdoctoral Scholar salary/stipend minimum rate for Experience Level 0 shall equal Experience Level 2 of the new NRSA scale, and progress sequentially as described in Appendix __, Table 23.
4. When extramural agencies establish stipends at a rate less than the University-established salary/stipend minimum, and the campus elects to proceed with the appointment of a Postdoctoral Scholar, the campus shall provide additional funding to increase the salary/stipend level of the Postdoctoral Scholar to the established minimum. The supervisor shall arrange the additional funding prior to the start date of an appointment.
5. If the University provides a supplement to a Postdoctoral Scholar such that the Postdoctoral Scholar's total salary exceeds the Postdoctoral Scholar's base salary/stipend rate, continuance or discontinuance of the supplement is at the sole discretion of the University, unless the supplement is necessary to meet the salary/stipend requirements of this article.
6. When the requirements of the sponsoring agency exceed the requirements of this Agreement, with the exception of the provisions of §A.2. above, the requirements of the sponsoring agency shall control all salary increases and adjustments to the individual Postdoctoral Scholar's salary.

B. UC POSTDOCTORAL SCHOLAR EXPERIENCE BASED SALARY/STIPEND SCALE

Changes to the scale, as referenced in below, shall be reflected in Table 23 of the Academic Salary Scale – Appendix __ to the Agreement.

1. December 1, 2016 Scale Increases
 - a. On December 1, 2016, the University shall implement the projected FY 2017 NIH Ruth L. Kirschstein National Research Service Award (NRSA) Stipend levels in accordance with A. 3. Above.
 - b. On December 1, 2016, all full-time Postdoctoral Scholars shall have their salaries/stipends increased to the NIH experience based scale at the same experience step they are currently on. If the Postdoctoral Scholars

anniversary/reappointment date is December 1, 2016, the provisions of B. 1. c. shall also apply.

- c. Postdoctoral Scholar's with salary/stipend amount above the appropriate experience level will not receive an increase pursuant to this Section.
- d. Postdoctoral Scholars awarded a Kirschstein Fellowship, shall receive an increase on the effective date established in their revised NIH Award Notice.

2. Subsequent Salary/Stipend Scale Increases Through the Duration of the Agreement

Increases to the University Postdoctoral Scholar salary/stipend minima rates shall be made in accordance with the NIH Notice pertaining to the Ruth L. Kirschstein National Research Service Award (NRSA) Stipend Levels. The effective date of the change is the first day of the payroll period following the announcement, except for Postdoctoral Scholars awarded a Kirschstein Fellowship, for whom the effective date is the date established in their revised NIH Award Notice.

- a. The implementation of and/or changes to the UC Postdoctoral Scholar Salary Scale does not automatically affect the salaries of Postdoctoral Scholars, except for Kirschstein Fellows as provided above.
- b. The new minima will apply to individual salaries/stipends only when a Postdoctoral Scholar is newly appointed, reappointed, or on the anniversary date for those Postdoctoral Scholars with multiple year appointments.
- c. Individual Postdoctoral Scholar salary/stipend increases shall occur in accordance with the provisions of §B.C. below.

C. INDIVIDUAL POSTDOCTORAL SCHOLAR INCREASES

Once a Postdoctoral Scholar is appointed at or above the appropriate experience rate, all future appointments must be to at least the appropriate experience based salary/stipend rate.

- 1. In the event a Postdoctoral Scholar receives a multiple-year appointment, the Postdoctoral Scholar must thereafter receive salary/stipend increases to the appropriate experience-based salary/stipend rate on their anniversary date, as applicable in the scale referenced in Appendix ___ - Table 23..
- 2. If a Postdoctoral Scholar's salary/stipend amount is above the appropriate experience level on reappointment, or on their anniversary date for Postdoctoral Scholars with multi-year appointments, the Postdoctoral Scholar shall receive an increase to at least the minimum of the next appropriate salary/stipend experience level, or at least a two percent (2%) salary increase, whichever is greater, as applicable in the scale referenced in Appendix ___ - Table 23

Postdoctoral Scholar Experience Based Salary/Stipend Minima

UC Scale		Effective December 1, 2016
UC Appointment Step for Postdoctoral Scholar Experience Level	Projected NIH/NRSA Stipend for FY 2017	
0 (0-11 months)	\$48,216	
1 (12-23 months)	\$50,316	
2 (24-35 months)	\$52,140	
3 (36-47 months)	\$54,228	
4 (48-59 months)	\$56,400	
5 (60-71 months) by exception	\$58,560	

EXHIBIT
“C”

Appointment and Promotion: APM - 390 - Postdoctoral Scholars

Preamble

At the University of California, the postdoctoral experience emphasizes scholarship and continued research training for individuals who have recently completed a doctoral degree. The Postdoctoral Scholar conducts research under the general oversight of a faculty mentor in preparation for a career position in academe, industry, government, or the nonprofit sector. Postdoctoral work provides essential training in many disciplines for individuals pursuing academic careers and may include opportunities to enhance teaching and other professional skills.

Postdoctoral Scholars contribute to the academic community by enhancing the research and education programs of the University. They bring expertise and creativity that enrich the research environment for all members of the University community, including graduate and undergraduate students. The University strives to provide a stimulating, positive, and constructive experience for the Postdoctoral Scholar, by emphasizing the mutual commitment and responsibility of the institution, the faculty, and the Postdoctoral Scholar.

390-0 Policy

This policy defines and sets forth terms and conditions relating to the appointment of Postdoctoral Scholars. It applies to both (1) Postdoctoral Scholars who are employees of the University and (2) Postdoctoral Scholars who are appointed as fellows and are paid stipends by extramural agencies either directly or through the University.

390-4 Definition

Postdoctoral Scholar appointments are temporary positions with fixed end dates intended to provide a full-time program of advanced academic preparation and research training. Individuals pursuing clinical fellowships and residencies in the health sciences are excluded from appointment to these titles.

Postdoctoral Scholars train under the direction and supervision of faculty mentors in preparation for academic or research careers. In addition to pursuing advanced preparation in research, Postdoctoral Scholars may be approved to engage in other activities to enhance teaching and other professional skills. If formal teaching duties are assigned, a Postdoctoral Scholar must hold both a Postdoctoral Scholar title and an appropriate teaching title. Under this circumstance, the full-time Postdoctoral Scholar appointment percentage will be reduced accordingly.

Ordinarily, Postdoctoral Scholars are not permitted to serve as principal investigators on extramurally-sponsored contracts or grants. Because the University recognizes that proposal preparation is an important aspect of most postdoctoral training, campuses may permit Postdoctoral Scholars to serve as principal

investigators on awards that are restricted to Postdoctoral Scholars, on small awards for research expenses or travel, or in other circumstances approved by the Chancellor.

390-6 Responsibility

- a. Faculty mentors are responsible for guiding and monitoring the advanced training of Postdoctoral Scholars. In that role, faculty mentors should make clear the goals, objectives, and expectations of the training program and the responsibilities of Postdoctoral Scholars. They should regularly and frequently communicate with Postdoctoral Scholars, provide regular and timely assessments of the Postdoctoral Scholar's performance, and provide career advice and job placement assistance.
- b. The Chancellor has the authority to approve appointments and reappointments of Postdoctoral Scholars and to establish campus policies that supplement APM - 390. As provided in [APM - 100-6-d](#), the Chancellor may redelegate this authority.

390-8 Titles

The title of a Postdoctoral Scholar appointment is determined by the requirements of the funding agencies.

a. Postdoctoral Scholar – Employee

An appointment is made in the title "Postdoctoral Scholar – Employee" when (1) the agency funding the salary requires or permits the appointee to be an employee of the University, or (2) whenever General Funds, Opportunity Funds or other University discretionary funds are used to support the position.

b. Postdoctoral Scholar – Fellow

An appointment is made in the title "Postdoctoral Scholar – Fellow" when the Postdoctoral Scholar has been awarded a fellowship or traineeship for postdoctoral study by an extramural agency and the fellowship or traineeship is paid through a University account.

c. Postdoctoral Scholar – Paid Direct

An appointment is made in the title "Postdoctoral Scholar – Paid Direct" when the Postdoctoral Scholar has been awarded a fellowship or traineeship for postdoctoral study by an extramural agency and the agency pays the fellowship or traineeship directly to the Postdoctoral Scholar, rather than through the University. Such appointments shall have a "without-salary" status.

- d. Postdoctoral Scholars may be assigned to more than one Postdoctoral Scholar title concurrently depending on University and extramural funding agency requirements.

390-10 Appointment Criteria

Appointment as a Postdoctoral Scholar requires a doctoral degree (e.g., Ph.D., M.D.) or the foreign equivalent.

390-17 Terms of Service

- a. Postdoctoral Scholar appointments are temporary and have fixed end dates. Appointments are typically made for one year but may be made for up to three years. Campuses may require a minimum duration of appointment (e.g., one year).
- b. The total duration of an individual's postdoctoral service may not exceed five years, including postdoctoral service at other institutions. By exception, the Chancellor may grant an extension not to exceed a sixth year.
- c. Pursuant to [APM - 137-30-b](#), it is within the University's sole discretion not to reappoint a Postdoctoral Scholar.

390-18 Salary and Stipend

a. Scale

An authorized salary and stipend scale establishing minimum and maximum pay rates for Postdoctoral Scholar titles is issued by the Office of the President. This scale is adjusted annually by the general range adjustment, if any, approved by the President for non-exclusively represented, non-Senate academic appointees. For "Postdoctoral Scholars – Employee," campuses may establish steps within the scale.

b. Individual Range Adjustments

When providing range adjustments for other non-exclusively represented, non-Senate academic employees, campuses may provide range adjustments for "Postdoctoral Scholars – Employee" for salaries that fall between the minimum and maximum scale established by the Office of the President (see APM - 390-18-a).

c. Criteria

Campuses are responsible for establishing the criteria for determining the salaries of individual "Postdoctoral Scholars – Employee" within the salary and stipend scale. Such criteria may include, but are not limited to, the individual's qualifications, number of years of experience, performance as a Postdoctoral Scholar, funding availability in the discipline, and competitive salaries and stipends paid by other universities.

When a stipend or salary is established for a Postdoctoral Scholar, equity among all appointees in the three Postdoctoral Scholar titles within the academic unit shall be taken into consideration.

d. Provision of Minimum Pay Level

When extramural agencies establish stipends at a rate less than the University- established salary and stipend scale minimum, and the University elects to proceed with such an appointment, the campus is required to provide additional funding to bring the pay level of the Postdoctoral Scholar up to the established minimum. The mentor is required to arrange the additional funding prior to the begin date of an appointment.

e. Exceeding the Scale Maximum

The Chancellor may approve salaries above the top of the authorized scale in exceptional instances.

f. Supplementation of Fellowship Stipends

A Postdoctoral Scholar in the “Postdoctoral Scholar – Fellow” or “Postdoctoral Scholar – Paid Direct” title may have the Postdoctoral Scholar’s stipend supplemented with additional funding beyond the scale minimum. Supplementation must be in conformance with the terms of the fellowship or traineeship and, if paid with University funds, be paid in the “Postdoctoral Scholar – Employee” title. Except as provided in APM - 390-18-e for salaries paid above scale, the sum of stipend and salary may not exceed the maximum of the scale and must be consistent with campus criteria for determining the appropriate pay level of an individual Postdoctoral Scholar.

g. Annual Salary Increases

Salary increases may be given annually to “Postdoctoral Scholars – Employee” on the basis of merit in accordance with established campus procedures. The effective date of merit increases shall be established by the campus. Increases to “Postdoctoral Scholars – Fellow” and “Postdoctoral Scholars – Paid Direct” should be provided in accordance with the provisions of the extramural funding agency.

Salary and stipend increases are to be recommended and approved in accordance with campus procedures.

390-19 Appointment Percentage

- a. Appointments to the Postdoctoral Scholar title are full time, based on the expectation that the Postdoctoral Scholar will be fully involved in scholarly pursuits. In special cases, upon written request of the appointee and concurrence of the mentor, an exception may be granted by the Chancellor when the appointee is unable to make a full-time commitment for reasons of health, family responsibilities, or employment external to the University. Such a request must take into account extramural funding agency requirements, if any.

When a reduced-time appointment has been approved, the mentor and Postdoctoral Scholar shall sign a written agreement specifying the reduction in hours of work and concomitant responsibilities.

- b. When a Postdoctoral Scholar additionally holds a University teaching appointment or other University position, the percent time of the Postdoctoral Scholar appointment normally will be reduced so that the sum of the percent times of the two appointments equals 100 percent.

390-21 Notice of Appointment

- a. A Postdoctoral Scholar shall be provided a written notice of appointment, which shall include the mentor's name, begin and end dates of the appointment, salary/stipend amount, source of funding, and work eligibility requirements for U.S. citizens and non-citizens. A copy of APM - 390 and a summary of benefits, or corresponding website information, shall accompany the appointment notice. The Postdoctoral Scholar is required to accept the appointment in writing.
- b. Campuses may require additional information in appointment letters, such as whether the appointment is renewable and the conditions for renewal.

390-25 Annual Reviews

- a. In furtherance of fostering a Postdoctoral Scholar's career, the mentor shall conduct an annual review with the Postdoctoral Scholar. A written evaluation will be provided to the Postdoctoral Scholar upon request.
- b. Campuses may require the following for such reviews:
 - (1) An assessment of the Postdoctoral Scholar's progress to date, strengths, areas needing improvement, potential for a research career in the discipline, and a summary of expectations and activities for the following year;
 - (2) That a written summary of the review shall be provided to and signed by the Postdoctoral Scholar;
 - (3) That a review will be conducted whenever a salary increase is proposed;
 - (4) That any written evaluation will be maintained by the Graduate Division or other central office.

390-27 Equal Opportunity, Nondiscrimination, and Diversity

- a. The University of California is committed to a university environment that provides equal opportunity and promotes a diversity of backgrounds, perspectives, and experiences among faculty, staff, Postdoctoral Scholars, and the student body.

- b. Campuses should strive to have an inclusive, supportive environment that provides postdoctoral training opportunities and maximizes and values the potential of all Postdoctoral Scholars.
- c. Campuses are encouraged to post postdoctoral positions in order to promote equal opportunity for all candidates.

390-40 Grievances

- a. A Postdoctoral Scholar may present a grievance according to the following procedures.
- b. Each Chancellor may establish and issue additional procedures to implement this section of the policy. Prior to planned issuance, such procedures should be submitted to the Provost and Senior Vice President – Academic Affairs for approval.
- c. Each Chancellor shall designate an administrator or office as the grievance liaison for Postdoctoral Scholars (hereinafter referred to as grievance liaison).
- d. A grievance is a complaint filed by a Postdoctoral Scholar that alleges one or both of the following:
 - 1) A specific act by the University was arbitrary or capricious and adversely affected the Postdoctoral Scholar's then-existing appointment or training program. For the purposes of this policy, an act is not arbitrary or capricious if the decision-maker exercised reasoned judgment.
 - 2) A violation of applicable University rules, regulations, or policies occurred that adversely affected the Postdoctoral Scholar's then-existing appointment or training program.

A grievance alleging a violation of the Postdoctoral Scholar layoff policy (see APM - 390-45) or the Postdoctoral Scholar corrective action and dismissal policy (see APM - 390-50) shall be filed under APM - 390-40-d(2) only.

- e. Mediation

The intent of this policy is to encourage voluntary resolution including mediation when it is desired by both parties. Each campus is encouraged to implement a mediation process to facilitate voluntary resolution of grievances.

f. Step I – Informal Grievance Resolution

- (1) Step I of the grievance process is the attempt at informal resolution. Postdoctoral Scholars are encouraged to discuss concerns and/or complaints with their mentors, other senior faculty members, department heads, or the ombudsperson, and to attempt informal resolution at an early stage. Attempts at informal resolution do not extend the time limits

for filing a formal grievance unless a written extension is granted by the grievance liaison.

- (2) If informal resolution is attempted but unsuccessful, a grievant may request that the grievance liaison assist in resolving the grievance. Where appropriate, the grievance liaison may work with the parties to reach an informal resolution.
- (3) When a grievance alleges sexual harassment, the grievant may elect to substitute the campus Sexual Harassment Complaint Resolution Procedure as Step I. If a grievant selects this mechanism and the complaint is not resolved to the grievant's satisfaction, the grievant may file a Step II formal grievance in writing with the grievance liaison within fifteen (15) calendar days from the date the grievant is notified of the result of the pre-grievance complaint resolution process of the sexual harassment procedure or within forty-five (45) calendar days from the date the grievant filed the sexual harassment complaint, whichever is earlier.

g. Step II – Formal Grievance Review

- (1) If a grievance that is not resolved informally to the satisfaction of the grievant, the Postdoctoral Scholar may file a Step II formal grievance. A Step II grievance must be filed in writing with the grievance liaison within thirty (30) calendar days from the date on which the Postdoctoral Scholar knew, or could reasonably be expected to know, of the event or act that gave rise to the grievance, or within thirty (30) calendar days after the date of separation, whichever is earlier. Except by written mutual agreement of the parties, no additional issues shall be introduced after the Step II grievance has been filed. A written extension may be granted by the grievance liaison.
- (2) The formal written grievance must:
 - (a) identify the specific act and/or violation that is being grieved;
 - (b) state either (i) the specific acts to be reviewed, the name of the person(s) alleged to have carried out the act(s), the date(s) the alleged act(s) occurred, and a description of how the act(s) were arbitrary or capricious; or (ii) the University rules, regulations or policies that the grievant believes have been violated, the name of the person(s) alleged to have done the violation(s), the date(s) the alleged violation(s) occurred, and a description of how the rules, regulations, or policies have been violated;
 - (c) specify how the Postdoctoral Scholar's then-existing appointment or training program was adversely affected;
 - (d) specify the remedy requested.

- (3) Upon receipt of a formal written grievance, the grievance liaison shall complete an initial review of the grievance and determine whether the grievance is complete, timely, within the jurisdiction of APM - 390-40, and contains sufficient facts that support the allegations made in the grievance. Within ten (10) calendar days of receipt of the grievance, the grievance liaison shall notify the grievant in writing of the acceptance of the grievance. If the grievance is not accepted, the reasons shall be specified as follows:
 - (a) If the grievance liaison determines that the grievance is incomplete or factually insufficient, the grievant will have ten (10) calendar days from the date of the written notice to provide information to make the grievance complete, including additional facts. If the grievant fails to make the grievance complete or provide sufficient facts, the grievance will be dismissed.
 - (b) If the grievance liaison determines that the grievance is untimely or outside the jurisdiction of APM - 390-40, the grievance will be dismissed.
 - (c) If the grievance raises multiple issues, the grievance liaison will make a determination described above with regard to each issue. The grievance liaison may accept some issues and dismiss others pursuant to this review process.
 - (d) If all or part of a grievance is dismissed at this stage, the grievance liaison will provide the grievant with a written explanation of the basis for the dismissal.
- (4) When a formal written grievance is accepted, the grievance liaison shall forward the grievance and any supportive materials to the Step II reviewer for review and written decision, and notify the Step II reviewer and the grievant of the date the Step II response is due. Generally, the Step II reviewer will be the department or unit head. However, if the department or unit head took the action that is being grieved, the grievance liaison may exercise discretion and designate another administrator as the Step II reviewer, and so notify the department or unit head and the grievant.
- (5) If a Step II grievance raises allegations of discrimination, harassment, or retaliation in violation of APM - 035, the grievance liaison shall forward a copy of the grievance to the appropriate campus compliance office for review. The results of any related grievances or investigations shall be provided to the grievance liaison. At the discretion of the grievance liaison, information regarding related grievances or investigations may be forwarded to the Step II reviewer for consideration in making a Step II decision.
- (6) The Step II reviewer shall review the grievance and, if appropriate, shall investigate and/or meet with the parties. Within thirty (30) calendar days from the date of receipt of the grievance, the Step II reviewer shall send a written response to the grievant and the grievance liaison. The response will state whether the grievance is denied or upheld in whole or in part. If the grievance is denied in whole or in part, the response will state that the Postdoctoral Scholar has the right to appeal the decision to Step III of the grievance

procedure; if the grievance is upheld, the response will describe the remedy, if any, being awarded.

h. Step III – Formal Grievance Appeal

- (1) A formal grievance not resolved to the satisfaction of the Postdoctoral Scholar at Step II may be appealed in writing to Step III with the grievance liaison within fifteen (15) calendar days from the date on which the Step II response is issued. The Step III formal grievance appeal must set forth the unresolved issue(s) and the remedy requested. Except by written mutual agreement of the parties, no issues shall be introduced in the appeal that were not included in the original grievance.
 - (2) All formal grievance appeals will be subject to Step III administrative consideration. Within seven (7) calendar days from receipt of a formal grievance appeal, the grievance liaison shall forward the appeal, the Step II formal grievance, and the Step II response to the Chancellor for review and written decision.
 - (3) In reviewing the grievance appeal, the Chancellor may consult with the Graduate Council, other appropriate Academic Senate or administrative committees, or appropriate individuals.
 - (4) Based on the record, the Chancellor shall determine whether the Step II formal grievance was properly reviewed and whether the decision made at Step II shall be upheld, rejected, or modified.
 - (5) The Chancellor shall provide a final written decision to the Postdoctoral Scholar within thirty (30) calendar days following receipt of the formal grievance appeal. The written decision shall include a statement of the reasons if the decision of the Step II review is rejected or modified in whole or in part, including any remedy in whole or in part, and a statement that the decision is final.
- i. A Postdoctoral Scholar may self-represent or may be represented by another person at any stage of the grievance process. The University shall be represented as the Chancellor deems appropriate.
 - j. Prior to expiration of a time limit, extensions may be granted by the grievance liaison upon written request by either party. If the Postdoctoral Scholar fails to meet a deadline, the grievance will be considered resolved on the basis of the last University response. If a University official fails to meet a deadline, the Postdoctoral Scholar may move the grievance to the next step in the process. Time limits that expire on days that are not business days at the location where the grievance is filed shall be automatically extended to the next University business day.
 - k. The Postdoctoral Scholar and the Postdoctoral Scholar's representative, if employed by the University, shall be granted time off with pay to attend meetings convened by the University to consider grievances under APM - 390-40. Time spent by the Postdoctoral Scholar and the

Postdoctoral Scholar's representative in investigation and preparation of a grievance shall not be on pay status.

- l. If the grievance is sustained in whole or in part, the remedy shall not exceed restoring to the Postdoctoral Scholar the pay, benefits, or rights lost either as a result of the violation of University rules, regulations, or policies, or as a result of an arbitrary or capricious action, less any income earned from any other employment. Payment of attorney's fees shall not be part of the remedy. Unless specifically authorized by the grievance liaison, compensation shall not be paid for any period that is the result of extension(s) of time requested by or on behalf of the Postdoctoral Scholar.
- m. The following may be consolidated in one review: grievances of two or more Postdoctoral Scholars, where the grievances are related and consolidation is appropriate under the circumstances; two or more grievances filed by the same grievant that are based on the same incident, issues, or act; or two or more grievances filed by the same grievant that are based on the same pattern of conduct. The grievance liaison shall decide whether a consolidation is appropriate.
- n. [APM - 140](#) (Non-Senate Academic Appointees/Grievances) does not apply to individuals appointed in a Postdoctoral Scholar title.

390-45 Layoff

- a. Layoff is defined as the termination by the University of a Postdoctoral Scholar appointment prior to the end date as a result of appropriate funding becoming unavailable.
- b. In the event of layoff, the department, unit head, or other University official shall provide notification in writing to the Postdoctoral Scholar not less than thirty (30) calendar days in advance of the effective date of the early termination. Appropriate pay in lieu of notice may be given.
- c. A Postdoctoral Scholar who is subject to layoff may request that the Chancellor or other University officer supply a written summary concerning the unavailability of appropriate funding that is the reason for the layoff.
- d. Layoff decisions may be appealed in accordance with APM - 390-40, the Postdoctoral Scholar grievance policy.
- e. [APM - 145](#) (Non-Senate Academic Appointees/Layoff and Involuntary Reduction in Time) does not apply to individuals appointed in a Postdoctoral Scholar title.

390-50 Corrective Action and Dismissal

- a. The University may impose corrective action or dismissal when, in its reasoned judgment, the Postdoctoral Scholar's performance or conduct merits the action.
- b. Each Chancellor may establish and issue additional procedures for instituting corrective action and dismissal of Postdoctoral Scholars in accord with the standards and procedures set forth in APM - 390-50.
- c. Corrective action is the institution of one of the following:
 - 1) Written warning, which is a communication that informs the Postdoctoral Scholar of the nature of the inadequate performance or misconduct; requirements for continuation in the training program; and the probable consequence of continued inadequate performance or misconduct.
 - 2) Suspension, which is debarment from the training program without pay for a stated period of time. Unless otherwise noted, the terms of a suspension will include loss of normal Postdoctoral Scholar privileges, such as access to University property and parking and library privileges.
 - 3) Reduction in salary or stipend for a stated period of time. The amount and duration of the reduced salary or stipend shall be specified.
 - 4) Other action consistent with requirements of extramural fellowship agencies.
- d. Dismissal is the termination of a Postdoctoral Scholar's appointment initiated by the University, prior to the appointment end date, when, in the reasoned judgment of the University, the Postdoctoral Scholar's conduct or performance does not justify continuation.
- e. Prior to the institution of formal corrective action or dismissal, informal efforts to resolve the problem should be made, where appropriate.
- f. A Postdoctoral Scholar may be placed on immediate investigatory leave with pay, without prior written notice, for the purpose of reviewing or investigating conduct that in the judgment of the Chancellor requires removing the Postdoctoral Scholar from University premises. While on such leave, the Postdoctoral Scholar's return to University premises without written permission may create independent grounds for dismissal. Such investigatory leave shall be confirmed in writing after it is instituted.
- g. Before initiating the actions of suspension without pay, reduction in salary or stipend, dismissal, or other actions consistent with the requirements of extramural fellowship agencies, the University shall provide a written Notice of Intent to the Postdoctoral Scholar. The Notice shall state:

- 1) the intended action and the proposed effective date;
- 2) the reason(s) for the action, including a description of the inadequate performance or misconduct and any warnings that have been given;
- 3) the Postdoctoral Scholar's right to respond either orally or in writing within fourteen (14) calendar days of the date of issuance of the written Notice of Intent;
- 4) the name of the person to whom the appointee should respond.

No Notice of Intent is required for a written warning.

- h. A Postdoctoral Scholar who receives a written Notice of Intent shall be entitled to respond, either orally or in writing, within fourteen (14) calendar days of the date of issuance of the Notice of Intent. The response, if any, shall be reviewed by the administration.
- i. If the University determines to institute the corrective action or dismissal following the review of a timely response, if any, from the Postdoctoral Scholar, the University shall issue, within thirty (30) calendar days of the issuance of the written Notice of Intent, a written Notice of Action to the Postdoctoral Scholar of the corrective action or dismissal and its effective date.

The Notice of Action also shall notify the Postdoctoral Scholar of the right to grieve the action under APM - 390-40, the Postdoctoral Scholar grievance policy.

The Notice of Action may not include an action more severe than that described in the Notice of Intent.

A copy of the Notice of Action shall also be placed in the Postdoctoral Scholar's personnel file.

- j. A Postdoctoral Scholar may self-represent or may be represented by another person at any stage of the corrective action or dismissal process.
- k. Upon written request and prior to expiration of any time limits stated in APM - 390-50, the Chancellor may grant extensions, as appropriate.
- l. [APM - 150](#) (Non-Senate Academic Appointees/Corrective Action and Dismissal) does not apply to individuals appointed in a Postdoctoral Scholar title.

390-60 Sick Leave (Effective January 1, 2004)

- a. "Postdoctoral Scholars – Employee" are eligible for paid sick leave of up to twelve days per twelve-month appointment period.

Unless the extramural funding agency has different sick-leave requirements, “Postdoctoral Scholars – Fellow” and “Postdoctoral Scholars – Paid Direct” are also eligible for paid sick leave of up to twelve days per twelve-month appointment period.

Postdoctoral Scholars with appointments of less than twelve months are eligible for sick leave in proportion to the appointment period; for example, a Postdoctoral Scholar with a six-month appointment is eligible for up to six days of sick leave.

- b. For “Postdoctoral Scholars – Employee,” unused sick leave shall be carried forward to subsequent Postdoctoral Scholar appointments. Unless the extramural funding agency has different requirements, the unused sick leave of “Postdoctoral Scholars – Fellow” and “Postdoctoral Scholars – Paid Direct” shall be carried forward to subsequent Postdoctoral Scholar appointments.
- c. Sick leave shall be used in keeping with normally approved purposes, including personal illness; medical appointments; childbearing (see [APM - 715](#) and [760](#)); disability; and medical appointments of, illness of, or bereavement for a Postdoctoral Scholar’s child, parent, spouse, domestic partner, sibling, grandparent or grandchild.
- d. Sick leave shall be recorded in one-day increments when it is used.
- e. [APM - 710](#) (Leaves of Absence/Sick Leave) does not apply to individuals appointed in a Postdoctoral Scholar title.

390-61 Time Off (Effective January 1, 2004)

Postdoctoral Scholars do not accrue vacation. “Postdoctoral Scholars – Employee” are expected to take time off each academic year in the intersession and recess periods (which constitutes about four weeks, excluding University holidays) between the beginning of Fall Term and the end of Spring Term. If, however, the Postdoctoral Scholar’s training and research program involves work during these periods, it is expected that the mentor will approve equivalent time off at another mutually agreeable time. Unless the extramural funding agency contains provisions to the contrary, “Postdoctoral Scholars – Fellow” and “Postdoctoral Scholars – Paid Direct” are eligible to take time off under these same conditions. Postdoctoral Scholars will remain on pay status during intersession and recess periods or their alternatives.

390-62 Childbearing, Parental, and Family and Medical Leave

- a. Postdoctoral Scholars are eligible for childbearing leave, parental leave, and active service-modified duties as provided in [APM - 760](#) and for family and medical leave as provided in [APM - 715](#).
- b. Campuses may provide additional benefits that supplement or enhance the benefits specified in [APM - 760](#) or [APM - 715](#).

- c. Childbearing, parental, and family and medical leave policies for “Postdoctoral Scholars – Fellow” and “Postdoctoral Scholars – Paid Direct” are subject to the requirements of the Postdoctoral Scholar’s extramural funding agency.

390-63 Holidays

Official holidays for Postdoctoral Scholars are those administrative holidays published in the University Calendar.

390-64 Military Leave

Military leave for Postdoctoral Scholars is governed by [APM - 751](#) (Leaves of Absence/Military Leave).

390-65 Jury Leave

A Postdoctoral Scholar shall be eligible for a jury duty leave. Verification of service on jury duty shall be provided by the Postdoctoral Scholar to the University upon request. Pay for jury duty will not continue beyond the end date of the Postdoctoral Scholar’s appointment.

390-75 University of California Retirement Plan Membership

“Postdoctoral Scholars – Employee” contribute to the University of California Defined Contribution Plan as Safe Harbor participants and are not eligible for the University of California Retirement Plan. “Postdoctoral Scholars – Fellow” and “Postdoctoral Scholars – Paid Direct” are not eligible for either plan.

390-76 Benefit Plans

All Postdoctoral Scholars are eligible for designated health-care and other benefit plans.

390-80 Procedures

Campuses shall establish local procedures to implement APM - 390.

Revision History

September 23, 2020:

- Technical revision to remove gendered language and to correct minor grammatical errors.

For details on prior revisions, please visit the [Academic Personnel and Programs website](#).

**EXHIBIT
“D”**

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, UAW. Case 02-RC-143012

August 23, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA,
HIROZAWA, AND MCFERRAN

The threshold question before us is whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. Here, after a hearing directed by the Board, the Regional Director applied *Brown University*, 342 NLRB 483 (2004), where the Board found that graduate student assistants were not employees within the meaning of Section 2(3), and dismissed a petition filed by the Graduate Workers of Columbia-GWC, UAW, which seeks to represent both graduate and undergraduate teaching assistants, as well as graduate research assistants.¹ The Board granted review in this case on December 23, 2015, and then issued a notice and invitation to file briefs, identifying the primary issue presented, as well as subsidiary issues that would follow if *Brown University* were overruled.² We have carefully considered the record, the

¹ The petition defined the bargaining unit sought as follows:

Included: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers and Graders); All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.

Excluded: All other employees, guards and supervisors as defined in the Act.

² On January 16, 2016, the Board invited the parties and interested amici to file briefs addressing the following four issues:

1. Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act?

2. If the Board modifies or overrules *Brown University*, supra, what should be the standard for determining whether graduate student assistants engaged in research are statutory employees, including graduate student assistants engaged in research funded by external grants? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974)).

positions of the parties and the amici,³ the reasoning of the *Brown University* Board, and the views of our dissenting colleague, who endorses *Brown University* (as well as advancing arguments of his own).

For the reasons that follow, we have decided to overrule *Brown University*, a sharply-divided decision, which itself overruled an earlier decision, *New York University*, 332 NLRB 1205 (2000) (*NYU*). We revisit the *Brown University* decision not only because, in our view, the Board erred as to a matter of statutory interpretation, but also because of the nature and consequences of that error. The *Brown University* Board failed to acknowledge that the Act does not speak directly to the issue posed here, which calls on the Board to interpret the language of the statute in light of its policies. The *Brown University* Board's decision, in turn, deprived an entire category of workers of the protections of the Act, without a convincing justification in either the statutory language or the policies of the Act.

As we will explain, our starting point in determining whether student assistants are covered by the Act is the broad language of Section 2(3), which provides in relevant part that “[t]he term ‘employee’ shall include any employee,” subject to certain exceptions—none of which address students employed by their universities.⁴ The *Brown University* Board held that graduate assistants cannot be statutory employees because they “are primarily students and have a primarily educational, not economic, relationship with their university.”⁵ We disagree. The Board has the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they

3. If the Board concludes that graduate student assistants, terminal masters degree students and undergraduate students are statutory employees, would a unit composed of all these classifications be appropriate?

4. If the Board concludes that graduate student assistants, terminal masters degree students and undergraduate students are statutory employees, what standard should the Board apply to determine whether they constitute temporary employees?

³ Briefs were filed in support of the Petitioner by: American Association of University Professors (AAUP); American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); American Federation of Teachers (AFT); Ellen Dannin, Attorney; The General Counsel of the NLRB; Individual Academic Professors of Social Science and Labor Studies (IAP); National Association of Graduate-Professional Students (NAGPS); Service Employees International Union and Committee of Interns and Resident, SEIU Healthcare (SEIU-CIR); and United Steelworkers (USW). Filing in support of Columbia were: American Council on Education (ACE), et al.; Brown University et al.; Higher Education Council of the Employment Law Alliance (HEC); and National Right to Work Legal Defense and Education Foundation (NRW).

⁴ 29 U.S.C. §152(3).

⁵ *Brown University*, 342 NLRB at 487.

are compensated. Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.

The unequivocal policy of the Act, in turn, is to “encourag[e] the practice and procedure of collective bargaining” and to “protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.”⁶ Given this policy, coupled with the very broad statutory definitions of both “employee” and “employer,” it is appropriate to extend statutory coverage to students working for universities covered by the Act unless there are strong reasons *not* to do so.⁷ We are not persuaded by the *Brown University* Board’s self-described “fundamental belief that the imposition [sic] of collective bargaining on graduate students would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act.”⁸ This “fundamental belief” is unsupported by legal authority, by empirical evidence, or by the Board’s actual experience.

Thus, we hold today that student assistants who have a common-law employment relationship with their university are statutory employees under the Act. We will apply that standard to student assistants, including assistants engaged in research funded by external grants. Applying the new standard to the facts here, consistent with the Board’s established approach in representation cases, we conclude (1) that all of the petitioned-for student-assistant classifications consist of statutory employees; (2) that the petitioned-for bargaining unit (comprising graduate students, terminal Master’s degree students, and undergraduate students) is an appropriate unit; and (3) that none of the petitioned-for classifications consists of temporary employees who may not be included in the unit. Accordingly, we reverse the decision of the Regional Director and remand the proceedings to the Regional Director for further appropriate action.

⁶ 29 U.S.C. §151.

⁷ Cf. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001) (upholding Board’s rule allocating burden of proof to party asserting supervisory exception to Sec. 2(3), citing broad definition of “employee”).

⁸ 342 NLRB at 493. Under the Act, collective bargaining can never be “imposed” on employees by the Board; rather, the Act guarantees employees full freedom of choice in deciding whether or not to seek union representation, based on majority support. See National Labor Relations Act, §§1, 7, & 9, 29 U.S.C. §§151, 157, 159.

I. OVERVIEW OF PRECEDENT

A. Board precedent prior to *Brown University*

The Board has exercised jurisdiction over private, nonprofit universities for more than 45 years.⁹ During that time, the Board has permitted collective bargaining by faculty members at private universities and has had frequent occasion to apply the Act in the university setting.¹⁰ The Board first considered the status of graduate student assistants in *Adelphi University*, 195 NLRB 639 (1972). There, the Board held that graduate assistants should be excluded from a bargaining unit of university faculty members because they did not share a community of interest with the faculty. However, the *Adelphi* Board did not address whether the student assistants were statutory employees. Two years later, the Board held that certain university research assistants were “primarily students” and thus *not* statutory employees, observing that the relationship between the research assistants and the university was “not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer.” *The Leland Stanford Junior University*, 214 NLRB 621, 623 (1974). For similar reasons, the Board dismissed representation petitions for house staff at teaching hospitals in *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976) and *St. Clare’s Hospital*, 229 NLRB 1000 (1977).¹¹

In *Boston Medical Center*, 330 NLRB 152 (1999), the Board overruled *Cedars-Sinai* and *St. Clare’s Hospital* and held that interns, residents, and clinical fellows (house staff) at a teaching hospital were statutory employees entitled to engage in collective bargaining with the hospital over the terms and conditions of their employment. In so holding, the Board emphasized the broad scope of Section 2(3) and noted the absence of any statutory exclusion for students or house staff. And, contrary to *St. Clare’s Hospital*, in *Boston Medical Center* the Board found that the policies of the Act would be advanced by extending full statutory protection to house staff.¹²

The Board first held that certain university graduate assistants were statutory employees in its 2000 decision in *NYU*, *supra*. In *NYU*, the Board examined the statutory language of Section 2(3) and the common law agency

⁹ See *Cornell University*, 183 NLRB 329 (1970).

¹⁰ See, e.g., *Bradford College*, 261 NLRB 565 (1982).

¹¹ In *St. Clare’s Hospital*, the Board clarified *Cedars-Sinai*, observing that “national labor policy . . . preclude[d] the extension of collective-bargaining rights and obligations to situations such as the one” presented, which implicated predominantly academic, not economic, interests. 229 NLRB at 1002.

¹² 330 NLRB at 160.

doctrine of the conventional master-servant relationship, which establishes that such a “relationship exists when a servant performs services for another, under the other’s control or right of control, and in return for payment.”¹³ In so doing, the Board determined that “ample evidence exists to find that graduate assistants plainly and literally fall within the meaning of ‘employee’ as defined in Section 2(3)” and by the common law.¹⁴ The Board’s interpretation was based on the breadth of the statutory language, the lack of any statutory exclusion for graduate assistants, and the undisputed facts establishing that the assistants in that case performed services under the control and direction of the university for which they were compensated.

The NYU Board also relied on *Boston Medical Center* to support its policy determination that collective bargaining was feasible in the university context.¹⁵ In *Boston Medical Center*, the Board held that interns, residents and clinical fellows (collectively, house staff) at a teaching hospital were statutory employees entitled to engage in collective bargaining with the hospital over the terms and conditions of their employment.¹⁶ After 16 years, *Boston Medical Center* remains good law today—with no evidence of the harm to medical education predicted by the dissenters there—but NYU was overruled only a few years after it was decided, by a sharply divided Board’s 2004 decision in *Brown University*.

B. *Brown University*

In *Brown University*, the majority described NYU as “wrongly decided,” and invoked what it called the “underlying fundamental premise of the Act,” i.e. that the Act is “designed to cover economic relationships.”¹⁷ The Board further relied on its “longstanding rule” that the Board will decline to exercise its jurisdiction “over relationships that are ‘primarily educational.’”¹⁸ In so deciding, the *Brown University* majority rejected NYU’s reliance on the existence of a common-law employment relationship between the graduate students and the university, stating that “[e]ven assuming arguendo” such a relationship existed, “it does not follow that [the graduate assistants] are employees within the meaning of the Act.”¹⁹ That issue was “not to be decided purely on the basis of older common-law concepts,” but rather by determining “whether Congress intended to cover the indi-

vidual in question.”²⁰ Disavowing the need for empirical analysis, the *Brown University* majority instead relied on what it perceived to be a fundamental tenet of the Act and a prerequisite to statutory coverage: a relationship that is *primarily* economic in character, regardless of whether it constitutes common-law employment.

In addition to its declaration that graduate assistants, as primarily students, were necessarily excluded from statutory coverage, the *Brown University* Board also articulated a policy rationale based almost exclusively on the overruled decision in *St. Clare’s Hospital*, supra, finding that the *St. Clare’s* Board had correctly “determined that collective bargaining is not particularly well suited to educational decisionmaking and that any change in emphasis from quality education to economic concerns will ‘prove detrimental to both labor and educational policies.’”²¹ That determination ostensibly was supported by several factors: (1) that the student-teacher relationship is based on mutual academic interests, in contrast to the conflicting economic interests that inform the employer-employee relationship; (2) that the educational process is a personal one, in contrast to the group character of collective bargaining; (3) that the goal of collective bargaining, promoting equality of bargaining power, is “largely foreign to higher education”; and (4) that collective bargaining would “unduly infringe upon traditional academic freedoms.”²²

The *Brown University* dissenters, in stark contrast, noted that “[c]ollective bargaining by graduate student employees” was “increasingly a fact of American university life” and described the majority’s decision as “woefully out of touch with contemporary academic reality.”²³ According to the dissenters, the majority had misapplied the appropriate statutory principles and erred “in seeing the academic world as somehow removed from the economic realm that labor law addresses.”²⁴ The dissenters emphasized that the majority’s decision improperly disregarded “the plain language of the statute—which defines ‘employees’ so broadly that graduate students who perform services for, and under the control of, their universities are easily covered” and instead chose to exclude student assistants.²⁵ This decision was based on “policy concerns . . . not derived from the Act at all,” reflecting “an abstract view of what is best for American higher education—a subject far removed from the

¹³ 332 NLRB at 1206.

¹⁴ Id.

¹⁵ Id.

¹⁶ 330 NLRB at 164-65.

¹⁷ 342 NLRB at 483, 488.

¹⁸ Id. at 488.

¹⁹ Id. at 491.

²⁰ Id., citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

²¹ Id. at 489, citing 229 NLRB at 1002.

²² Id. at 489-490.

²³ Id. at 493 (dissent of Member Liebman and Member Walsh).

²⁴ Id. at 494.

²⁵ Id. at 493.

Board's expertise."²⁶ Contrary to the majority, the dissenters concluded, in line with the Board's decision in *NYU*, that the terms and conditions of graduate-student employment were adaptable to collective bargaining (as illustrated by experience at public-sector universities and at New York University itself) and that empirical evidence contradicted claims that "academic freedom" and educational quality were harmed by permitting collective bargaining.²⁷

We believe that the *NYU* Board and the *Brown University* dissenters were correct in concluding that student assistants who perform work at the direction of their universities for which they are compensated are statutory employees. That view better comports with the language of Section 2(3) of the Act and common-law agency principles, the clear policy of the Act, and the relevant empirical evidence.²⁸

II. DISCUSSION

A. The Brown University Board Erred by Determining that, as a Matter of Statutory Interpretation, Student Assistants Could Not Be Treated as Statutory Employees

For reasons already suggested, the *NYU* Board was on very firm legal ground in concluding that student assistants could be employees of the university within the meaning of Section 2(3) of the Act, while also being students—and thus permitting collective bargaining when student assistants freely choose union representation.²⁹ We now reaffirm that approach. Where student assistants have an employment relationship with their university under the common law test—which they do here—this relationship is sufficient to establish that the student assistant is a Section 2(3) employee for all statutory purposes. We do not hold that the Board is required to find workers to be statutory employees whenever they are common-law employees, but only that the Board may and should find here that student assistants are statutory employees.³⁰

²⁶ *Id.* at 497.

²⁷ *Id.* at 499–500.

²⁸ Leading scholars of labor law have long agreed with this view. See, e.g., Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X*, 89 B.U. L. Rev. 189, 222 (2009) ("In *Brown*, the Board majority departed from the most relevant precedent, effectively refused to engage any available evidence, and disagreed with the dissenters and with the *New York University* decision in a way that vitiated any claim for special deference to its expertise in labor relations."). See also Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Functions and Suggestions for Reform*, 58 Duke L. J. 2013, 2076–2077 (2009).

²⁹ *New York University*, supra, 332 NLRB at 1206.

³⁰ Cf. *NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995) (observing that "[i]n some cases, there may be a question about whether the Board's departure from the common law of agency with respect to

1. Section 2(3)

Section 2(3) of the Act defines "employee" to "include any employee," subject to certain specified exceptions.³¹ The Supreme Court has observed that the "breadth of [Section] 2(3)'s definition is striking: the Act squarely applies to 'any employee.'"³² The "phrasing of the Act," the Court has pointed out, "seems to reiterate the breadth of the ordinary dictionary definition" of the term, a definition that "includes any 'person who works for another in return for financial or other compensation.'"³³

The Court has made clear, in turn, that the "task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the Act,'" the Board.³⁴

None of the exceptions enumerated in Section 2(3) addresses students generally, student assistants in particular, or private university employees of any sort.³⁵ The absence of student assistants from the Act's enumeration of categories excluded from the definition of employee is itself strong evidence of statutory coverage.³⁶ Although Section 2(3) excludes "individuals employed . . . by any . . . person who is not an employer . . . as defined" in Section 2(2) of the Act, private universities do not fall within any of the specified exceptions, and, indeed, as previously noted, the Board has chosen to exercise jurisdiction over private, nonprofit universities for more than 45 years.³⁷

The Act does not offer a definition of the term "employee" itself. But it is well established that "when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning'" of the

particular questions and in a particular statutory context, renders its interpretation unreasonable," but finding no such issue presented because the "Board's interpretation of the term 'employee' [was] consistent with the common law"). See also *Office Employees Int'l Union, Local No. 11 v. NLRB*, 353 U.S. 313 (1957) (Board lacked discretion to refuse to assert jurisdiction over labor unions as employers, in face of clear Congressional expression in Sec. 2(2) of Act, defining "employer" to exclude "any labor organization (other than when acting as an employer)").

³¹ 29 U.S.C. § 152(3).

³² *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984).

³³ *Town & Country Electric*, supra, 516 U.S. at 90, quoting American Heritage Dictionary 604 (3d ed. 1992).

³⁴ *Sure-Tan, Inc.*, supra, 467 U.S. at 891, quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944).

³⁵ Nor is the employee status of students mentioned anywhere else in the Act. Thus, "Congress has not directly addressed the precise question at issue" in this case. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

³⁶ See *Sure-Tan, Inc.*, supra, at 891–892.

³⁷ See *Cornell University*, supra, 183 NLRB at 331–333, overruling *Trustees of Columbia University*, 97 NLRB 424 (1951).

term, with reference to “common-law agency doctrine.”³⁸ Not surprisingly, then, the Supreme Court has endorsed the Board’s determination that certain workers were statutory employees where that determination aligned with the common law of agency.³⁹ Other federal courts have done so as well.⁴⁰ In accordance with the statute’s broad definition and with the Supreme Court’s approval, the Board has interpreted the expansive language of Section 2(3) to cover, for example, paid union organizers (salts) employed by a company,⁴¹ undocumented aliens,⁴² and “confidential” employees,⁴³ among other categories of workers.

The most notable instance in which apparent common-law employees were found *not* to be employees under the Act, in spite of the absence of an explicit statutory exclusion, is the exception that proves the rule. In *Bell Aerospace*, cited by the *Brown University* Board, the Supreme Court held that “managerial employees” were not covered by the Act because Congress had clearly implied their exclusion by the Act’s design and purpose to facilitate fairness in collective bargaining.⁴⁴ As the Court concluded, giving employee status to *managers* would be contrary to this purpose: it would place managers, who would be expected to be on the side of the employer in bargaining, and non-managerial employees in the same bargaining “camp,” “eviscerat[ing] the traditional distinction between labor and management.”⁴⁵ The exclusion of managers rested on legislative history, along with

the intrinsic purpose and structure of the Act. No legislative history supports excluding student assistants from statutory coverage, nor does the design of the Act itself.⁴⁶

2. The *Brown* Board Did Not Adequately Consider the Text of Section 2(3)

The *Brown University* Board insisted that Section 2(3) of the Act must not be examined in isolation; rather, the Board must “look to the underlying fundamental premise of the Act, viz. the Act is designed to cover economic relationships.”⁴⁷ Certainly, the Supreme Court has suggested that, despite the centrality of common-law agency principles to employee status under the Act, “[i]n doubtful cases resort must still be had to economic and policy considerations to infuse [Section] 2(3) with meaning.”⁴⁸ But we reject the *Brown University* Board’s claim that finding student assistants to be statutory employees, where they have a common-law employment relationship with their university, is somehow incompatible with the “underlying fundamental premise of the Act.” The Act is designed to cover a particular type of “economic relationship” (in the *Brown University* Board’s phrase)—an employment relationship—and where that relationship exists, there should be compelling reasons before the Board excludes a category of workers from the Act’s coverage.

The fundamental error of the *Brown University* Board was to frame the issue of statutory coverage not in terms of the existence of an employment relationship, but rather on whether some other relationship between the employee and the employer is the primary one—a standard neither derived from the statutory text of Section 2(3) nor from the fundamental policy of the Act.⁴⁹ Indeed, in

³⁸ *Town & Country Electric*, supra, 516 U.S. at 94, quoting *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322–323 (1992).

³⁹ *Id.* at 94–95 (rejecting employer’s argument that common law principles precluded Board’s determination that paid union organizers, salts, were statutory employees, and holding that salts fell within reasonable construction of common law definition).

⁴⁰ See, e.g., *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563 (D.C. Cir. 2016), enfg. 357 NLRB 1761 (2011) (musicians in a regional orchestra are statutory employees); *Seattle Opera v. NLRB*, 292 F.3d 757, 761–762 (D.C. Cir. 2002), enfg. 331 NLRB 1072 (2000) (opera company’s auxiliary choristers are statutory employees). The Board has consistently applied common-law principles in its application of other concepts under the Act, including the Act’s broad definition of an employer. See, e.g., *Browning-Ferris Industries*, 362 NLRB No. 186 (2016) (test for joint-employer status).

⁴¹ *Town & Country Electric*, supra, 516 U.S. at 94 & 97–98 (common-law principles supported Board’s construction of the term “employee” to include salts).

⁴² *Sure-Tan*, supra, 467 U.S. at 892 (observing that undocumented aliens are “not among the few groups of workers expressly exempted by Congress” from the definition of “employee” and that “extending the coverage of the Act to [them] is consistent with the Act’s avowed purpose of encouraging and protecting the collective-bargaining process”).

⁴³ *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189–190 (1981).

⁴⁴ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

⁴⁵ *Id.* at 284 fn. 13.

⁴⁶ Contrary to Columbia’s assertion, the fact that Congress has not enacted legislation to countermand the Board’s *Brown* decision carries little weight. One is not to infer legislative intent based on Congress’s seeming acquiescence to an agency decision unless there is evidence that Congress actually considered the precise agency action at issue. *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 169–170, fn. 5 (2001). For this reason, we do not rely today on the fact that Congress took no action to overrule the Board’s earlier decision in *NYU*.

⁴⁷ 342 NLRB at 488.

⁴⁸ *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 168 (1971).

⁴⁹ Columbia also argues for our adoption of another, similar non-common-law standard: the “primary beneficiary” analysis used by the courts in some Fair Labor Standards Act (FLSA) cases, including cases involving the employee status of student interns. Because the FLSA definition of a statutory employee is not tethered to the common law (as the Act’s definition is), and because the FLSA reflects policy goals distinct from those of the Act, we are not persuaded that the “primary beneficiary” analysis should govern this case. For the same reason, we are not persuaded by Columbia’s contention that the Department of Labor’s recent guidance regarding whether graduate research assistants are employees within the meaning of the FLSA bears on the separate

spite of the *Brown University* Board’s professed adherence to “Congressional policies,” we can discern no such policies that speak to whether a common-law employee should be excluded from the Act because his or her employment relationship co-exists with an educational or other non-economic relationship.⁵⁰ The Board and the courts have repeatedly made clear that the extent of any required “economic” dimension to an employment relationship is the payment of tangible compensation. Even when such an economic component may seem comparatively slight, relative to other aspects of the relationship between worker and employer, the payment of compensation, in conjunction with the employer’s control, suffices to establish an employment relationship for purposes of the Act.⁵¹ Indeed, the principle that student assistants may have a common-law employment relationship with their universities—and should be treated accordingly—is recognized in other areas of employment law as well.⁵²

question of whether student assistants who have a common-law employment relationship with their universities should be regarded as employees under the NLRA.

⁵⁰ Our dissenting colleague observes that an “array of federal statutes and regulations apply to colleges and universities,” but he does not identify any statute or regulation that speaks directly (or even indirectly) to the key question here. That Congress is interested in supporting and regulating postsecondary education, as it surely is, does not demonstrate a Congressional view on whether or how the NLRA should be applied to student assistants.

Nor does our colleague identify any potential for conflict between the Act’s specific requirements and those of federal education law— with one possible exception, related to educational records, which we address below. See fn. 93, *infra*. That application of the Act in some specific respect might require accommodation to another federal law cannot mean that the Board must refrain from applying the Act, at all, to an entire class of statutory employers or statutory employees. Cf. *Sure-Tan, Inc.*, *supra*, 467 U.S. at 89–893, 903–904 (affirming Board’s holding that undocumented workers were statutory employees under NLRA, but concluding that federal immigration law precluded awarding certain remedies for periods when workers were not legally entitled to be present and employed in United States). See generally *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (“[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”) (quotations omitted).

⁵¹ See *Town & Country Electric*, *supra*, 516 U.S. at 88, 95 (although chief purpose of union salts seeking employment was to organize and form a union, not to benefit economically, they were nonetheless employees as they were both paid and controlled by the company with respect to ordinary workplace duties); *Seattle Opera Assn.*, 331 NLRB 1072, 1073 (2000) (observing that while auxiliary choristers received some nonmonetary benefit in the form of personal satisfaction at their involvement in the opera, which is characteristic of a volunteer relationship, they also received monetary compensation for their effort, and this fact, along with employer control, made them employees under the Act), *enfd.* 292 F.3d 757 (D.C. Cir. 2002).

⁵² For purposes of employment law, student assistants cannot be fairly categorized as “volunteers,” rather than employees. See *Restatement of Employment Law* §1.02 (“An individual is a volunteer and not an

In sum, we reject the *Brown* Board’s focus on whether student assistants have a “primarily educational” employment relationship with their universities.⁵³ The Supreme Court has cautioned that “vague notions of a statute’s ‘basic purpose’ are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration.”⁵⁴ The crucial statutory text here, of course, is the broad language of Section 2(3) defining “employee” and the language of Section 8(d) defining the duty to bargain collectively. It seems clear to us, then, that the Act’s text supports the conclusion that student assistants who are common-law employees are covered by the Act, unless compelling statutory and policy considerations require an exception. As we explain next, the relevant considerations strongly favor statutory coverage.

B. Asserting Jurisdiction over Student Assistants Promotes the Goals of Federal Labor Policy

1. Overview of Federal Labor Policy

Federal labor policy, in the words of Section 1 of the Act, is to “encourag[e] the practice and procedure of collective bargaining,” and to protect workers’ “full freedom” to express a choice for or against collective-

employee if the individual renders uncoerced services to a principal without being offered a material inducement”). As the *Restatement* explains, “[w]here an educational institution compensates student assistants for performing services that benefit the institution, . . . such compensation encourages the students to do the work for more than educational benefits and thereby establishes an employment as well as an educational relationship.” *Id.*, comment g. The *Restatement* illustrates this principle with the following example:

A is a graduate student in biochemistry at university P. In order to complete the degree requirements, A must work in a laboratory under P’s auspices, either for pay or as a volunteer. A works in the laboratory of a professor, for which A is paid a yearly stipend and given full tuition remission. The professor has secured grants to support the research that A is assisting. *A is an employee of P. P is providing A with significant benefits both in order to further A’s education and also to obtain A’s services on P’s funded research.*

Id., illustration 10 (emphasis added).

⁵³ The *Brown University* Board insisted that “there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process” and announced that the Board would “decline to take these risks with our nation’s excellent private educational system.” 342 NLRB at 493. The Board’s statement—coupled not only with the absence of any experiential or empirical basis for it, but also with the remarkable assertion that no such basis was required—strongly suggests that the Board acted based on little more than its own view of what was best for private universities. “No one in Congress,” an academic critic of *Brown University* has written, “would have wanted the Board to determine which workers may be protected by the Act on the basis of mere suppositions without consideration of how statutory or other goals would be served in practice by exclusion or coverage.” Michael C. Harper, *Judicial Control of the National Labor Relations Board’s Lawmaking in the Age of Chevron and Brand X*, 89 B. U. L. Rev. 189, 220 (2009).

⁵⁴ *Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993) (emphasis in original).

bargaining representation. *Permitting* student assistants to choose whether they wish to engage in collective bargaining—not prohibiting it—would further the Act’s policies.

Although the *Brown University* Board held that student assistants were *not* statutory employees, it also observed that, even assuming they were, the Board would have “discretion to determine whether it would effectuate national labor policy to extend collective bargaining rights” to student assistants and that, in fact, it would “*not* effectuate the purposes and policies of the Act to do so.”⁵⁵ We disagree not with the claim that the Board has some discretion in this area,⁵⁶ but with the conclusion reached by the *Brown University* Board, including its view that “empirical evidence” is irrelevant to the inquiry.⁵⁷ We have carefully considered the arguments marshaled by the Board majority in *Brown University* (as well as the arguments advanced here by Columbia and supporting amici, as well as our dissenting colleague), but find that they do not outweigh the considerations that favor extending statutory coverage to student assistants.

The claims of the *Brown* majority are almost entirely theoretical. The *Brown University* Board failed to demonstrate that collective bargaining between a university and its employed graduate students cannot coexist successfully with student-teacher relationships, with the educational process, and with the traditional goals of higher education. Labor law scholars have aptly criticized the *Brown University* decision as offering “no empirical support” for its claims, even though “those assertions are empirically testable.”⁵⁸

The National Labor Relations Act, as we have repeatedly emphasized, governs only the employee-employer relationship. For deciding the legal and policy issues in this case, then, it is not dispositive that student-teacher relationship involves different interests than the employee-employer relationship; that the educational process is individual, while collective bargaining is focused on the group; and that promoting equality of bargaining power is not an aim of higher education. Even conceded, all

these points simply confirm that collective bargaining and education occupy different institutional spheres. In other words, a graduate student may be both a student *and* an employee; a university may be both the student’s educator *and* employer. By permitting the Board to define the scope of mandatory bargaining over “wages, hours, and other terms and conditions of employment,” the Act makes it entirely possible for these different roles to coexist—and for genuine academic freedom to be preserved. It is no answer to suggest, as the *Brown University* Board did, that permitting student assistants to bargain over their terms and conditions of employment (no more and no less) somehow poses a greater threat to academic freedom than permitting collective bargaining by non-managerial faculty members, “[b]ecause graduate student assistants are students.”⁵⁹ That the academic-employment setting poses special issues of its own—as the Board and the Supreme Court have both recognized⁶⁰—does not somehow mean that the Act cannot properly be applied there at all.

2. Applying the Act to Student Assistants Would Not Infringe upon First Amendment Academic Freedom

The *Brown University* Board endorsed the view that “collective bargaining would unduly infringe upon traditional academic freedoms,” citing the “right to speak freely in the classroom” and a list of “traditional academic decisions” including “course length and content, standards for advancement and graduation, [and] administration of exams.”⁶¹ Insofar as the concept of academic freedom implicates the First Amendment, the Board certainly must take any such infringement into account.⁶² But there is little, if any, basis here to conclude that treating employed graduate students as employees under the Act would raise serious constitutional questions, much less violate the First Amendment.

The Supreme Court has made clear that academic freedom, in the constitutional sense, involves freedom from government efforts “to control or direct the *content*

⁵⁹ 342 NLRB at 490 fn. 26.

⁶⁰ See *NLRB v. Yeshiva University*, 444 U.S. 672, 680-681 (1980), citing *Syracuse University*, 204 NLRB 641, 643 (1973) (permitting law school faculty to vote separately from other university faculty members on questions of representation, based on divergent professional interests). In *Syracuse University*, the Board observed that in the “academic world,” the “basic interests recognized by the Act remain the same, but their interrelationship, the employer-employee relationship, and even the employee-employee relationship, does not squarely fit the industrial model.” 204 NLRB at 643.

⁶¹ 342 NLRB at 490, citing *St. Clare’s Hospital*, supra, 229 NLRB at 1003.

⁶² Cf. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (declining to construe Act as authorizing Board to exercise jurisdiction over lay faculty members at church-related schools, given serious First Amendment questions potentially raised).

⁵⁵ 342 NLRB at 492 (emphasis added).

⁵⁶ However, in exercising this discretion, we tread carefully and with an eye toward the Act’s purposes. In *Northwestern University*, 362 NLRB No. 167 (2015), we denied the protections of the Act to certain college athletes—without ruling on their employee status—because, due to their situation within and governance by an athletic consortium dominated by public universities, we found that our extending coverage to them would not advance the purposes of the Act. Here, conversely, we have no reason to believe that extending bargaining rights will not meaningfully advance the goals of the Act.

⁵⁷ 342 NLRB at 492-493.

⁵⁸ Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L. J. 2013, 2076-2077 (2009).

of the speech engaged in by the university or those affiliated with it.”⁶³ No such effort is involved here. Neither the *Brown University* majority, nor the parties or amici in this case, have explained how the “right to speak freely in the classroom” (in the *Brown University* Board’s phrase) would be infringed by collective bargaining over “terms and conditions of employment” for employed graduate students, as the Act envisions.⁶⁴

Further, the Supreme Court has explained that “[a]lthough parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of ‘wages, hours, and other terms and conditions of employment.’”⁶⁵ Defining the precise contours of what is a mandatory subject of bargaining for student assistants is a task that the Board can and should address case by case.⁶⁶ That approach will permit the Board to consider any genuine First Amendment issues that might actually arise—in a concrete, not speculative, context.⁶⁷

In upholding that Board’s authority to exercise jurisdiction over faculty members at private universities—provided that they are statutory employees—the Supreme Court has implicitly rejected the view that some undefined need to preserve academic freedom overrides that policies of the Act. In *Yeshiva University*, supra, the Court found that the full-time university faculty members there—whose “authority in academic matters [was] abso-

lute”⁶⁸—were excluded from the Act’s coverage, as managerial employees, on that basis. But the Court also observed that not all university faculty members will be managerial employees and that “professors may not be excluded [from statutory coverage] merely because they determine the content of their own courses, evaluate their own students, and supervise their own research.”⁶⁹ If the *Brown University* Board’s broad view of academic freedom were correct, then it seems highly unlikely that the *Yeshiva* Court could have contemplated collective bargaining by university professors (as, indeed, the Board has permitted for many years⁷⁰) in the face of such an obvious constitutional obstacle.

3. Empirical Evidence and the Board’s Experience Indicate That It Is Appropriate for the Board to Exercise Jurisdiction over Student Assistants

If, historically, the Board had permitted student assistants to engage in collective bargaining, and if actual experience over the years had demonstrated both that collective bargaining rarely proved beneficial to students and that it seriously harmed the ability of private universities to function effectively, then perhaps the Board would have had grounds for deciding that the Act cannot productively be applied in the university setting. But that is not the case, because collective bargaining by student assistants at private universities is historically uncommon. Neither administrative experience nor empirical evidence supported the *Brown University* Board’s determination that extending statutory protection to student assistants would be detrimental to the educational process.

It is telling, moreover, that the *Brown University* Board gave no weight at all to the analogous experience of public universities with collective bargaining by student assistants or to private universities’ experience with faculty bargaining, subjects we turn to below. The experience of student assistant collective bargaining at public universities provides no support for the fearful predictions of the *Brown University* Board. In the words of one scholar, “[t]here appear to be no major disasters that have arisen because of [graduate-student] unions,” and examples of collective bargaining in practice “appear to demonstrate that economic and academic issues on campus can indeed be separated.”⁷¹

⁶³ *University of Pennsylvania v. EEOC*, 493 U.S. 182, 197 (1990) (emphasis in original) (rejecting university’s First Amendment challenge to EEOC investigative subpoena under Title VII, seeking materials related to faculty-member tenure review process alleged to be discriminatory).

⁶⁴ National Labor Relations Act, §8(d), 29 U.S.C. §158(d) (“[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.”).

⁶⁵ *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674–675 (1981) (footnotes omitted).

⁶⁶ In this situation, as with other aspects of labor law, the “‘nature of the problem, as revealed by unfolding variant situations,’ requires ‘an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.’” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 575 (1978), quoting *Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961).

⁶⁷ In *Associated Press v. NLRB*, 301 U.S. 103, 132–133 (1937), which involved the discriminatory discharge of an editorial employee, the Supreme Court upheld Board jurisdiction over a news-gathering organization, despite arguments that it would violate the First Amendment freedom of the press. The Court found that Board’s reinstatement order “in nowise circumscrib[e]d” the First Amendment rights of the Associated Press, observed that the “publisher of a newspaper has no special immunity from the application of general laws,” and rejected the contention that because “regulation in a situation not presented would be invalid,” the Board could not exercise jurisdiction at all.

⁶⁸ 444 U.S. at 686.

⁶⁹ Id. at 690, fn. 31.

⁷⁰ See, e.g., *Bradford College*, 261 NLRB 565 (1982). See also *Pacific Lutheran University*, 361 NLRB No. 157 (2014).

⁷¹ Judith Wagner DeCew, *Unionization in the Academy: Visions and Realities* 98 (2003). See also Josh Rinschler, *Students or Employees? The Struggle over Graduate Student Unions in America’s Private Colleges and Universities*, 36 J. College & University L. 615, 639–640

Here, Columbia, its supporting amici, and our dissenting colleague defend the *Brown University* decision, echoing the claim that permitting collective bargaining by student assistants will harm the educational process. These arguments are dubious on their own terms. Our skepticism is based on the historic flexibility of collective bargaining as a practice and its viability at public universities where graduate student assistants are represented by labor unions and among faculty members at private universities.

As the *Brown University* dissenters observed, “[c]ollective bargaining by graduate student employees is increasingly a fact of American university life.”⁷² Recent data show that more than 64,000 graduate student employees are organized at 28 institutions of higher education, a development that began at the University of Wisconsin at Madison in 1969 and that now encompasses universities in California, Florida, Illinois, Iowa, Massachusetts, Michigan, Oregon, Pennsylvania, and Washington.⁷³ At these universities, to be sure, collective bargaining is governed by state law, not by the National Labor Relations Act.⁷⁴ Even so, the experience with graduate-student collective bargaining in public universities is of relevance in applying the Act, as the closest proxy for experience under the Act.⁷⁵

By way of example, as AFT notes in its amicus brief, the University of Illinois, Michigan State University, and Wayne State University include language in their graduate-assistant collective-bargaining agreements giving

(2010) (“[E]vidence from public institutions as well as from NYU during the period it had a graduate student union, suggests that unionization does not result in the sky falling.”).

⁷² 342 NLRB at 493 (dissent of Members Liebman and Walsh). The dissenters cited a body of scholarly literature examining this development. *Id.* at fn. 1. See Neal H. Hutchens & Melisa B. Hutchens, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 *Gonzaga L. Rev.* 105, 106–107 (2004); Daniel J. Julius & Patricia J. Gumpport, *Graduate Student Unionization: Catalysts and Consequences*, 26 *Review of Higher Education* 187, 191–196 (2002); Grant M. Hayden, “*The University Works Because We Do*”: *Collective Bargaining Rights for Graduate Assistants*, 69 *Fordham L. Rev.* 1233, 1236–1243 (2001). See also DeCew, *supra*, *Unionization in the Academy* at 89–110.

⁷³ J. Berry & M. Savarese, *Directory of U.S. Faculty Contracts and Bargaining Agents in Institutions of Higher Education* (2012). See also Daniel J. Julius & Nicholas DiGiovanni, Jr., *Academic Collective Bargaining: On Campus Fifty Years*. Center for Studies in Higher Education, Research & Occasional Paper Series: CSHE 4.13 at 5 (April 2013), available at www.cshe.berkeley.edu/publications.

⁷⁴ Sec. 2(2) of the Act excludes “any State or political subdivision thereof” from the definition of “employer.” 29 U.S.C. §152(2).

⁷⁵ *Cf. Management Training Corp.*, 317 NLRB 1355, 1357 (1995) (holding that Board will exercise jurisdiction over employers without considering extent of their control over purely economic terms and conditions of employment and citing “successful and effective bargaining” in public sector “where economic benefits play a small role”).

management defined rights concerning courses, course content, course assignments, exams, class size, grading policies and methods of instruction, as well as graduate students’ progress on their own degrees.⁷⁶ This is not to suggest a prescription for how individual collective-bargaining agreements should resolve matters related to the protection of academic freedom and educational prerogatives. Rather, these agreements show that parties can and successfully have navigated delicate topics near the intersection of the university’s dual role as educator and employer.

Other scholars, whose studies were cited in the *Brown University* dissent,⁷⁷ confirm that view. Based on their survey-based research of public universities, they reject the claim, for example, that collective bargaining will harm mentoring relationships between faculty members and graduate students.⁷⁸ More recent survey-based research found “no support” for the contentions that graduate student unionization “would harm the faculty-student relationship” or “would diminish academic freedom,” and observed that “[d]espite the NLRB’s focus on the potential negative effects on academic outcomes, graduate students themselves have likely been more concerned with the basic terms and conditions of employment.”⁷⁹ Although Columbia presented the testimony of an academic economist to address this study, its expert simply maintained that the study could not “rule out harm or benefit” to the faculty-student relationship from collective bargaining. When the best analytical evidence offered by Columbia suggests merely that neither harm nor benefit from collective bargaining can be ruled out, the dire predictions of the *Brown University* Board are undercut.

⁷⁶ Agreement by and between the Board of Trustees of the University of Illinois and Graduate Employees’ Organization IFT/AFT 6300 (August 16, 2012–August 15, 2017), available at <http://www.ahr.illinois.edu/geo.pdf>; Collective Bargaining Agreement between Michigan State University and The Graduate Employees Union, Local 6196, AFT-Michigan/AFL-CIO (May 2015–May 2019), available at <https://www.hr.msu.edu/documents/contracts/GEU2015-2019.pdf>; Collective Bargaining Agreement between Wayne State University and The Graduate Employees Organizing

Committee, AFT (May 2015–February 2018), available at http://provost.wayne.edu/pdf/geoc_contract_2015-2018_w_toc.pdf.

⁷⁷ 342 NLRB at 499–500.

⁷⁸ Julius & Gumpport, *supra*, *Graduate Student Unionization: Catalysts and Consequences*, 26 *Review of Higher Education* at 201, 209; Gordon J. Hewitt, *Graduate Student Employee Collective Bargaining and the Educational Relationship between Faculty and Graduate Students*, 29 *J. Collective Negotiations in the Public Sector* 153, 159–164 (2000).

⁷⁹ Sean E. Rogers, Adrienne E. Eaton, and Paula B. Voos, *Effects of Unionization on Graduate Student Employees: Faculty-Student Relations, Academic Freedom, and Pay*, 66 *Industrial & Labor Relations Rev.* 487, 507 (2013).

Columbia and supporting amici point to a few individual examples arising from the 28 public universities and 64,000 represented public university student assistants, along with NYU on the private side, in which, they contend, collective bargaining by student assistants has proven detrimental to the pursuit of the school's educational goals. They note the occurrences of strikes and grievances over teaching workload and tuition waivers. Similarly, they point to grievances over classroom assignments and eligibility criteria for assistantships. But labor disputes are a fact of economic life—and the Act is intended to address them.

Columbia and its supporting amici suggest that collective-bargaining demands would interfere with academic decisions involving class size, time, length, and location, as well as decisions concerning the formatting of exams. They also worry that disputes over whether bargaining is required for such issues may lead to protracted litigation over the parties' rights and obligations as to a given issue, for example, over the propriety of a university's change in class or exam format, thus burdening the time-sensitive educational process. However, to a large extent, the Board's demarcation of what is a mandatory subject of bargaining for student assistants, and what is not, would ultimately resolve these potential problems.⁸⁰ Moreover, there is no good reason to doubt that unions and universities will be able to negotiate contract language to delineate mutually satisfactory boundaries of their respective rights and obligations.⁸¹ Indeed, faculty members have successfully negotiated collective-bargaining agreements that address terms and conditions of employment at private universities while contractually ensuring academic freedom for decades.⁸²

⁸⁰ Indeed, decisions concerning management's right to control its fundamental operations and to produce a product of its choosing are issues of concern to manufacturing employers as well. Collective bargaining does not limit such a management right normally, unless the parties consent to it. See *First National Maintenance v. NLRB*, 452 U.S. 666, 677–679 (1981). However, in a common feature of collective bargaining across economic sectors, employers must, and do, routinely address incidental operational impacts based on their agreements with unions. For example, an employer chooses the amount and type of product it produces, but an employer must bargain about employees' hours of work and must operate within whatever work-hours constraint it agrees to.

⁸¹ Notably, the NYU graduate assistants union, voluntarily recognized by that university after the Board overruled its NYU decision, has given the university control over academic matters in the parties' collective-bargaining agreement.

⁸² As AAUP notes in its amicus brief, many of its unionized faculty chapters' collective-bargaining agreements expressly refer to and quote the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure*, which provides a framework that has proven mutually agreeable to many unions and universities. See *1940 Statement of Principles*

The notion that the parties themselves can resolve, through the bargaining process, many of the latent conflicts suggested by Columbia and amici (as well as by our dissenting colleague)—and hence forge successful bargaining relationships—is not a theoretical one. The experience at New York University is a case in point. Even after *Brown University* issued, NYU continued—after a brief interruption—to voluntarily recognize its graduate assistants union and successfully negotiated collective-bargaining agreements with that union.

Both the original and successor agreements at NYU addressed such matters as stipends, pay periods, discipline and discharge, job posting, a grievance-and-arbitration procedure, and health insurance—nearly all familiar mandatory subjects of bargaining across the private sector, which appear to have been successfully adapted to a university setting.⁸³ The agreements also incorporate a “management and academic rights” clause, which would tend to allay fears that collective bargaining will attempt to dictate academic matters.⁸⁴ In the most recent agreement, in effect from September 1, 2014, to August 31, 2020, the clause preserved the university's right to “determine . . . qualifications . . . and assignment of graduate employees; to determine the processes and criteria by which graduate employees' performance is evaluated; . . . to schedule hours of work; . . . to determine how and when and by whom instruction is delivered; . . . to introduce new methods of instruction; . . . and to exercise sole authority on all decisions involving

on Academic Freedom and Tenure, available at <https://www.aaup.org/file/1940%20Statement.pdf>.

⁸³ The evidence all seems to suggest that the bread-and-butter economic concerns reflected in the NYU collective-bargaining agreement are what drive American graduate students to seek union representation. See, e.g., Julius & Gumport, *supra*, *Graduate Student Unionization: Catalysts and Consequences*, 26 *Review of Higher Education* at 196 (“[D]ata show that the unionization of these individuals is driven fundamentally by economic realities.”); Gerrilynn Falasco & William J. Jackson, *The Graduate Assistant Labor Movement, NYU and Its Aftermath: A Study of the Attitudes of Graduate Teaching and Research Assistants at Seven Universities*, 21 *Hofstra Labor & Employment L. J.* 753, 800 (2004) (“Overwhelmingly, the respondents from the seven universities surveyed indicated that the most important issues to them were wages and health insurance”).

⁸⁴ Collective-Bargaining Agreements between NYU and International Union, UAW, AFL-CIO and Local 2110, Technical Office and Professional Workers, UAW, Sept. 1, 2001-Aug. 31, 2005, and Sept. 1, 2014-Aug. 31, 2020, Art. XXII. See *Brown University*, *supra*, 342 NLRB at 499 (dissent) (discussing agreement). The cited clause would seem to confirm the view of one scholar that the “historical development of professional norms of academic freedom creates a strong potential for faculty and GAs [employed graduate students] to find common interests in carrying out the core functions of the university.” Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 *Cornell J. L. & Public Policy* 263, 326 (2007) (discussing events at Cornell).

academic matters . . . decisions regarding who is taught, what is taught, how it is taught and who does the teaching.”⁸⁵

Moreover, to the extent disputes nonetheless do arise, the process of resolving such disputes over the boundaries of parties’ rights and obligations is common to nearly all collective-bargaining contexts in which management seeks to act in some way it believes is important to its business, including critical sectors such as national security and national defense. Not long after *Brown University* was decided, for example, the Board observed that “for over 60 years, in times of both war and peace, the Board has asserted jurisdiction over employers and employees that have been involved in national security and defense,” and that the Board could “find no case in which our protection of employees’ Section 7 rights had an adverse impact on national security or defense.”⁸⁶ Similarly, in the acute care hospital sector, the *Boston Medical Center* Board, *supra*, recognized house staff at teaching hospitals as statutory employees, and the Board’s experience since that decision has provided no support for one dissenting member’s prediction that “American graduate medical education [would] be irreparably harmed”⁸⁷ if the Board asserted jurisdiction over house staff.

These critical sectors have proven able to effectively integrate collective bargaining, with its occasional disputes and attendant delays, into their modes of doing business. We have no reason to doubt that the higher-education sector cannot do the same. Indeed, some of the practical concerns raised by Columbia and amici seem to be generic complaints about the statutory requirements inherent in a collective-bargaining relationship, rather than education-specific concerns. For example, it is posed as problematic by amici that a university may have to bargain, at least as to effect, over the elimi-

nation of assistantship positions. However, bargaining over staffing levels is a core concern of employees, and standard fare for collective bargaining. Fulfilling one’s obligation to bargain about job loss or staffing levels, or the effects thereof, has not proven unduly burdensome to countless other unionized workplaces.⁸⁸ Similarly, Columbia and amici, as well as our dissenting colleague, also raise the specter of strikes (and lockouts), and the impact they might have on the educational trajectory of students and on their considerable investment in their education; but the problems raised by strikes are common to nearly all industries in which the Board accords employees bargaining rights.⁸⁹

Moreover, we cannot give credence to the dissent’s speculation that, among other things, the provisions of the Act might negatively interfere with university confidentiality practices or standards of decorum, for example by authorizing abusive language by student assistants directed against faculty. The Act’s provisions pertaining to document production and the boundaries of protected conduct are, and always have been, contextual. The Board evaluates such claims in light of workplace standards and other relevant rules and practices.

Moreover, while focusing on a few discrete problems that may arise in bargaining—without considering the likelihood that they would both actually occur and not be amenable to resolution by bargaining partners acting in good faith—Columbia and amici neglect to weigh the

⁸⁸ See, e.g., *St. Anthony Hospital Systems*, 319 NLRB 46, 47 & 50 (1995) (discussing a hospital’s duty to bargain with nurses’ union over staffing levels).

⁸⁹ Strikes may affect the operations of an employer—especially in industries where the provision of goods and services may be time-sensitive. However, these already include many sectors where collective bargaining has long been a staple of workplace life, such as those involving caring for hospital patients, maintaining critical infrastructure, publishing newspapers, unloading billions of dollars in overseas freight, and teaching students in college or pre-college settings (as in the case of unionized faculty in private schools). In all of these situations, strikes pose the possibility of a disruption with significant costs, given the value and/or time-sensitivity of the goods and services involved. Yet, the Act permits collective bargaining in these sectors; and indeed, employers have incorporated the risks of economic conflict into their negotiation strategies and modes of doing business. The Board’s experience demonstrates that parties grasp the seriousness of recourse to economic weapons, and do not do so lightly or without the conviction that their position is worth fighting for. There is no reason to set universities apart, where the Act otherwise points toward coverage.

Our dissenting colleague points to the potential for unique consequences to student assistants in the event of a work stoppage, such as loss of academic credit and tuition waivers. As we have noted, the Act permits collective bargaining—and permits parties to decide for themselves what risks to take—even where there is a potential for economic disruption. However, to the extent a work stoppage cannot be avoided, parties will frequently resolve a strike or lockout on terms that address questions pertaining to vested rights and other such matters that arose because of the work stoppage.

⁸⁵ We recognize that part of the ostensible reason NYU decided to withdraw recognition from its union of student assistants was the recommendations of two university committees, which cited the union’s filing of grievances that were perceived as threatening to undercut NYU’s academic decisionmaking. We need not decide whether this perception was accurate or whether it would hold true over time and at other universities where student assistants organized. That employees may invoke their Sec. 7 rights to a greater or lesser degree has no bearing on whether the Act should be interpreted to grant them those rights. We note, in any case, that the NYU collective-bargaining relationship was new, that the collective-bargaining agreement was untested, and that ultimately the university appears to have prevailed in grievance-arbitration proceedings in its assertion of its academic prerogatives.

⁸⁶ *Firstline Transportation Security*, 347 NLRB 447, 453 (2006) (rejecting argument that Board should decline to assert jurisdiction over privately-employed airport security screeners, on national-security grounds).

⁸⁷ *Boston Medical Center*, *supra*, 330 NLRB at 182.

possibility of any *benefits* that flow from collective bargaining, such as those envisioned by Congress when it adopted the Act. In this connection, it is worth noting that student assistants, in the absence of access to the Act's representation procedures and in the face of rising financial pressures, have been said to be "ferverently lobbying their respective schools for better benefits and increased representation."⁹⁰ The eagerness of at least some student assistants to engage in bargaining suggests that the traditional model of relations between university and student assistants is insufficiently responsive to student assistants' needs. That is not to say collective bargaining will necessarily be a panacea for such discontent, but it further favors coverage by the Act, which was designed to ameliorate labor unrest.⁹¹

Finally, we disagree with the suggestion of our dissenting colleague that the Act's procedures are ill suited here, because student assistants have finite terms and because the academic world may experience a fast pace of development in fields of study, and thus because, in the time it takes for the Board to resolve a question arising under

⁹⁰ David Ludwig, *Why Graduate Students of America Are Uniting*, *The Atlantic*, available at <http://www.theatlantic.com/education/archive/2015/04/graduate-students-of-the-world-unite/390261/>. See also Rachel Bernstein, *Ivy League Graduate Students Push for Unionization*, *Science*, available at <http://www.sciencemag.org/careers/2015/04/ivy-league-graduate-students-push-unionization> ("Graduate students' concerns include inadequate health insurance, high prices for dependent coverage on student health insurance policies, and insufficient child care and family leave support."). Indeed, some scholarship suggests that universities are actively seeking to derive greater profit from instructional and research activities, and to lower their teaching costs. Such endeavors—to lower labor costs to increase profit—are hallmarks of the sort of economic dynamic in which, historically, employees' bargaining rights have played an important countervailing role. See generally *The Corporatization of Higher Education*, 39 *Monitor on Psychology* 50 (2008), available at <http://www.apa.org/monitor/2008/12/highered.aspx>.

⁹¹ Indeed, it is important to note the policy judgment embodied in the Act: that collective bargaining can help avert workplace unrest that may occur in the absence of a process for employees to choose representation, bargain collectively, and resolve disputes peacefully. See *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488 (1960) (good-faith bargaining "may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take."). The Act is designed to lessen conflict by channeling disputes into structured negotiations and reflects the judgment of Congress that collective bargaining, with its occasional attendant workplace conflicts such as strikes and lockouts, is a right to be accorded broadly and across many industries.

It is noteworthy that at NYU, graduate assistants struck after the Board reversed its *NYU* decision and the school withdrew recognition from their union. Without the protection of the Act, student assistants lacked recourse to the orderly channels of bargaining and instead chose to resort to more a disruptive means of resolving their dispute with the University.

the Act, there may be significant turnover or other changes involving affected employees. It goes without saying that the resolution of cases under the Act, both representation and unfair labor practice cases, before the Board and the courts can be time-consuming. However, this is simply not a basis on which to deny the Act's protections to student assistants. The alternative—to deny coverage because of the effects of procedural delays—would seem to countenance the denial of the Act's coverage to large groups of employees whose tenures are short or industries where there is a rapid pace of change.⁹²

In sum, there is no compelling reason—in theory or in practice—to conclude that collective bargaining by student assistants cannot be viable or that it would seriously interfere with higher education. We have put suppositions aside today and have instead carefully considered the text of the Act as interpreted by the Supreme Court, the Act's clearly stated policies, the experience of the Board, and the relevant empirical evidence drawn from collective bargaining in the university setting. This is not a case, of course, where the Board must accommodate the National Labor Relations Act with some other federal statute related to private universities that might weigh against permitting student assistants to seek union representation and engage in collective bargaining. Finding student assistants to be statutory employees, and permit-

⁹² In cases involving seasonal workplaces or those with significant turnover, the Board has held elections even though, when there have been employer challenges, bargaining may not begin until well after the election. In this connection, the Board generally presumes that new employees support the union in the same proportion as those who voted. See generally *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 779 (1990). Otherwise, it would be difficult for employees in any workplace with high turnover to ever achieve representation, because the nature of administrative adjudication, as well as the provision of due process to an employer's challenges to certification may delay a final ruling on certification. Conversely, when an employer's operation is seasonal in nature or otherwise involves peaks and valleys in employment, the Board retains the discretion to adjust the election date to ensure that a representative group of employees will be able to express their choice concerning representation. See, e.g., *Tusculum College*, 199 NLRB 28, 33 (1972) (adjusting date of election to the beginning of the fall semester to ensure that a representative complement of the petitioned-for faculty would have an opportunity to express their wishes).

In unfair labor practice cases, remedies are commonly applied after affected individuals have ceased working for an employer. But remedies are tailored to address the violation of the Act relative to the context in which they are applied. Backpay or other monetary remedies may still be appropriate even after an individual is no longer in an employment relationship with a respondent. Other remedies, such as in a bad-faith bargaining case, involve the unit as a whole, and thus may be implemented in the future, notwithstanding the turnover of individual employees. Notice-posting requirements ensure that future complements of employees are aware of any violations and provide assurances that the violations will not continue in the future.

ting them to seek union representation, does not conflict with any federal statute related to private universities, as far as we can discern. Certainly the *Brown University* Board cited no statutory conflict, nor have the parties and amici in this case.⁹³ Our conclusion is that affording student assistants the right to engage in collective bargaining will further the policies of the Act, without engendering any cognizable, countervailing harm to private higher education.

Accordingly, we overrule *Brown University* and hold that student assistants who have a common-law employment relationship with their university are statutory employees entitled to the protections of the Act.

⁹³ Where a party does not actually raise a supposed conflict between the Act and another federal statute, the Board is not required to consider the issue. *Can-Am Plumbing, Inc.*, 350 NLRB 947, 947–948 (2007). For his part, our dissenting colleague takes us to task for failing to accommodate the Act with the “broad range of federal statutes and regulations [that] apply to colleges and universities,” which “govern, among other things, the accreditation of colleges and universities, the enhancement of quality, the treatment of student assistance, graduate/postsecondary improvement programs, and the privacy of student records.” But our colleague does not explain how any one of these education statutes and regulations bears on the specific issue posed in this case or how the Board should accommodate the Act to them—short of not applying our statute at all to student assistants. That alternative, of course, is disfavored, unless a conflict between two federal statutes is truly irreconcilable. See *Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016) (rejecting asserted conflict between NLRA and Federal Arbitration Act). There is no such conflict here, as we have already explained. See fn. 50, supra.

That an industry or economic sector is governed in certain respects by other federal laws, in addition to being covered by the NLRA, cannot mean that the Board must determine, in the abstract, whether the general policies of those other laws might be better accomplished if the Act did *not* apply, notwithstanding the absence of any exemption from coverage in the statutory text or the legislative history. It is far too late in the day—45 years after the Board’s decision in *Cornell University*, supra—to argue that the Act cannot safely be applied to private universities. The supposed conflicts our colleague conjures would seem to arise, for example, in cases where the Board applies the Act to university faculty members, but there is no suggestion in our case law that an actual conflict has ever arisen (or even been raised by a university employer).

Our colleague identifies *one* specific, potential conflict between the NLRA and federal education law related to the disclosure of educational records, where Sec. 8(a)(5) of the Act, which grants unions the right to information necessary for carrying out their collective-bargaining duties, conceivably could require a disclosure that the Family Educational Rights and Privacy Act (FERPA) might otherwise prohibit. Any such conflict can and should be addressed in the particular factual setting in which it arises. Suffice it to say that the Act recognizes that a union’s right to information may, in a particular context, be subordinated to a legitimate confidentiality interest. See, e.g., *Olean General Hospital*, 363 NLRB No. 62, slip op. at 7–8 (2015) (considering state laws protecting patient confidentiality). See generally *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

III. APPLICATION TO THIS CASE

We now apply our holding to the facts of this case. For the reasons that follow, we conclude (1) that all of the petitioned-for student-assistant classifications consist of statutory employees; (2) that the petitioned-for bargaining unit (comprising graduate students, terminal Master’s degree students, and undergraduate students) is an appropriate unit; and (3) that none of the petitioned-for classifications consists of temporary employees who must be excluded from the unit by virtue of the limited length of their employment.

A. Statement of Facts

Columbia is a nonprofit postsecondary educational institution located in New York City. Columbia’s major sources of annual revenue include tuition (net revenue of \$940 million in 2015, nearly a quarter of operating revenue) and government contracts and grants (\$750 million).⁹⁴

Graduate students at Columbia are selected by the faculty of the academic departments into which they are accepted on the basis of academic performance, as demonstrated by educational background and standardized test scores. In general, Ph.D. candidates spend five to nine years of study within their discipline, during which they take coursework, as well as prepare a doctoral thesis, that the candidates develop with guidance of faculty or in connection with their laboratory work. During their enrollment, candidates are subject to various academic requirements, including timely progress toward a thesis and proficiency in coursework. Most Ph.D. candidates are required to take on teaching duties for at least one semester as part of their academic requirements, although many departments require additional semesters of teaching as a condition for obtaining a degree.⁹⁵

Columbia fully funds most Ph.D. student assistants, typically providing tuition and a stipend, for at least their

⁹⁴ See Consolidated Financial Statements, The Trustees of Columbia University in the City of New York, available at <http://finance.columbia.edu/files/gateway/content/reports/financials2015.pdf>. Tuition and government grants are the second and third largest revenue streams. Columbia, which operates a hospital, earned the most revenue, approximately \$1 billion, from patient care.

A substantial portion of the tuition revenue comes from students in graduate and professional programs, including law and business. However, the approximately 8500 undergraduates at Columbia, paying approximately \$25,000 in base tuition per semester, generate about \$376 million in tuition revenue, of which only \$148 million is offset by grant aid from Columbia. See Columbia University, Institutional Grant Aid by School, 2014–2015, available at http://www.columbia.edu/cu/opir/abstract/opir_institutional_grant_aid_1.htm.

⁹⁵ There is some variation as to the specifics of degree program requirements and the nature of student assistant duties across schools and programs at Columbia.

first 5 years of study. In most students' second through fourth year, taking on teaching or research duties is a condition for full receipt of such funding. For most Ph.D. candidates, the first and fifth years are funded without a condition of service. In students' sixth year and beyond, teaching-based support may be available. Research-based financial support, unlike teaching support, frequently comes in whole or in part from sources outside the University. Grants from government or other outside entities, generally to support a specified research task, often cover research assistants' financial awards. However, the University will make up any shortfall if outside grants provide a level of funding that falls below the standard graduate funding package.

Terminal Master's degree students (as opposed to those who earn the degree as an intermediate step toward earning a Ph.D.) typically earn their degrees in shorter time periods and do not prepare a thesis. They receive very little financial aid, although some take on teaching duties for which they receive compensation.

The nature of teaching duties for a teaching assistantship varies. Columbia's teaching assistants, known as Instructional Officers, fall into various subsidiary categories, which involve varying levels of discretion and involvement in course design. Undergraduate, Master's degree, and Ph.D. student assistants can all serve in teaching assistant roles, with some similarities in their duties, although Ph.D. teaching assistants may take on the most advanced duties. Notably, some Instructional Officers teach components of the core curriculum, which is Columbia's signature course requirement for all undergraduate students regardless of major. Instructional Officers generally work up to 20 hours per week, and they are typically appointed for one or two semesters at a time.

Instructional Officers include the specific classifications of Teaching Fellows and Teaching Assistants. Teaching Fellows are doctoral students in the Graduate School of Arts and Sciences, while Teaching Assistants may be either doctoral or Master's degree students and perform similar functions outside the Graduate School of Arts and Sciences. Teaching Fellows and Teaching Assistants spend 15–20 hours a week undertaking a wide range of duties with respect to a course. Their duties may include grading papers and holding office hours, leading discussion or laboratory sessions, or assuming most or all the teaching responsibilities for a given course. Columbia maintains other, specialized teaching-assistant funding as well. Instructional officers who participate in the Teaching Scholars Program, a category that includes Ph.D. students who are somewhat advanced in their studies, teach courses that they have designed for

undergraduates in their junior or senior years. Undergraduates serve in the Teaching Assistant III classification. They are responsible for grading homework and running laboratory or problem sections that are ancillary to large classes within the School of General Studies and Columbia College.

The category of Instructional Officers also includes classifications of Preceptors and Readers (sometimes referred to as "Graders"). Preceptors are graduate assistants who teach significant undergraduate courses with high levels of independence. These positions are generally available only to graduate students far along in their studies because they require the highest level of teaching ability. Preceptors hold office hours, design and grade all exams and assignments in their courses, and assign final grades to their students. Readers/Graders are Master's degree students who are appointed to grade papers under the direction of a course instructor. Finally, Course Assistants, who are not Instructional Officers and do not receive semester-long appointments, assist faculty with administering classes by performing clerical tasks that may include proctoring exams, printing and collecting homework, answering students' questions, and occasionally grading assignments.

Research Officers generally participate in research funded by outside entities. The research grants specify the nature of the research and the duties of the individuals working on the grant. The revenue from the grant beyond the amounts allotted to research assistantships goes to Columbia's general operating expenses. Graduate Research Assistants in Ph.D. programs must both comply with the duties specified by the grant and simultaneously carry out research that they will ultimately present as part of their thesis.⁹⁶ Departmental Research Assistants, by contrast, are Master's degree students and are appointed and funded by the University and provide research assistance to a particular department or school within the University.

Teaching and research occur with the guidance of a faculty member or under the direction of an academic department. In the teaching context, poor performance by an instructional officer is addressed through remedial training, although in one instance poor performance resulted in the University's removal of a student's teaching duties, and the cancellation of his stipend.

B. Application of the Revised Section 2(3) Analysis

For the reasons that follow, we conclude that the petitioned-for student-assistant classifications in this case⁹⁷

⁹⁶ Training grant recipients are subject to slightly different conditions, and are discussed below.

⁹⁷ As reflected in its petition, the Union here seeks to represent:

comprise statutory employees: individuals with a common-law employment relationship with Columbia University. At the hearing before the Regional Director, Columbia seemingly conceded⁹⁸ that, if the Board were to adopt the common-law test, the petitioned-for individuals—with the exception of students operating under training grants—were employees under the Act. In its brief to the Board on review, however, Columbia argues that research assistants are not common-law employees, citing the Board’s decision in *Leland Stanford*, supra. With respect to teaching assistants, Columbia confines itself to arguing that the common-law test should not be the standard of statutory employment (a position we have rejected). Below, we begin by examining the common-law employment status of Columbia’s student assistants generally. We then address arguments specific to the status of Columbia’s research assistants and overrule *Leland Stanford* because its reasoning cannot be reconciled with the general approach we adopt today.

1. Instructional Officers⁹⁹

Common-law employment, as noted above, generally requires that the employer have the right to control the employee’s work, and that the work be performed in exchange for compensation.¹⁰⁰ That is the case here.

All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.

⁹⁸ At the hearing, Columbia’s counsel stated, “If the Board finds that students who provide services to their institutions are employees based on common law test of employment, if you will, then our position would be that the graduate research assistants and the teaching assistants would be considered employees and part of an appropriate bargaining unit, but that the students on training grants are simply not employees because they’re not employed in a University position, that they’re simply supported by the Government to be students and they don’t provide a service to the University.”

⁹⁹ This category encompasses the Teaching Assistants, Teaching Fellows, Preceptors, and Readers/Graders named in the petition. Course assistants, a classification named in the petition, do not appear to be Instructional Officers and are not appointed on a semester-long basis. The increments of their employment—they may work in less-than-semester-long intervals—may raise questions about their eligibility. However, we leave such determinations to the Regional Director in determining an eligibility formula (as we discuss, infra) in the first instance.

¹⁰⁰ See, e.g., *Seattle Opera*, supra, 292 F.3d at 762 (“[T]he person asserting statutory employee status [under the Act] 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.”) (emphasis in original). Accord *Restatement of Employment Law* §1.02 (2015) (“Where an educational institution

Here, the University directs and oversees student assistants’ teaching activities. Indeed, the University possesses a significant interest in maintaining such control, as the student assistants’ work advances a key business operation of the University: the education of undergraduate students. The record shows that teaching assistants who do not adequately perform their duties to the University’s satisfaction are subject to corrective counseling or removal.

Instructional officers receive compensation in exchange for providing services to the University. Receipt of a full financial award is conditioned upon their performance of teaching duties. When they do not perform their assigned instructional duties, the record indicates they will not be paid. For instance, after one assistant, Longxi Zhao, was removed from his teaching assistantship, his stipend was cancelled. In his termination letter, the University indicated that, “[T]his termination is effective immediately. As a result, you will no longer receive a salary for this position.” This letter, in connection with the explicit conditioning of awards on performance of teaching duties, demonstrates that the University offers student assistants stipends as consideration for fulfilling their duties to perform instructional services on the University’s behalf.

Although the payments to Ph.D. student assistants may be standardized to match fellowship or other non-work based aid, these payments are not merely financial aid. Students are required to work as a condition of receiving this tuition assistance during semesters when they take on instructional duties, and such duties confer a financial benefit on Columbia to offset its costs of financial aid, even if it chooses to distribute the benefit in such a way that equalizes financial aid for both assistants and non-assistant students. Indeed, in semesters where a student assistant would normally be required to work as a condition of funding, he or she may opt not to work only if he or she finds a source of outside fellowship aid. Also, the stipend portion of the financial package given to assistants is generally treated as part of university payroll and is subject to W-2 reporting and I-9 employment verification requirements.

Even though it is unnecessary to delve into the question of whether the relationship between student assistants and their universities is primarily economic or educational—we have overruled the *Brown University* standard—the facts in this case do not suggest a primarily educational relationship, but rather, simply point to the

compensates student assistants for performing services that benefit the institution . . . such compensation encourages the student to do the work for more than educational benefits and thereby establishes an employment as well as an educational relationship”).

difficulty of the analytical exercise required by the prior approach.

While overlooked by the *Brown University* Board, there is undoubtedly a significant economic component to the relationship between universities, like Columbia, and their student assistants. On average, private non-profit colleges and universities generate a third of their revenue from tuition, and 13 percent from government grants, contracts and appropriations.¹⁰¹ Columbia, for example, generates nearly a billion dollars in annual tuition revenue and over a half-million in government grants and contracts.¹⁰²

Teaching assistants frequently take on a role akin to that of faculty, the traditional purveyors of a university's instructional output. The teaching assistants conduct lectures, grade exams, and lead discussions. Significant portions of the overall teaching duties conducted by universities are conducted by student assistants. The delegation of the task of instructing undergraduates, one of a university's most important revenue-producing activities, certainly suggests that the student assistants' relationship to the University has a salient economic character.

While Columbia's pool of student assistants consists of enrolled students who were selected based on the University's academic admissions process, this fact is not inconsistent with an economic relationship. Students pre-selected for their academic proficiency would naturally tend to constitute a labor pool geared toward the endeavor of teaching or researching in a university setting, and their usage as instructors and researchers achieves the efficiency of avoiding a traditional hiring process for these jobs.¹⁰³

¹⁰¹ See National Center for Education Statistics, *Postsecondary Revenues by Source*, available at http://nces.ed.gov/programs/coe/pdf/Indicator_CUD/coe_cud_2015_06.pdf.

¹⁰² See Consolidated Financial Statements, The Trustees of Columbia University in the City of New York, available at <http://finance.columbia.edu/files/gateway/content/reports/financials2015.pdf>.

¹⁰³ The claim that universities could more inexpensively hire adjunct faculty to perform the duties also does not establish that the relationship is primarily educational. Indeed, it is unclear that using students in these roles is more costly to a university. As previously noted, a university that makes use of an existing pool of student labor garners the efficiency benefit of avoiding costly labor searches. Moreover, the financial packages offered to graduate students are dictated in part by the need to be competitive with other schools also seeking to attract top graduate students. Although it may pay student assistants more compensation than it would need to pay to attract an employee hired on the open market, a university also receives the benefit of making itself more attractive in recruiting graduate students. Compensation to a student assistant is offset, then, by the benefits of hiring students. Thus, because it fails to account for all the benefits that accrue to a university by using its graduate students to fill assistantships, the argument that

And, the fact that teaching may be a degree requirement in many academic programs does not diminish the importance of having students assist in the business of universities by providing instructional services for which undergraduate students pay tuition.¹⁰⁴ Indeed, the fact that teaching assistants are thrust wholesale into many of the core duties of teaching—planning and giving lectures, writing exams, etc., including for such critical courses as Columbia's Core Curriculum—suggests that the purpose extends beyond the mere desire to help inculcate teaching skills.

We have no difficulty, then, in finding that all of the petitioned-for classifications here comprise statutory employees—with the possible exception of research assistants. That issue, as we explain next, is more complicated in light of Board precedent.

2. Student Research Assistants

As indicated, Columbia argues that student research assistants have no common-law employment relationship with the University. It relies on *Leland Stanford's* determination that certain externally-funded research assistants were not employees.¹⁰⁵ That holding was later applied by the *NYU* Board in finding that some research assistants in that case were not statutory employees, even as it reversed the overall exclusion of student assistants from the Act's protections.¹⁰⁶ Applying our holding today regarding the employment status of student assistants, we find that core elements of the reasoning in *Leland Stanford* are no longer tenable. We further find that, under the common-law test discussed in our decision today, research assistants at Columbia are employees under the Act.

In *Leland Stanford*, the student research assistants received external funding to cover their tuition while they essentially went about pursuing their own individual ac-

student assistants are more costly to a university than an employee hired in the free market is not self-evidently true.

¹⁰⁴ As the American Association of University Professors, an organization that represents professional faculty—the very careers that many graduate students aspire to—states in its brief, teaching abilities acquired through teaching assistantships are of relatively slight benefit in the attainment of a career in higher education. While the evidence does suggest that graduate research assistantships dovetail more strongly with the career/educational goals of graduate students than teaching assistantships, it is by no means clear that education overshadows economics in the case of research assistants either.

¹⁰⁵ *Supra*, 214 NLRB at 623.

¹⁰⁶ See *NYU*, *supra*, 332 NLRB at 1209 fn.10, citing *Leland Stanford*, *supra* (“[W]e agree that the Sackler graduate assistants and the few science department research assistants funded by external grants are properly excluded from the unit [because] [t]he evidence fails to establish that the research assistants perform a service for the Employer and, therefore, they are not employees as defined in Section 2(3) of the Act.”).

ademic goals in a manner of their own choosing. They were not subject to discharge for failure to perform satisfactory work, but would at worst receive a non-passing grade for their coursework. Further, the Board concluded, the award the research assistants received was not correlated to the nature or quantum of services they rendered. The Board also contrasted the student research assistants with non-student research associates who were employees. The student researchers received none of the fringe benefits that these non-student employee research associates received. And these non-student research associates already had their academic degrees, were under the direction of their department, and were subject to discharge.

In view of these facts, the *Stanford* Board found that the externally-funded research assistants were “primarily students,” and concluded that their relationship with the university was not one of employment because it was “not grounded on the performance of a specific task where both the task and the time of its performance is designated and controlled by an employer [but] [r]ather it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary.”¹⁰⁷

Leland Stanford thus, in many respects, focused upon the absence of the common-law features of employment of the externally-funded research assistants. It contrasted the research assistants with non-student, employee research associates who worked under the direction of their department, and it noted that the work performed by the externally-funded research assistants was largely done at the students’ own discretion and for their own benefit. It also observed that these student research assistants could not be disciplined in a traditional sense. Their researcher status, and presumably their aid award, was not terminable based on a failure to meet any obligations of the grant, undermining a claim that the aid was compensation.

However, the *Leland Stanford* decision arguably suggested that the mere fact that the performance of a task that advanced a student’s personal educational goals could negate an employment relationship. It described the status of the research assistants as akin to “the situation of all students,” who work on academic projects, and suggested the importance of the fact that they were “simultaneously students” as well as researchers.¹⁰⁸ Because *Leland Stanford* thus relied in part on the existence of a student relationship in determining employee status, rather than determining whether a common-law relation-

ship existed, we now overrule it, alongside *Brown University*, as inconsistent with the approach adopted today, which better reflects the language and policies of the Act.¹⁰⁹

The premise of Columbia’s argument concerning the status of its research assistants is that because their work simultaneously serves both their own educational interests along with the interests of the University, they are not employees under *Leland Stanford*. To the extent Columbia’s characterization of *Leland Stanford* is correct, we have now overruled that decision. We have rejected an inquiry into whether an employment relationship is secondary to or coextensive with an educational relationship. For this reason, the fact that a research assistant’s work might advance his own educational interests as well as the University’s interests is not a barrier to finding statutory-employee status.¹¹⁰

Nonetheless, it remains the case that if a student research assistant is not an employee under the common-law test, we would not normally find the assistant to be an employee under the Act. But there is nothing about the nature of student-assistant research that would automatically imply an absence of the requisite control under the common-law test. It is theoretically possible that funders may wish to further a student’s education by effectively giving the student unconditional scholarship aid, and allowing the student to pursue educational goals without regard to achieving any of the funder’s own particular research goals. But where a university exerts the requisite control over the research assistant’s work, and specific work is performed as a condition of receiving the financial award, a research assistant is properly treated as an employee under the Act.

The research assistants here clearly fall into this latter category of common-law employees. The research of Columbia’s student assistants, while advancing the assistants’ doctoral theses, also meets research goals associated with grants from which the University receives substantial income.¹¹¹ The research assistants here work under the direction of their departments to ensure that

¹⁰⁹ Our dissenting colleague contends that the longstanding nature of the Board’s *Leland Stanford* precedent favors leaving its holding—that research assistants are not statutory employees—untouched. However, as we have already explained, we believe that the better view is that student assistants, including research assistants, should be regarded as employees under the Act.

¹¹⁰ In this respect, our decision is entirely consistent with other employee-status decisions under the Act involving individuals who work, at least in part, to advance personal interests. See fn. 39–41, *supra*.

¹¹¹ One can conceive of countless employment situations where the employee gains personally valuable professional experience and skills while simultaneously performing a valuable service for his or her employer.

¹⁰⁷ 214 NLRB at 623.

¹⁰⁸ *Id.*

particular grant specifications are met. Indeed, another feature of such funding is that the University typically receives a benefit from the research assistant's work, as it receives a share of the grant as revenue, and it is relieved of any need to find other sources of funding for graduate students under a research grant; thus it has an incentive to ensure proper completion of the work in accordance with the grant. Further, a research assistant's aid package requires fulfillment of the duties defined in the grant, notwithstanding that the duties may also advance the assistant's thesis, and thus the award is compensation. Students, when working as research assistants, are not permitted to simply pursue their educational goals at their own discretion, subject only to the general requirement that they make academic progress, as they would be in semesters where they were under some form of financial aid other than a research grant.¹¹²

The funding here is thus not akin to scholarship aid merely passed through the University by a grantor without specific expectations of the recipients. Because Columbia directs the student research assistants' work and the performance of defined tasks is a condition of the grant aid, we conclude that the research assistants in this case are employees under the Act.¹¹³

Columbia argues that, even if research assistants generally are common-law employees, the research assistants funded by a specific form of grants known as *training grants* present unique circumstances and lack the characteristics of common-law employment. However, the record shows that Columbia, which receives revenue from these training grants, is charged with ensuring that research assistants thereunder receive appropriate training within a formalized program (consistent with the funder's goal of having a well-trained workforce in biomedical and behavioral research), and accordingly it oversees and directs the research assistants who receive the grants. Additionally, research assistants often receive funds from research and training grants simultaneously. Further, participation in specific training activities is a requirement for receipt of training grants; thus, notwith-

standing the grantor's statement that the grant aid is not salary, it is a form of compensation.

C. Student Assistants in the Petitioned-for Unit Share a Community of Interest

We now turn to the question of whether the petitioned-for unit is a unit appropriate for collective bargaining. Columbia argues that the petitioned-for unit is inappropriate because it groups undergraduate and Master's degree student assistants together in the same unit with Ph.D. assistants. According to Columbia, differences in pay and benefits, duties, and remunerative interests demonstrate the absence of a community of interest. We disagree.

The first and central right that Section 7 of the Act grants employees is "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" Section 9(b) provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." As recognized by the Supreme Court, Section 9(a) "suggests that employees may seek to organize 'a unit' that is 'appropriate'—not necessarily *the* single most appropriate unit."¹¹⁴ In other words, "[m]ore than one appropriate bargaining unit logically can be defined in any particular factual setting."¹¹⁵

In making the determination of whether the proposed unit is *an* appropriate unit, the Board's "focus is on whether the employees share a 'community of interest.'"¹¹⁶ In determining whether employees in a proposed unit share a community of interest, the Board examines:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employ-

¹¹² *Stanford* found that the fact that the university equalized financial packages for research assistants and other graduate students suggested that funding for research assistants was financial aid and not compensation. 214 NLRB at 622. As previously discussed, we do not believe that Columbia's practice to distribute the benefits it receives from student-assistant labor, in order to equalize aid packages, demonstrates that funding for an assistantship is not compensation, given that the research work assigned in a given semester is a requirement for receipt of aid.

¹¹³ Indeed, in *NYU*, the Board upheld the Regional Director's determination that those research assistants who were "assigned specific tasks and . . . [who] work[ed] under the direction and control of the faculty member," were employees eligible for inclusion in the unit. See *NYU*, supra, 332 NLRB at 1221 fn.51.

¹¹⁴ *American Hospital Assn.*, 499 U.S. 606, 610 (1991) (emphasis in original). See also *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 942 (2011), enf. 727 F.3d 552 (6th Cir. 2013).

¹¹⁵ *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Operating Engineers Local 627 v. NLRB*, 595 F.2d 844, 848 (D.C. Cir. 1979)).

¹¹⁶ *Specialty Healthcare*, supra, 357 NLRB at 942, quoting *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 491 (1985).

ees; have distinct terms and conditions of employment; and are separately supervised.¹¹⁷

Further, to honor the statutory command to maximize employees' freedom in choosing a representative, the Board has held that a petitioner's desire concerning the unit "is always a relevant consideration."¹¹⁸ Although Section 9(c)(5) of the Act provides that "the extent to which the employees have organized shall not be controlling," the Supreme Court has made clear that the extent of organization may be "consider[ed] . . . as one factor" in determining if the proposed unit is an appropriate unit.¹¹⁹ We thus consider the unit expressed in the petition to be a factor, although not a determinative one.

In *Specialty Healthcare and Rehabilitation Center of Mobile*,¹²⁰ the Board held that a unit is appropriate if the employees in the proposed unit constitute a readily identifiable grouping and share a community of interest. Here, the proposed unit consists of a readily identifiable grouping of employees: all student employees who provide instructional services and all research assistants at Columbia University's campuses. We further find that the employees in the unit share a community of interest and agree with the Regional Director who, in concluding the unit was appropriate, found substantial similarities among the types of work of all the student assistants in the proposed unit. She noted that they work in similar settings (in labs and classrooms at the same university) and serve similar functions with respect to the University's fulfillment of its teaching and research mission. Thus, the petitioned-for unit of student assistants performing instructional services and research services provide supplemental educational services to the faculty and the University and therefore constitute a readily identifiable grouping of employees within the University's operations that share a community of interest.

While Columbia argues that there are some dissimilarities, such as differences in the difficulty and independence of work assignments, as well as in pay and benefits, among the categories of student assistants, we find that—although there might potentially be other appropriate unit groupings among these student assistants—the petitioned-for classifications share a sufficient community of interest to form an appropriate unit. We note that all of the student assistants here are performing a supplemental educational service. That is, their duties are functionally integrated into a system designed to meet the university's teaching and research missions in non-faculty roles. Alt-

hough some of the assistantships undertaken by Ph.D. students may involve advanced duties, in many cases their roles are similar to those of Master's and undergraduate assistants who fill related positions. And even when the Ph.D. assistants take on more advanced roles, there is often still an overlap of job duties with Master's and undergraduate student assistants.¹²¹

Further, all student assistants work under the direction of the University. Most are appointed on a semester-long basis and are paid in part through a tuition remission and in part via a bimonthly stipend. Although it is the contention of our dissenting colleague that the "broad array" of employees within the unit militates against its appropriateness, we note that the Act countenances broad units where there are factors establishing a community of interest. For example, the Board has held, consistent with the Act's text, that similarly situated employees can form an appropriate employer-wide unit.¹²² We find under these circumstances that differences in level and type of compensation¹²³ and some differences in the nature of work assignments, do not negate the shared community of interest of employees in the petitioned-for unit, given the many other relevant similarities.

Columbia also argues that, because they are in shorter-term degree programs geared toward rapid graduation and job-market entry, Master's and undergraduate student assistants are less likely to be concerned with issues of housing costs, quality of health care, and availability of dependent health coverage. Assuming the veracity of Columbia's speculation regarding Master's and undergraduate students' likely priorities, it is nonetheless the case that classifications in a unit need not have complete identity of interests for the unit to be appropriate. While Master's and undergraduate assistants may, arguably,

¹²¹ Notably, a Columbia Vice-Provost testified to "considerable similarity" between the teaching duties of a Master's degree teaching assistant and a Ph.D. appointed as a teaching fellow, ostensibly a higher-difficulty position. The record also indicates that, while Ph.D. assistants take on the most advanced and independent teaching assignments, there are various types of discrete teaching duties, such as grading and leading discussion sections, that are performed by both undergraduate/Master's student assistants and Ph.D. assistants.

¹²² Sec. 9(b) provides, inter alia, that: "The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. 159(b). See also *Hazard Express, Inc.*, 324 NLRB 989 (1997) (finding appropriate a unit including "drivers, dockworkers, and helpers and excluding clericals"); *Jackson's Liquors*, 208 NLRB 807, 808 (1974) ("not[ing] that the employerwide unit, being one of the units listed in the Act as appropriate for bargaining, is presumptively appropriate").

¹²³ See *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1236 (2003) (difference in pay not controlling as to unit determination in light of other similarities); *Four Winds Services*, 325 NLRB 632, 632 (1998) (same).

¹¹⁷ *Specialty Healthcare*, supra, 357 NLRB at 942 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

¹¹⁸ *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964).

¹¹⁹ *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442 (1965).

¹²⁰ 357 NLRB at 946.

have some different priorities from those of Ph.D. assistants, there are also overarching common interests. For most student assistants, there will be a shared desire to successfully balance coursework with job responsibilities, as well as a shared desire to mitigate the tuition and opportunity costs of being a student. Additionally, all student assistants are likely to share a desire to address policies affecting job postings, pay periods, stipend disbursement, and personal health insurance coverage. Student assistants also have common interests in developing guidelines for discipline and discharge and establishing a grievance-and-arbitration procedure. While Ph.D. assistants, as longer-term students, may be somewhat more concerned with certain types of remuneration, such as housing subsidies, their interests are certainly not at odds with those of the shorter-term employees. Indeed the unit's overarching interest in addressing issues pertaining to one's simultaneous employment and enrollment as a student provides ample basis on which to pursue a common bargaining agenda.

Therefore, applying traditional community of interest factors to these facts, we conclude that the petitioned-for unit is an appropriate unit.¹²⁴

D. None of the Petitioned-for Classifications Contain Temporary Employees Who Must Be Excluded From the Unit

Columbia argues that certain classifications must be excluded from the unit because they comprise temporary employees, who may not be included in the unit. We reject this argument.

In its analysis of whether an employee should be excluded from a unit as a "temporary employee," the Board focuses on "the critical nexus between an employee's temporary tenure and the determination whether he shares a community of interest with the unit employees."¹²⁵ To determine whether an alleged temporary employee shares a community of interest, the Board examines various factors, including "whether or not the employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created."¹²⁶

¹²⁴ We stress that the bargaining relationship here pertains only to undergraduates' employment relationship and does not interfere with any other role the university may play with respect to students' academic or personal development. Since undergraduate student assistants share a community of interest with the other student assistants, they are appropriately included in the same unit.

¹²⁵ *Marian Medical Center*, 339 NLRB 127, 128 (2003).

¹²⁶ *Id.*

However, the determination is not based on the nature of an employee's tenure in a vacuum; rather, the nature of the alleged temporary employees' employment must be considered relative to the interests of the unit as a whole. The practice of excluding temporary employees from a unit merely recognizes that, "as a general rule," employees of a defined, short tenure are "likely" to have divergent interests from the rest of the unit.¹²⁷

Here, Columbia argues that undergraduate and terminal Master's assistants in the petitioned-for unit are "temporary" in the sense that they are employed for relatively short, finite periods of time, averaging only about two (not necessarily continuous) semesters of work. However, all the employees in this unit, which we find to be an appropriate, serve finite terms. Although the Ph.D. student assistants typically serve for the longest periods, all the classifications perform similar duties in (not necessarily continuous) semester increments.¹²⁸ Thus, in some sense, one could argue that all the student assistants here are temporary. Yet the Board has made clear that finite tenure alone cannot be a basis on which to deny bargaining rights, because "[i]n many employment relationships, an employee may have a set tenure and, in that sense, may not have an indefinite departure date To extend the definition of 'temporary employee' to [all] such situations, however, would be to make what was intended to be a limited exception swallow the whole."¹²⁹ Therefore we must look beyond the finite tenure of the student assistants at issue, and consider whether and to what extent their tenure affects their community of interest with the unit or their ability to engage in meaningful bargaining.¹³⁰

Further, we find that Master's and undergraduate student assistants' relatively short tenure, within the context of this unit, does not suggest a divergence of interests that would frustrate collective bargaining.¹³¹ In *Manhat-*

¹²⁷ *Id.*

¹²⁸ Indeed, to exclude Master's and undergraduate student assistants here who share a community of interest with the unit as a whole might undercut the integrity of the overall bargaining unit, because these employees perform not-readily differentiable work compared to Ph.D. student assistants, and thus could easily be utilized as substitutes for bargaining unit employees. See generally *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263, 263 (2001) (temporary employees who worked work side-by-side at same jobs under same supervision as other employees were properly included in unit).

¹²⁹ *Boston Medical*, supra, 330 NLRB at 166.

¹³⁰ To the extent that cases like *San Francisco Art Institute*, 226 NLRB 1251 (1976), suggest that the mere fact of being a *student* in short-term employment with one's school renders one's interests in the employment relationship too "tenuous," such cases are incompatible with our holding here today and are overruled.

¹³¹ This case is distinguishable from *Goddard College*, 216 NLRB 457, 458 (1975), cited by the dissent. In that case there was a significant difference in employment expectations between the visiting pro-

tan College, 195 NLRB 65, 65–66 (1972), the Board found that faculty members on terminal contracts shared a community of interest with their colleagues for the duration of their employment and were therefore properly included in a faculty bargaining unit.¹³² The Board has never held that, regardless of community of interest with the broader unit, arguably temporary employees should be denied bargaining rights altogether.¹³³ If, under the specific circumstances of a case, alleged temporary employees possess a sufficient interest in bargaining over terms and conditions of employment to allow for successful and stable collective bargaining on their behalf, they are permitted to bargain collectively within an appropriate unit.¹³⁴

Here, even the Master’s and undergraduate student assistants typically serve more than one semester—and thus their tenure is not so ephemeral as to vitiate their interest in bargaining over terms and conditions of employment. Indeed, a semester at Columbia is not some insignificant or arbitrary period of time spent performing a task, but rather it constitutes a recurring, fundamental unit of the instructional and research operations of the University. And notwithstanding the length of any individual assistant’s tenure, the University will continuously employ groups of Master’s and undergraduate student assistants to perform research and instructional duties across semesters (and, although the precise composition of these groups will differ from semester to semester, there will typically be some individual student assistants

fessors, who typically worked at the university less than a year, and tenured faculty. The question there was whether it would be appropriate to combine individuals with a long-term relationship to an employer with those whose long-term interests lay elsewhere. Here, as we have noted, all the employees—both the allegedly temporary Master’s and undergraduate assistants, as well as the Ph.D. assistants—serve finite periods in semester increments, during which they perform similar services to the University. Further, as student assistants working during academic semesters, they will share common interests in addressing issues unique to their status, such as those involving the balancing of work and academic obligations. See *Goucher College*, 364 NLRB No. 71, slip op. at 2 & fn. 7 (2016) (finding that terminal-appointment faculty should be included in unit because they share a community of interest with nontenure faculty “that is more significant than whether or not they have a reasonable expectation of reappointment”). Also, unlike the visiting faculty in *Goddard*, most student assistants possess a long-term goal of achieving employment elsewhere, as opposed to cultivating a permanent relationship with the University.

¹³² See also *Rensselaer Polytechnic Institute*, 218 NLRB 1435, 1437 (1975).

¹³³ See *Kansas City Repertory Theatre*, 356 NLRB 147, 147 (2010) (“The logical consequence of the Employer’s argument is that temporary or intermittent employees cannot exercise the rights vested in employees by Section 9 of the Act. However, no such exclusion appears in the definition of employees or elsewhere in the Act.”).

¹³⁴ See *Manhattan College*, supra, at 65–66.

who are carried over from one semester to another).¹³⁵ Because the University’s employment of Master’s and undergraduate student assistants is regularly recurring, with some carryover between semesters, and their individual tenures are neither negligible nor *ad hoc*, we believe that as a group, they, together with the Ph.D. assistants, form a stable unit capable of engaging in meaningful collective bargaining.¹³⁶

Accordingly, we find that none of the petitioned-for classifications consists of temporary employees who should be excluded from the unit by virtue of their finite tenure of employment.

E. Voting Eligibility Formula

There remains the issue of which of the employees in the petitioned-for unit—some of whom, on account of intermittent semester appointments, may not be eligible to vote under the Board’s traditional eligibility date approach—should nonetheless be permitted to vote because of their continuing interest in the unit. In this connection, although it does not fully address the eligibility question, the Petitioner has suggested in its brief that student assistants who have been appointed for at least one semester should be deemed eligible.

We observe that the unique circumstances of student assistants’ employment manifestly raise potential voter eligibility issues. The student assistants here tend to work for a substantial portion of their academic career, but not necessarily in consecutive semesters; thus, during any given semester, individuals with a continuing interest in the terms and conditions of employment of the unit may not be working. The Board has long recognized that certain industries and types of employment, particularly those with patterns of recurring employment, may necessitate rules governing employee eligibility. The Board

¹³⁵ We are not, as the dissent suggests, establishing a special rule for student assistants. Rather, we are applying relevant principles concerning the establishment of units of employees, including some with relatively short, finite tenures, to the particular circumstances of student assistants. The question we must ask before denying a category of employees the right to bargain collectively is whether their tenure precludes meaningful bargaining. Otherwise, to deny bargaining rights merely because one has a short tenure, would be antithetical to the Act. The evidence here indicates that meaningful bargaining is possible within such a unit. Notably, student assistant collective bargaining at public universities sometimes involves units of students without exclusions based on expected duration of employment; yet there is no evidence that this has proven an impediment to effective bargaining. See, e.g., *Collective Bargaining Agreement between Michigan State University and The Graduate Employees Union, Local 6196, AFT-Michigan/AFL-CIO* (May 2015—May 2019), supra.

¹³⁶ Cf. *Kelly Bros. Nurseries*, 140 NLRB 82, 85 (1962) (category of seasonal employees properly included in a bargaining unit where the employer relied on these employees to serve over recurring production seasons, and where there was some employee holdover from season to season).

attempts to strike a balance between the need for an ongoing connection with a unit and concern over disenfranchising voters who have a continuing interest notwithstanding their short-term, sporadic, or intermittent employment.¹³⁷ Setting such rules on a pre-election basis by use of eligibility formulas also serves the efficiency goal of avoiding protracted post-election litigation over challenges to individual voters.

Such eligibility formulas attempt to include employees who, despite not being on the payroll at the time of the election, have a past history of employment that would tend to signify a reasonable prospect of future employment.¹³⁸ We have traditionally devised these formulae by examining the patterns of employment within a job or industry, and determining what amount of past employment serves as an approximate predictor of the likelihood of future employment.

For example, in a case involving adjunct faculty, the Board noted the importance of “prevent[ing] an arbitrary distinction” which disenfranchises employees with a continuing interest in their employment within the unit but who happen not to be working at the time of the election.¹³⁹ In the particular circumstances of that case, the Board looked at factors including whether adjuncts had signed teaching contracts and the extent to which they had actually taught over previous semesters.¹⁴⁰

Here, the record contains data concerning the average number of semesters worked relative to a student assistant’s time enrolled at the University, as well as data concerning typical patterns of work over the academic career of a Ph.D. student assistant. But neither the Regional Director nor the parties have specifically addressed what an appropriate formula would be under these circumstances. Having determined the appropriate unit, we therefore remand this case and instruct the Regional Director to take appropriate measures, including reopening the record, if necessary, to establish an appropriate voting eligibility formula.

ORDER

The Regional Director’s Decision is reversed. The proceeding is remanded to the Regional Director for fur-

¹³⁷ See *Steiny & Co.*, 308 NLRB 1323, 1325 (1992); *Trump Taj Mahal Casino*, 306 NLRB 294 (1992).

¹³⁸ See *Trump Taj Mahal Casino*, supra, 306 NLRB at 296 (reiterating Board’s obligation to be “flexible in . . . devis[ing] formulas . . . to afford employees with a continuing interest in employment the optimum opportunity for meaningful representation”).

¹³⁹ *C.W. Post Center*, 198 NLRB 453, 454 (1972).

¹⁴⁰ Id. See also *Steiny*, supra, 308 NLRB at 1326 (articulating formula for construction work that accounts for non-continuous work patterns).

ther appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. August 23, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues decide that college and university students are “employees” for purposes of collective bargaining under the National Labor Relations Act (NLRA or Act) when serving in a variety of academic assistant positions. An assortment of student positions are involved here: the petitioned-for bargaining unit includes all “student employees” who engage in “instructional services,” including “graduate and undergraduate Teaching Assistants,” “Teaching Fellows,” “Preceptors,” “Course Assistants,” “Readers,” and “Graders,” plus “Graduate Research Assistants” and “Departmental Research Assistants.” No distinctions are drawn based on subject, department, whether the student must already possess a bachelor’s or master’s degree, whether a particular position has other minimum qualifications, whether graduation is conditioned on successful performance in the position, or whether different positions are differently remunerated. As a result of today’s decision, all of these university student assistant positions¹ are made part of a single, expansive, multi-faceted bargaining unit.

I believe the issues raised by the instant petition require more thoughtful consideration than the Board majority’s decision gives them. In particular, my colleagues

¹ For ease of reference, I use the terms *college* and *university* interchangeably. For the same reason, I use the term *student assistants* to refer to all types of students encompassed within the petitioned-for bargaining unit—i.e., all “student employees” who engage in “instructional services,” including “graduate and undergraduate Teaching Assistants,” “Teaching Assistants,” “Teaching Fellows,” “Preceptors,” “Course Assistants,” “Readers,” and “Graders,” as well as “Graduate Research Assistants” and “Departmental Research Assistants.”

disregard a fundamental fact that should be the starting point when considering whether to apply the NLRA to university students. Full-time enrollment in a university usually involves one of the largest expenditures a student will make in his or her lifetime, and this expenditure is almost certainly the most important financial investment the student will ever make. In the majority of cases, attending college imposes enormous financial burdens on students and their families, requiring years of preparation beforehand and, increasingly, years of indebtedness thereafter. Many variables affect whether a student will reap any return on such a significant financial investment, but three things are certain: (i) there is no guarantee that a student will graduate, and roughly 40 percent do not;² (ii) college-related costs increase substantially the longer it takes a student to graduate, and roughly 60 percent of undergraduate students do not complete degree requirements within four years after they commence college;³ and (iii) when students do not graduate at all, there is likely to be no return on their investment in a college education.⁴

I respect the views presented by my colleagues and by advocates on all sides regarding the issues in this case. However, Congress never intended that the NLRA and collective bargaining would be the means by which students and their families might attempt to exercise control over such an extraordinary expense. This is not a commentary on the potential benefits associated with collec-

tive bargaining in the workplace. Rather, it is a recognition that for students enrolled in a college or university, their instruction-related positions do not turn the academic institution they attend into something that can fairly be characterized as a “workplace.” For students, the least important consideration is whether they engage in collective bargaining regarding their service as research assistants, graduate assistants, preceptors, or fellows, which is an incidental aspect of their education. If one regards college as a competition, this is one area where “winning isn’t everything, it is the only thing,” and I believe winning in this context means fulfilling degree requirements, hopefully on time.⁵

The Board has no jurisdiction over efforts to ensure that college and university students satisfy their postsecondary education requirements. However, Congress has certainly weighed in on the subject: an array of federal statutes and regulations apply to colleges and universities, administered by the U.S. Department of Education, led by the Secretary of Education. My colleagues disregard the Board’s responsibility to accommodate this extensive regulatory framework. In addition, I believe collective bargaining and, especially, the potential resort to economic weapons protected by our statute fundamentally change the relationship between university students, including student assistants, and their professors and academic institutions. Collective bargaining often produces short-term winners and losers, and a student assistant in some cases may receive some type of transient benefit as a result of collective bargaining pursuant to today’s decision. Yet there are no guarantees, and they might end up worse off. Moreover, I believe collective bargaining is likely to detract from the far more important goal of completing degree requirements in the allotted time, especially when one considers the potential consequences if students and/or universities resort to economic weapons against one another. I also believe that the Board’s processes and procedures are poorly suited to deal with representation and unfair labor practice cases involving students. Add these up, and the sum total is uncertainty instead of clarity, and complexity instead of

² U.S. Department of Education, National Center for Education Statistics (NCES), *The Condition of Education 2016*, [Undergraduate Retention and Graduation Rates](https://nces.ed.gov/fastfacts/display.asp?id=40) (excerpted at <https://nces.ed.gov/fastfacts/display.asp?id=40>) (last visited Aug. 5, 2016). The NCES reports that the “6-year graduation rate for first-time, full-time undergraduate students who began their pursuit of a bachelor’s degree at a 4-year degree-granting institution in fall 2008 was 60 percent. That is, 60 percent of first-time, full-time students who began seeking a bachelor’s degree at a 4-year institution in fall 2008 completed the degree at that institution by 2014.” *Id.*

³ Dr. Peter Cappelli, *Will College Pay Off?*, p. 18 (Public Affairs 2015) (hereinafter “Cappelli”). See also Complete College America, *Four-Year Myth: Make College More Affordable—Restore the Promise of Graduating on Time*, pp. 4, 6 (2014) (<http://completecollege.org/wp-content/uploads/2014/11/4-Year-Myth.pdf>) (reporting that only 36 percent of students attending flagship 4-year college bachelor degree programs graduate on time); Danielle Douglas-Gabriel, *Why So Many Students Are Spending Six Years Getting a College Degree*, Washington Post, Dec. 2, 2014 (<https://www.washingtonpost.com/news/wonk/wp/2014/12/02/why-so-many-students-are-spending-six-years-getting-a-college-degree/>) (last visited Aug. 5, 2016).

⁴ University coursework may result in various personal benefits even if students fail to earn a degree. However, there is little doubt that the financial return on the investment required to attend college requires graduation. See, e.g., Cappelli, p. 48 (“The biggest cost associated with going to college, though, is likely to be the risk that a student does not graduate on time or, worse, drops out altogether. There is virtually no payoff from college if you don’t graduate.”).

⁵ The expression “winning isn’t everything, it’s the only thing” is commonly attributed to legendary football coach Vince Lombardi, who was the head coach for the Green Bay Packers from 1959 to 1967. However, it appears to have been originated by Henry Russell (Red) Sanders, who was the head coach of the University of California, Los Angeles (UCLA) Bruins football team from 1949 to 1957. See Wikipedia, [Winning isn’t everything; it’s the only thing](https://en.wikipedia.org/wiki/Winning_isn%27t_everything;_it%27s_the_only_thing) (last visited Aug. 5, 2016). Red Sanders also referred to the rivalry between UCLA and the University of Southern California (USC) and famously stated: “Beating [USC] is not a matter of life or death, it’s more important than that.” *Id.*

simplicity, with the risks and uncertainties associated with collective bargaining—including the risk of breakdown and resort to economic weapons—governing the single most important financial decision that students and their families will ever make.

For these reasons, I agree with former Member Brame, who stated that the Board resembles the “foolish repairman with one tool—a hammer—to whom every problem looks like a nail; we have one tool—collective bargaining—and thus every petitioning individual looks like someone’s ‘employee.’” *Boston Medical Center Corp.*, 330 NLRB 152, 182 (1999) (Member Brame, dissenting). Accordingly, as explained more fully below, I respectfully dissent.

DISCUSSION

The Board here changes the treatment that has been afforded student assistants throughout the Act’s history of 80 years, with the exception of a four-year period that was governed by the Board’s divided opinion in *New York University (NYU)*.⁶ Prior to *NYU*, the Board in *Adelphi University*⁷ and *The Leland Stanford Junior University*⁸ held that various student assistants could not be included in petitioned-for units. After *NYU*, the Board similarly held that various student assistants were not employees in *Brown University*.⁹

I disagree with my colleagues’ decision to apply the Act to college and university student assistants. In my view, this change is unsupported by our statute, and it is ill-advised based on substantial considerations, including those that far outweigh whether students can engage in collective bargaining over the terms and conditions of education-related positions while attempting to earn an undergraduate or graduate degree.

The Supreme Court has stated that “the authority structure of a university does not fit neatly within the statutory scheme” set forth in the NLRA. *NLRB v. Yeshiva University*, 444 U.S. 672, 680 (1980). Likewise, the Board has recognized that a university, which relies so heavily on collegiality, “does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world.” *Adelphi University*, 195 NLRB at 648. The obvious distinction here has been recognized by the Supreme Court and the Board: the lecture hall is not the factory floor, and the “industrial model cannot be imposed blindly on the academic world.” *Syracuse Univer-*

sity, 204 NLRB 641, 643 (1973); see also *Yeshiva*, 444 U.S. at 680.

The Board has an uneven track record in its efforts to apply the NLRA to colleges, universities and other educational institutions. In *Yeshiva*, the Board summarily rejected the university’s position that its faculty members were managerial employees who were exempt from the Act. The Supreme Court reversed, finding that the faculty members constituted managerial employees and that the Board’s conclusions were neither consistent with the Act nor rationally based on articulated facts. 444 U.S. at 686–691.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court rejected the Board’s exercise of jurisdiction over lay faculty members at two groups of Catholic high schools, concluding that to do so would give rise to “serious First Amendment questions” involving church/state entanglement and that there was insufficient evidence Congress intended that “teachers in church-operated schools should be covered by the Act.” Id. at 504–507; see also *Pacific Lutheran University*, 361 NLRB No. 157 (2014).¹⁰

In *Boston Medical Center*, a divided Board found that interns, residents and fellows at a teaching hospital were employees under the Act.¹¹ However, the majority did not change the status of university student assistants, whom the Board had previously determined not to be employees.¹² And as noted previously, except for the four-year period governed by *NYU*,¹³ the Board has consistently held that university student assistants are *not* employees,¹⁴ most recently in *Brown University*,¹⁵ where the Board reaffirmed that a student assistant’s relationship with a university is “primarily educational.” *Brown*, 342 NLRB at 487.

¹⁰ Cf. *Northwestern University*, 362 NLRB No. 167 (2015) (declining to exercise jurisdiction over grant-in-aid scholarship football players without reaching the question of “employee” status under the NLRA).

¹¹ 330 NLRB at 159–165. Members Hurtgen and Brame dissented. Id. at 168–170 (Member Hurtgen, dissenting); id. at 170–182 (Member Brame, dissenting).

¹² The majority in *Boston Medical* explained that hospital interns, residents and fellows—referred to as “house staff”—were materially different from students, including student assistants:

[W]hile house staff possess certain attributes of student status, they are unlike many others in the traditional academic setting. Interns, residents, and fellows do not pay tuition or student fees. They do not take typical examinations in a classroom setting, nor do they receive grades as such. They do not register in a traditional fashion. Their education and student status is geared to gaining sufficient experience and knowledge to become Board-certified in a specialty.

Id. at 161 (footnote omitted).

¹³ 332 NLRB at 1205.

¹⁴ See fn. 7–9, *supra*.

¹⁵ 342 NLRB at 483.

⁶ 332 NLRB 1205 (2000).

⁷ 195 NLRB 639, 640 (1972).

⁸ 214 NLRB 621(1974).

⁹ 342 NLRB 483 (2004).

I agree with the Board majority's reasoning in *Brown*. There, the Board considered whether "graduate student assistants who are admitted into, not hired by, a university, and for whom supervised teaching or research is an integral component of their academic development" should be deemed employees under the Act. *Brown*, 342 NLRB at 483. The Board majority held that these individuals were not "employees," based on the conclusion that "graduate student assistants, who perform services at a university in connection with their studies, have a predominately academic, rather than economic, relationship with their school." *Id.* The Board majority stated that the "fundamental premise of the Act" was "to cover economic relationships," and the majority recognized "the simple, undisputed fact that all the petitioned-for individuals [were] students and must first be enrolled at *Brown*" before they could be graduate assistants. *Id.* at 488. The majority emphasized that the work done by graduate assistants was "part and parcel of the core elements of the Ph.D. degree." *Id.* In the case of most doctoral students who provided instruction, for example, the majority observed that "teaching is so integral to their education that they will not get the degree until they satisfy that requirement." *Id.*; see also *Leland Stanford*, 214 NLRB at 621, 622 (student research assistants who received stipends to perform research projects were not employees, since the research was "part of the learning process" and a step leading to the "thesis and . . . toward[s] the goal of obtaining the Ph.D. degree"). The Board majority in *Brown* concluded it was likely that collective bargaining would impermissibly interfere with academic freedom and be "detrimental to the educational process."¹⁶ The majority explained:

Imposing collective bargaining would have a deleterious impact on overall educational decisions by the . . . faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution¹⁷

Apart from my belief that the Board correctly addressed these issues in *Brown*, I especially disagree with several aspects of my colleagues' opinion to the contrary.

¹⁶ *Brown*, 342 NLRB at 493.

¹⁷ *Brown*, 342 NLRB at 490. Cf. *Yeshiva*, 444 U.S. at 686 (recognizing that academic freedom applies not only to the clash of ideas among faculty but also to debate concerning "which students will be admitted, retained, and graduated").

1. *The Financial Investment Associated With a University Education, and the Mistake of Making Academic Success Subserving to the Risks and Uncertainties of Collective Bargaining and the Potential Resort to Economic Weapons.* Given the critical importance of higher education, I believe the time is long past when the question of whether to apply the NLRA to students can appropriately be decided based on the standard lines of division that are commonplace in matters that come before the Board. Many parties tend to favor union representation and collective bargaining generally, and one can reasonably expect many of these parties to support union representation and collective bargaining for university student assistants. Likewise, when some parties tend to oppose union representation or collective bargaining, it is unsurprising when they oppose these things for student assistants as well. The Board's role should be different. We administer a statute enacted by Congress that was adopted with a focus on conventional workplaces, not universities. For this reason, as noted above, the Board and the courts have recognized that unique issues arise in applying the NLRA to academic work settings, even when dealing with college and university faculty. Moreover, the NLRB has no regulatory authority over efforts to ensure that undergraduates and graduate students at colleges and universities satisfy their degree requirements. And the Board should not ignore the fact that, for the vast majority of students, attendance at a college or university has a paramount goal—to obtain a degree—and this goal, if attained, is usually achieved at enormous expense. Neither should the Board disregard the unfortunate reality in the United States that many students never receive their degree.¹⁸

I believe my colleagues—though armed with good intentions—engage in analysis that is too narrow, excluding everything that is unique about the situation of college and university students. In particular, my colleagues disregard what hangs in the balance when a student's efforts to attain an undergraduate or graduate degree are governed by the risks and uncertainties of collective bargaining and the potential resort to economic weapons by students and universities. What hangs in the balance has

¹⁸ College graduation rates in a significant number of other countries are higher than in the United States (although it appears difficult to obtain recent data that permit a reliable comparison). See, e.g., Institute of Education Sciences, National Center for Education Statistics, Youth Indicators 2011 (identifying 12 countries having higher college graduation rates than the United States among first-time college students, and 11 countries having lower rates) (https://nces.ed.gov/pubs2012/2012026/chapter2_23.asp and https://nces.ed.gov/pubs2012/2012026/figures/figure_23.asp) (last viewed Aug. 1, 2016); Cappelli, p. 29 ("[T]he United States has among the worst [college] graduation rates of any country.").

immense importance, and it does not come cheap for the great majority of undergraduate and graduate students and their families. As one commentator has explained, “college is for many people *the biggest financial decision they will ever make,*” it “*makes more demands on our cognitive abilities than most of us will ever see again in our lives,*” and the “*biggest cost associated with going to college . . . is likely to be the risk that a student does not graduate on time or, worse, drops out altogether. There is virtually no payoff from college if you don’t graduate.*”¹⁹

My colleagues ignore these considerations, and they disclaim any responsibility to address anything other than the need to promote collective bargaining. In their words:

We have put suppositions aside today and have instead carefully considered the text of the Act as interpreted by the Supreme Court, the Act’s clearly stated policies, the experience of the Board, and the relevant empirical evidence drawn from collective bargaining in the university setting. This is *not* a case . . . where the Board must accommodate the National Labor Relations Act with some other federal statute related to private universities that might weigh against permitting student assistants to seek union representation and engage in collective bargaining.²⁰

Regarding examples where bargaining involving student assistants (according to Columbia University and other parties) “has proven detrimental to the pursuit of the school’s educational goals,” my colleagues state that “labor disputes are a fact of economic life,” and “the Act is intended to address them.”²¹ They conclude:

The National Labor Relations Act . . . governs only the employee-employer relationship. For deciding the legal and policy issues in this case, then, *it is not dispositive that the student-teacher relationship involves different interests than the employee-employer relationship; that the educational process is individual, while collective bargaining is focused on the group; and that promoting equality of bargaining power is not an aim of higher education.* Even conceded, all these points simply confirm that collective bargaining and education occupy different institutional spheres.²²

I disagree with this analysis because it is contrary to what the Supreme Court has stated repeatedly is the “primary function and responsibility of the Board,”

¹⁹ *Cappelli*, pp. 8, 26, 48 (emphasis added). See also fns. 2-3, *supra* and accompanying text.

²⁰ Majority opinion, *supra*, slip op. at 12 (emphasis added).

²¹ Majority opinion, *supra*, slip op. at 10 (emphasis added).

²² Majority opinion, *supra*, slip op. at 7 (emphasis added).

which is “applying the general provisions of the Act to the complexities of industrial life.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979) (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 499 (1960); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)); see also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-267 (1975) (“The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.”).

The instant case does not involve “industrial life.”²³ Yet this only serves to reinforce the inappropriateness of “blindly” imposing collective bargaining and the rest of the NLRA on students in “the academic world.” *Syracuse University*, 204 NLRB at 643; see also *Yeshiva*, 444 U.S. at 680; *Adelphi University*, 195 NLRB at 648. The Board has applied the NLRA to college and university faculty members, which has presented its own challenges, as noted previously. The best interests of *students*, however, necessarily revolves around whether they obtain the education that costs so much in time and money and means so much to their future. The Board has no expertise regarding these issues, and Congress did not adopt our statute to advance the best interests of college and university students. This makes it inappropriate to summarily dismiss concerns in this area as being “not dispositive.”

Even more objectionable is my colleagues’ statement that the instant case involves no need to “accommodate the National Labor Relations Act with some other federal statute related to private universities that might weigh against permitting student assistants to seek union representation and engage in collective bargaining.”²⁴ This is contrary to *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942), where the Supreme Court stated that “the Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives.”

Regarding the need to accommodate other “Congressional objectives,” *id.*, there is no shortage of federal mandates applicable to colleges and universities that, to borrow my colleagues’ words, “might weigh against permitting student assistants to seek union representation and engage in collective bargaining.” Again, a broad range of federal statutes and regulations apply to colleges

²³ When the NLRA was adopted, Congress contemplated that the Act would primarily apply to industrial plants and manufacturing facilities. Sec. 1 of the Act refers to “industrial strife or unrest” and sets forth a policy to encourage “practices fundamental to the adjustment of industrial disputes,” and the Supreme Court has acknowledged that the “Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry.” *Yeshiva*, 444 U.S. at 680.

²⁴ Majority opinion, *supra*, slip op. at 12.

and universities, with significant involvement by the U.S. Department of Education, led by the Secretary of Education. Relevant laws include, among many others, the Higher Education Opportunity Act, enacted in 2008,²⁵ which reauthorized the Higher Education Act of 1965,²⁶ and the Family Educational Rights and Privacy Act (FERPA), enacted in 1974.²⁷ These statutes govern, among other things, the accreditation of colleges and universities, the enhancement of quality, the treatment of student assistance, graduate/postsecondary improvement programs, and the privacy of student records. In 2015, a task force created by a bipartisan group of U.S. Senators reviewed the Department of Education's regulation of colleges and universities and recommended, among other things, that the Department's regulations "be related to education, student safety, and stewardship of federal funds" and "not stray from clearly stated legislative intent."²⁸ The extensive federal regulation of colleges and universities focuses on access, availability, affordability and effectiveness, all of which relate to the ability of students to satisfy *educational* objectives. This supports my view that collective bargaining—and especially the resort to economic weapons between and among student assistants, faculty members, and administrators—is likely to substantially affect the educational process, separate from any impact on the economic interests of student assistants.

Furthermore, it is already clear that current Board law, if applied to university student assistants, may contradict federal education requirements. For example, FERPA broadly restricts the disclosure of educational records, including student disciplinary records.²⁹ However, cur-

rent Board law, if applied to university students, would *require* the disclosure of confidential witness statements (absent proof that the witnesses required protection from retaliation in the particular circumstances presented),³⁰ and Board law would prevent university officials from routinely requesting nondisclosure of matters discussed in investigatory interviews involving student assistants.³¹

records are protected as education records under *FERPA*," although disclosure without the student's consent is permitted in certain circumstances). FERPA regulations indicate that "education records" do not include records relating to employees of an educational institution, but this exclusion applies only if employment-related records "[r]elate exclusively to the individual in that individual's capacity as an employee." 34 CFR § 99.3 (defining "education records"). According to the U.S. Department of Education, the employment-related records of "graduate student teaching fellows/assistants," whose appointments are contingent on being students, constitute "education records" subject to FERPA's nondisclosure requirements. See Department of Education, *Letter of technical assistance to American Federation of Teachers re: disclosure of information on teaching assistants*, available at: <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/aft.html> (Aug. 21, 2000) (last viewed Aug. 3, 2016) (hereinafter "Dept. of Education, AFT letter"). In short, if a student complains about sex harassment by a student assistant, which may result in *academic* suspension or expulsion, for example, it appears clear that FERPA confidentiality requirements would apply to the investigative records, possibly including witness statements, directly contrary to NLRB law potentially requiring their disclosure. See fns. 30-31, *infra*. Because of FERPA's privacy requirements, there will undoubtedly be additional conflicts with NLRB disclosure obligations in other contexts, including union information requests to which employers must respond under NLRA Sec. 8(a)(5). See Dept. of Education, AFT letter, *supra* (information requested by union representing public university student assistants cannot be disclosed without the student assistants' consent); see also <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/josephambash.html> (Feb. 25, 2002) (last viewed Aug. 3, 2016) (teaching assistants' hours of work, stipend, length of contract, employment category, and selection for layoff are educational records protected from disclosure by FERPA).

Even before the Board majority decided to apply the NLRA to student assistants and thus create inconsistencies with other federal regulations applicable to colleges and universities, the Board's interpretation of the NLRA was contrary to other federal agency requirements and recommendations. For example, the Board's disclosure requirements applicable to workplace investigations and witness statements conflict with guidance from the Equal Employment Opportunity Commission (EEOC) regarding precisely the same issues. See *American Baptist Homes of the West d/b/a Piedmont Gardens*, 362 NLRB No. 139, slip op. at 12–13 (2015) (Member Johnson, dissenting in part); Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace, available at: <http://www.btlaborrelations.com/wp-content/uploads/2016/06/eec-report-on-sexual-harassment.pdf> (June 2016) (last viewed Aug. 4, 2016) (noting "strong support" from stakeholders "for the proposition that workplace investigations should be kept as confidential as is possible," but also observing that "an employer's ability to maintain confidentiality . . . has been limited in some instances by decisions of the National Labor Relations Board," and concluding that the "privacy of both the accuser and the accused should be protected to the greatest extent possible, consistent with legal obligations").

³⁰ See *Piedmont Gardens*, *supra*, 362 NLRB No. 139.

³¹ See *Banner Estrella Medical Center*, 362 NLRB No. 137 (2015).

²⁵ Pub. L. 110–315 (2008).

²⁶ Pub. L. 89–329 (1965). The Higher Education Act of 1965 was reauthorized in 1968, 1972, 1976, 1980, 1986, 1992, 1998, and 2008. It was extended through 2015, and reauthorization bills remain pending in Congress. See U.S. News University, House Approves Five Bipartisan Bills to Improve Higher Education Act (July 15, 2016) (<https://www.usnewsuniversitydirectory.com/news/paying-for-school/house-approves-five-bipartisan-bills-to-improve-higher-education-act/>) (last viewed July 28, 2016).

²⁷ Pub. L. 93–380 (1974). FERPA has been amended multiple times since its initial passage and may be found in its current form at 20 U.S.C. § 1232g.

²⁸ Task Force on Federal Regulation of Higher Education, *Recalibrating Regulation of Colleges and Universities*, pp. 2, 4 (2015) (http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf) (last visited Aug. 5, 2016). The Senate Committee on Health, Education, Labor, and Pensions also held a hearing on February 24, 2015 devoted to the Task Force's report. See <http://www.help.senate.gov/hearings/recalibrating-regulation-of-colleges-and-universities-a-report-from-the-task-force-on-government-regulation-of-higher-education> (Feb. 24, 2015) (last viewed July 28, 2016).

²⁹ See <http://www2.ed.gov/policy/gen/guid/fpco/brochures/postsec.html> (last viewed Aug. 3, 2016) (indicating that "student disciplinary

My colleagues apparently agree that “promoting equality of bargaining power is not an aim of higher education.”³² It is also clear that collective bargaining by students is not the focus of the numerous federal laws and regulations that apply to colleges and universities. These laws and regulations are designed, directly or indirectly, to enhance the quality of education, to strengthen equal access to higher education, and to eliminate potential obstacles to academic success. There is no reasonable justification for the Board’s failure to acknowledge the overriding importance of these non-employment issues for college and university students.

Nor can the Board freely disregard the fact that the potential resort to economic weapons is part and parcel of collective bargaining. Therefore, applying our statute to university student assistants may prevent them from completing undergraduate and graduate degree requirements in the allotted time, which is the primary reason they attend colleges and universities at such great expense. It is not an adequate response to summarily dismiss this issue, as the majority does, with the commonplace observation that “labor disputes are a fact of economic life.” For the students who may find themselves embroiled in them, labor disputes between universities and student assistants may have devastating consequences.

Conventional work settings feature many examples of constructive collective-bargaining relationships. Likewise, one cannot assume that all or most negotiations involving student assistants at universities would result in strikes, slowdowns, lockouts, and/or litigation. However, there is no doubt that economic weapons and the threatened or actual infliction of economic injury are central elements in collective bargaining to which resort may be made when parties are unable to reach agreement. As I stated in *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13, slip op. at 9 (2016) (Member Miscimarra, dissenting in part), one must “differentiate between what one would prefer to see in collective bargaining, and what role Congress contemplated for economic weapons as part of the collective-bargaining process.” I elaborated as follows:

What one hopes to see in any collective-bargaining dispute is its successful resolution without any party’s resort to economic weapons. But what Congress intended was for the Board to preserve the balance of competing interests—including potential resort to economic weapons—that Congress devised as the engine driving parties to resolve their differences and to enter into successful agreements. As the Supreme Court

stated in *NLRB v. Insurance Agents’ International Union*, 361 U.S. 477, 487–489 (1960), employers and unions in collective bargaining “proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . *The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.*”³³

When the Board transplants our statute into the university setting and places students in a bargaining relationship with the university, experience demonstrates that we cannot assume bargaining will be uneventful. Collective bargaining may evoke “extraordinarily strong feelings” and give rise to a “sharp clash between seemingly irreconcilable positions,” and when parties resort to various tactics in support of their respective positions, “such tactics are indeed ‘weapons,’” and “[n]obody can be confused about their purpose: they are exercised with the intention of inflicting severe and potentially irreparable injury, often causing devastating damage to businesses and terrible consequences for employees.”³⁴ As the court stated in *NLRB v. Wire Products Mfg. Corp.*, 484 F.2d 760, 765 (7th Cir. 1973), “[t]he strike is a potent economic weapon which may, and often is, wielded with disastrous effect on its employer target.”³⁵

³³ *Id.*, slip op. at 9 (Member Miscimarra, dissenting in part) (emphasis in original and emphasis added).

³⁴ *Id.*, slip op. at 10 (Member Miscimarra, dissenting in part).

³⁵ My colleagues refer to what they characterize as “empirical evidence” that, in their view, suggests collective bargaining involving student assistants has been undertaken successfully at public universities (where bargaining is typically governed by state public sector labor laws, which generally restrict or eliminate the right to strike) and at a private university on a non-NLRB-supervised basis (*New York University*). My colleagues state that certain agreements provide for “defined rights concerning courses, course content, course assignments, exams, class size, grading policies and methods of instruction, as well as graduate students’ progress on their own degrees,” and according to the majority, this shows that “parties can and successfully have navigated delicate topics near the intersection of the university’s dual role as educator and employer.” Majority opinion, *supra*, slip op. at 9. *Columbia University* and other parties have identified cases where bargaining by student assistants “has proven detrimental to the pursuit of the school’s educational goals,” with “strikes and grievances over teaching workload and tuition waivers” and “grievances over classroom assignments and eligibility criteria for assistantships,” but my colleagues dismiss these examples as “labor disputes” that are merely a “fact of economic life.” Majority opinion, *supra*, slip op. at 10.

I disagree with my colleagues’ selective attachment of significance to the examples of peaceful negotiations involving student assistants—none of which involves economic weapons permitted under the NLRA—and with their summary discounting of examples that go the other way. In my view, what should be controlling here are two unassailable propositions: collective bargaining under the NLRA involves the potential use of leverage through threatened or inflicted economic injury; and even among parties that negotiate in good faith with the best intentions, disputes involving resort to protected economic weapons by

³² Majority opinion, *supra*, slip op. at 7.

Of course, determining that student assistants are “employees” and have the right to be represented by a union under the NLRA does not mean they will choose to be represented. Likewise, as stated above, I am not predicting that most negotiations involving student assistants will involve resort to economic weapons. Nonetheless, in this particular context, I believe collective bargaining and its attendant risks and uncertainties will tend to detract from the primary reason that students are enrolled at a university—to satisfy graduation requirements, including in many cases the satisfactory completion of service in a student assistant position. And in some cases involving student assistants, it is predictable that breakdowns in collective bargaining will occur, and the resulting resort to economic weapons may have devastating consequences for the students, including, potentially, inability to graduate *after* paying \$50,000 to \$100,000 or more for the opportunity to earn a degree.³⁶

Now that, with today’s decision, student assistants are employees under the NLRA, what economic weapons are available to student assistants and the universities they attend? They would almost certainly include the following:

- *Strikes.* Student assistants could go on strike, which would mean that Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers, Graders, Graduate Research Assistants and Departmental Research Assistants would cease working, potentially without notice, and the university could suspend all remuneration.³⁷

one or both parties arise with regularity under our statute. I have no quarrel with the notion that colleges and universities should constructively engage with their students, including student assistants, in a variety of ways. Yet I believe such engagement need not necessarily take the form of collective bargaining under the NLRA and instead may take place (and, I am sure, has taken place and is taking place) “without the intervention of the Board enforcing a statutory requirement.” *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 fn. 19 (1981).

³⁶ The College Board reports that average annual tuition and fees at a private four-year college total \$32,410, which means that four years’ worth of average tuition and fees total \$129,640 at private universities. See <https://bigfuture.collegeboard.org/pay-for-college/college-costs/college-costs-faqs> (last viewed July 29, 2016). If a college career stretches to six years, which is the most common time period used to evaluate whether incoming students will graduate from a four-year college (see fn. 3, *supra*, accompanying text), average tuition and fees at a private university would total \$194,460. These figures do not include additional expenditures for room, board, and other living expenses.

³⁷ In the event of a strike or lockout, an employer under the NLRA has the right to discontinue all wages and other forms of remuneration, with the sole exception of those wages or benefits that have already accrued, the payment of which does not depend on the performance of work. See *Texaco, Inc.*, 285 NLRB 241, 245 (1987) (“[A]n employer is not required to finance a strike against itself by paying wages or similar expenses dependent on the continuing performance of services

- *Lockouts.* The university could implement a lockout, which would require student assistants to cease working, and all remuneration would be suspended.
- *Loss, Suspension or Delay of Academic Credit.* If a student assistant ceases work based on an economic strike or lockout, it appears clear they would have no entitlement to credit for requirements that are not completed, such as satisfactory work in a student assistant position for a prescribed period of time. For example, if a particular degree required two semesters of service as a Teaching Assistant, and a student assistant could not satisfy that requirement because of a strike or lockout that persisted for two semesters, it appears clear the student assistant would not be entitled to receive his or her degree.
- *Suspension of Tuition Waivers.* In the event of a strike or lockout where the university suspended tuition waivers or other financial assistance that was conditioned on the student’s work as a student assistant, students would likely be foreclosed from attending classes unless they paid the tuition. Thus, the student assistant’s attendance at university could require the immediate payment of tuition, which averages \$32,410 annually at private universities.³⁸
- *Potential Replacement.* In the event of a strike, the university would have the right to hire temporary or permanent replacements. If permanent replacements were hired during an economic strike, this would mean that even if a student unconditionally offered to resume working at the end of the strike, the university could retain the replacements, and the student assistant would not be reinstated unless and until a vacancy arose through the departure of a replacement or the creation of a new position. Here as well, one would expect that the student would be required to pay full tuition in order to be permitted to attend classes, without regard to whatever tuition waiver or other financial aid was previously provided in consideration of the student’s services as a student assistant. Similarly, any failure to satisfy degree requirements associated with a student assistant’s work as a student assistant would preclude attainment of the degree.

for the employer,” absent proof that the benefits in question were “accrued,” which means “due and payable on the date on which the employer denied [them].”). See also *Ace Tank & Heater Co.*, 167 NLRB 663, 664 (1967).

³⁸ See fn. 33, *supra*.

- *Loss of Tuition Previously Paid.* If a student assistant paid his or her own tuition (again, currently averaging \$32,410 per year at a private university)³⁹ and only received a cash stipend as compensation for work as a student assistant, there appears to be little question that the student's tuition could lawfully be retained by the university even if a strike by student assistants persisted for an entire year, during which time the student was unable to satisfy any requirements for satisfactory work in his or her student assistant position.
- *Misconduct, Potential Discharge, Academic Suspension/Expulsion Disputes.* During and after a strike, employees remain subject to discipline or discharge for certain types of strike-related misconduct. Correspondingly, there is little question that a student assistant engaged in a strike would remain subject to academic discipline, including possible suspension or expulsion, for a variety of offenses. In such cases, I anticipate that parties will initiate Board proceedings alleging that students were unlawfully suspended or expelled for NLRA-protected activity, even though nothing in the Act permits the Board to devise remedies that relate to an individual's academic standing, separate and apart from his or her "employment."

It is also a mistake to assume that today's decision relates only to the creation of collective-bargaining rights. Our statute involves wide-ranging requirements and obligations. For example, existing Board cases require employers subject to the NLRA to tolerate actions by employees that most reasonable people would find objectionable, and it is unlawful for employers to adopt overly broad work rules to promote respect and civility by employees. Therefore, parents take heed: if you send your teenage sons or daughters to college, the Board majority's decision today will affect their "college experience" in the following ways:

- *Non-Confidential Investigations.* If your son or daughter is sexually harassed by a student assistant and an investigation by the university ensues, the university will violate federal law (the NLRA) if it routinely asks other student-assistant witnesses to keep confidential what is discussed during the university's investigation.⁴⁰
- *Witness Statement Disclosure.* In the above example, witness statements submitted by your son or daughter about sexual harassment by a student assistant must be disclosed to the union, unless (i) the university can prove that the statement's submission was conditioned on confidentiality, and (ii) even then, the statement must be disclosed unless the university can prove that your son or daughter needs protection, or other circumstances outweigh the union's need for the witness statement.⁴¹
- *Invalidating Rules Promoting Civility.* The university will be found to have violated the NLRA if it requires student assistants to maintain "harmonious interactions and relationships" with other students.⁴²
- *Invalidating Rules Barring Profanity and Abuse.* The university cannot adopt a policy against "loud, abusive or foul language" or "false, vicious, profane or malicious statements" by student assistants.⁴³
- *Outrageous Conduct by Student Assistants.* The university must permit student assistants to have angry confrontations with university officials in grievance discussions, and the student assistant cannot be lawfully disciplined or removed from his or her position even if he or she repeatedly screams, "I can say anything I want," "I can swear if I want," and "I can do anything I want, and you can't stop me."⁴⁴
- *Outrageous Social Media Postings by Student Assistants.* If a student assistant objects to actions by a professor-supervisor named "Bob," the university must permit the student to post a message on Facebook stating: "Bob is such a nasty mother fucker, don't know how to talk to people. Fuck his mother and his entire fucking family."⁴⁵
- *Disrespect and Profanity Directed to Faculty Supervisors.* The university may not take action against a student assistant who screams at a professor-supervisor and calls him a "fucking crook," a "fucking mother fucking" and an "asshole" when

³⁹ See fn. 33, supra.

⁴⁰ See, e.g., *Banner Estrella Medical Center*, supra, 362 NLRB No. 137. These disclosures, though required by the NLRB, may directly conflict with nondisclosure obligations under the Family Educational Rights and Privacy Act (FERPA). See fn. 29, supra.

⁴¹ See, e.g., *Piedmont Gardens*, supra, 362 NLRB No. 139. These disclosures, though required by the NLRB, may also directly conflict with nondisclosure obligations under FERPA. See fn. 29, supra.

⁴² See, e.g., *William Beaumont Hospital*, 363 NLRB No. 162 (2016); *2 Sisters Food Group*, 357 NLRB 1816 (2011).

⁴³ See *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999); *Lafayette Park Hotel*, 326 NLRB 825 (1998), enf. 203 F.3d 52 (D.C. Cir. 1999); *Cincinnati Suburban Press, Inc.*, 289 NLRB 966, 975 (1988).

⁴⁴ See *United States Postal Service*, 364 NLRB No. 62 (2016).

⁴⁵ See *Pier Sixty, LLC*, 362 NLRB No. 59 (2015).

the student assistant is complaining about the treatment of student assistants.⁴⁶

The above examples constitute a small sampling of the unfortunate consequences that will predictably follow from the majority's decision to apply our statute to student assistants at colleges and universities. The primary purpose of a university is to educate students, and the Board should not disregard that purpose in finding that student assistants are employees and therefore subject to all provisions of the NLRA.

2. *The Board's Processes and Procedures Are Incompatible with Applying the Act to University Student Assistants.* Another frailty associated with applying the NLRA to student assistants at universities relates to the cumbersome and time-consuming nature of the Board's processes and procedures, which makes those processes and procedures especially ill suited to students in a university setting.

The Board has engaged in well-publicized efforts to expedite the handling of representation cases, and in 2014 the Board issued an election rule that dramatically revised the Agency's representation-case procedures. See 79 Fed. Reg. 74, 308 (2014) (Election Rule). However, notwithstanding the Board's commitment to resolve representation cases as quickly as possible, doing so has sometimes proven difficult in cases involving colleges and universities. In part, these difficulties and resulting delays are owing to the fact that the religious affiliation of a college or university may entirely preclude the Board's exercise of jurisdiction.⁴⁷ However, even when representation cases involve universities that are not religiously affiliated, Board proceedings may still involve significant time, and the filing of election-related unfair labor practice charges may delay scheduled elections for months or years under the Agency's "blocking charge" doctrine.⁴⁸

The Board's handling of alleged unfair labor practices (ULPs) takes even more time. Our procedures require

the filing of a ULP charge, which is investigated by one of the Board's regional offices, which decides whether to issue a complaint, and if complaint issues, this is followed by a hearing before an administrative law judge, with posthearing briefing in most cases. After the judge issues a decision, parties have the right to file exceptions to that decision with the Board (in other words, they may appeal), with further briefing by the parties. Ultimately, the Board renders a decision, which may be appealed to a federal court of appeals. In addition, when the Board has found a violation and has ordered backpay and other remedial measures, there are additional compliance proceedings handled by the Board's regional offices, which can result in additional hearings before administrative law judges, additional posthearing briefs, supplemental decisions by the judges, and further appeals to the Board and the courts. In spite of everyone's best efforts, this lengthy litigation process consumes substantial time and too often causes unacceptable delays before *any* Board-ordered relief becomes available to the parties. Unfair labor practice cases may easily be litigated for three to five years before the Board issues a decision, and some cases take even longer. See, e.g., *CNN America, Inc.*, 361 NLRB No. 47 (2014) (alleged ULPs requiring 82 days of trial, more than 1,300 exhibits, more than 16,000 transcript pages, and more than 10 years of Board litigation, and the case still remains pending on appeal); *Dubuque Packing Co.*, 287 NLRB 499 (1987), remanded sub nom. *UFCW Local 150-A v. NLRB*, 880 F.2d 1422 (D.C. Cir. 1989), on remand 303 NLRB 386 (1991), enfd. in relevant part sub nom. *UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), cert. dismissed 511 U.S. 1138 (1994) (alleged ULPs requiring 13 years of Board and court litigation).⁴⁹

In the time it takes a typical NLRA case to be litigated and decided by the Board and the courts, the academic world may experience developments that dramatically change or even eliminate entire fields of study. Moreover, not only does a student assistant's position have a fixed duration, but the student status of the individual

⁴⁶ See *Plaza Auto Center, Inc.*, 360 NLRB No. 117 (2014).

⁴⁷ See, e.g., *Seattle University*, 364 NLRB No. 84 (2016) (representation proceedings involving religiously affiliated university where representation petition was filed February 20, 2014, and the Board's decision issued on August 23, 2016); *St. Xavier University*, 364 NLRB No. 85 (2016) (representation proceedings involving religiously affiliated university where representation petition was filed April 12, 2011, and the Board's decision issued on August 23, 2016); *Duquesne University*, Case 6-RC-80933 (representation proceedings involving religiously affiliated university where representation petition was filed May 14, 2012 and remains pending before the Board). See generally *Pacific Lutheran University*, 361 NLRB No. 157 (2014).

⁴⁸ The Board's treatment of delays associated with blocking charges was not materially changed in the Election Rule. See 79 Fed. Reg. at 74,455–74,456 (dissenting views of Members Miscimarra and Johnson).

⁴⁹ Sec. 10(j) of the NLRA authorizes the Board's General Counsel to initiate proceedings in federal district court seeking interim injunctive relief in certain cases, but the ultimate resolution of those disputes does not occur until the Board's disposition on the merits (subject to further appellate review). Moreover, the General Counsel is necessarily selective when evaluating whether particular cases warrant efforts to seek Sec. 10(j) relief, and there is no certainty that such relief, when sought, will be granted by the court. See, e.g., *Osthus v. Ingredion, Inc.*, Case No. 16-CV-38-LRR, 2016 WL 4098541 (N.D. Iowa July 28, 2016) (denying Sec. 10(j) petition on the basis that the Board "failed to meet its burden to demonstrate that irreparable injury is likely to occur absent injunctive relief").

occupying that position may itself come to an end long before a Board case affecting him or her is resolved. Students generally attend university for the purpose of doing something else—i.e., to obtain post-graduation employment, or to go on to post-doctoral or other post-graduate studies. Moreover, it is not uncommon for students to change majors, and faculty members also come and go. In these respects, treating student assistants as employees under the NLRA is especially poorly matched to the Board’s representation and ULP procedures.⁵⁰

3. *Other Considerations Undermine the Appropriateness of the Petitioned-For Bargaining Unit.* I believe the Board should find that student assistants are not employees for purposes of Section 2(3) of the Act. Therefore, I need not reach whether the bargaining unit sought in the instant case is an appropriate bargaining unit. Nonetheless, I will address two considerations that render the petitioned-for unit particularly problematic.

Preliminarily, however, I address an issue that is prior to appropriate-unit considerations: the majority’s decision to reject not only *Brown University* but an unbroken, decades-old line of precedent holding that research assistants are not employees under Section 2(3) of the Act. Research assistants are graduate students, usually in the hard sciences, who conduct research projects funded by private institutions or the government, and Columbia requires this research to be directly related to the research officer’s dissertation. The Board has consistently declined to find student research assistants to be employees under the Act. In *Adelphi University*, the Board declined to include graduate student research assistants in a unit of regular faculty on the basis that the research assistants were “primarily students,” 195 NLRB at 640, and it distinguished student research assistants from a research assistant deemed eligible in another case who “was not

simultaneously a student but already had his doctoral degree,” *id.* at 640 fn. 8. Similarly, in *Leland Stanford Junior University*, 214 NLRB at 621, the Board again concluded that student research assistants “are primarily students [and] not employees.” *Id.* at 623. Even during the brief period when the Board considered student instructors to be employees under the Act, the Board adhered to precedent holding that student research assistants are *not* Section 2(3) employees. See *NYU*, 332 NLRB at 1209 fn. 10 (applying *Leland Stanford* and finding that student research assistants were not employees); see also *Brown*, 342 NLRB at 483 (graduate student assistants, including research assistants, are not employees under Section 2(3) of the Act).

The facts regarding the research officers here differ in no material respect from those of the student research assistants in *Leland Stanford*, *NYU*, and *Brown*. Here, as in each of those cases, the students perform research as part of their progress towards a degree and are primarily students. Accordingly, based on a line of precedent that remained unbroken for more than 40 years, I believe the Board cannot reasonably find that research assistants are employees for purposes of the Act.

Turning to appropriate-unit considerations, I believe the Board cannot find that the broad array of student assistants here share a sufficient community of interests to warrant their inclusion in a single bargaining unit. The Petitioner seeks to represent all “student employees” who engage in “instructional services,” including “graduate and undergraduate Teaching Assistants,” “Teaching Fellows,” “Preceptors,” “Course Assistants,” “Readers,” “Graders,” “Graduate Research Assistants” and “Departmental Research Assistants.” The students within the various classifications in the petitioned-for unit vary considerably in terms of their duties, levels of responsibility, remuneration, and expected length of service. Although I would decline jurisdiction over the entire proposed unit on the basis that student assistants are not “employees,” and therefore I need not and do not reach or analyze the various issues relating to whether the proposed unit is appropriate, the evidence in the record demonstrates that what various student officers do and how they are remunerated vary enormously.

For example, some student assistants teach, and research assistants perform research. Course assistants do neither: they perform clerical duties, such as filing and copying, to help faculty administer courses. Generally, doctoral students have greater autonomy and responsibility in performing their instructional duties than do master’s degree candidates and undergraduates. Some doctoral students serve as preceptors, fully designing and implementing their own courses. By contrast, non-

⁵⁰ At various points, my colleagues analogize student assistants to intermittent workers, “seasonal” workers, and “workforces . . . with significant turnover.” These analogies fail to reflect substantial differences that exist between conventional employees whose work may be sporadic and student assistants. Even if conventional employees perform sporadic work, their employment most often contemplates that they will remain in the workforce, often in the same line of work and with the same employer. Student assistants nearly always occupy their positions on a short-term basis, with plans to permanently abandon their status as student assistants to complete their education, graduate, and obtain other positions. (My colleagues admit as much, noting that “student assistants possess a long-term goal of achieving employment elsewhere.” Majority opinion, *supra*, slip op. at 21 fn. 131). This is merely one additional reason that the Act is such an imperfect fit for student assistants. See *Saga Food Service*, 212 NLRB 786, 787 fn. 9 (1974) (finding a unit comprised solely of part-time student cafeteria workers would not “effectuate the purposes of the Act” “[i]n view of the nature of their employment tenure and our conclusion that their primary concern is their studies rather than their part-time employment”).

doctoral students predominantly grade papers or provide tutoring to their fellow students in laboratory or discussion sections.

Course assistants perform work that is intermittent in nature, and they are paid from Columbia's casual payroll. Remuneration for master's degree students and undergraduates is awarded only during the semesters that the students actually perform duties as student assistants. By contrast, doctoral students receive the same funding during the entire time spent pursuing their degree, whether they are performing duties as a student assistant during a certain semester or academic year or not. In contrast to the intermittent tenure of the course assistants, doctoral students generally must spend at least one year teaching, and sometimes multiple years, in order to obtain their degree. Undergraduate and master's degree students are not required to serve as student assistants in connection with their degree requirements.

In view of these and other fundamental dissimilarities, I believe the petitioned-for unit would likely be inappropriate under any community-of-interest test, including the one stated in *Specialty Healthcare*.⁵¹

The second consideration that, in my view, undermines the appropriateness of the petitioned-for unit relates to the Board's treatment of temporary employees, who are generally excluded from petitioned-for bargaining units. Here, I disagree with my colleagues' evaluation of the student assistants "as a group" and their application of a special rule to all of them—namely, that their tenure "is not so ephemeral as to vitiate their interest in bargaining over terms and conditions of employment."⁵² This standard inappropriately deviates from the Board's existing principles pertaining to temporary employees by creating a special rule for them. See, e.g., *Fordham University*, 214 NLRB 971, 975 (1974) (rejecting creation of a special rule for temporary employee status governing

faculty in academia). The Board has recognized that short-term or finite employment may not be conclusive as to temporary status, but it may nonetheless require a finding that certain members of a petitioned-for unit do not share a community of interests with the rest of the unit. Compare *Boston Medical Center*, 330 NLRB at 166 (finding appropriate a unit of house staff, where all employees in the proposed unit were generally employed by the employer for 3 to 7 years) with *Goddard College*, 216 NLRB 457, 458 (1975) (excluding from a unit of full-time faculty visiting faculty who generally stay for only one semester or one year). Regarding the petitioned-for unit in this case, I do not believe the Board can appropriately recognize a single bargaining unit that combines course assistants who work a few intermittent hours with doctoral candidates who may teach for several years.

CONCLUSION

There is a remarkable, life-changing procedure available for those fortunate enough to undergo it. During this procedure, the participants remain awake, they are closely evaluated while answering complex questions for an extended period of time, and they are monitored while performing other tasks as directed, which includes interacting with others. This life-changing procedure is enormously expensive, and many individuals receive financial assistance while undergoing it. The procedure is so demanding that many participants never complete it. Yet, research shows that successful completion of the procedure improves the rest of the person's life. It produces substantially more opportunities, higher compensation, enhanced satisfaction, and greater upward mobility both for the participants and for future generations.

This describes the role played by colleges and universities in the United States. My colleagues apply a distorted and highly selective lens to this life-changing procedure. Dismissing everything else as "not dispositive," they conclude that some participants satisfy the definition of an "employee" because (i) they perform tasks as directed, and (ii) they receive financial assistance. Even more erroneous, in my view, is the notion that public policy favors taking participants who are trying to complete this life-changing procedure and—while it is being conducted—having them engage in collective bargaining, which is governed by leverage and the potential clash of economic interests. It will wreak havoc to have economic weapons wielded by or against participants during this expensive procedure, especially since the weapons include strikes and lockouts—which can stop the procedure in its tracks—and the permanent replacement of the participants themselves!

⁵¹ See *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 942 (2011) (citing, among the factors the Board must examine to determine if a unit is appropriate, "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; . . . have distinct terms and conditions of employment; and are separately supervised") (citations omitted); see also *NYU*, 332 NLRB at 1205 fn. 5, 1209 fn. 10 (excluding research assistants funded by external grants and students who acted as graders and tutors from a unit of graduate assistants).

Specialty Healthcare does not govern the appropriateness of the petitioned-for unit in this case because there is no argument that the petitioned-for unit inappropriately excludes other putative employees. In any event, however, I would not apply *Specialty Healthcare* for the reasons stated in my dissenting opinion in *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 31–33 (2014) (Member Miscimarra, dissenting).

⁵² Majority opinion, *supra*, slip op. at 21.

The Board has a responsibility to acknowledge the enormous complexity, demands and benefits associated with every student's potential graduation from a college and university. In particular, I believe my colleagues improperly focus on the NLRA and "wholly ignore other and equally important Congressional objectives,"⁵³ especially the overriding importance of facilitating each student's satisfaction of degree requirements. Given the importance of this policy objective—which is reflected in numerous federal statutes and regulations governing education, and as to which the Board has no expertise—I believe the Board cannot reasonably apply our statute to student assistants at colleges and universities "without a clear expression of an affirmative intention of Congress."⁵⁴ No such evidence of Congressional intent exists.

"The 'business' of a university is education,"⁵⁵ and students are not the means of production—they are the "product." Their successful completion of degree requirements results from the combined commitment of faculty, administrators, and the students' own academic efforts. It is true that the Board has asserted jurisdiction over faculty members in private, non-exempt colleges and universities, notwithstanding the significant differences that exist between the academic and industrial worlds.⁵⁶ In my view, however, obstacles to fitting the square peg of the NLRA into the round hole of academia become insuperable when the petitioned-for "employees" are university student assistants.

⁵³ *Southern Steamship Co. v. NLRB*, 316 U.S. at 47.

⁵⁴ *Catholic Bishop*, 440 U.S. at 504.

⁵⁵ *Yeshiva*, 444 U.S. at 686.

⁵⁶ *C.W. Post Center*, 189 NLRB 904 (1971) (faculty members are professional employees who may bargain collectively).

The question here is not whether colleges and universities should constructively engage their students, including student assistants, in a variety of ways.⁵⁷ The question is whether Congress intended—and whether our statute can be reasonably interpreted—to make the NLRA govern the relationship between students and their universities merely because students may occupy a variety of academic positions in connection with their education. As noted above, for most students including student assistants, attending college is the most important investment they will ever make. I do not believe our statute contemplates that it should be governed by bargaining leverage, the potential resort to economic weapons, and the threat or infliction of economic injury by or against students, on the one hand, and colleges and universities, on the other.

For these reasons, and consistent with the Board's prior holding in *Brown University*, I believe the Board should find that the relationship between Columbia and the student assistants in the petitioned-for unit in this matter is primarily educational, and that student assistants are not employees under Section 2(3) of the Act.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 23, 2016

Philip A. Miscimarra,

Member

NATIONAL LABOR RELATIONS BOARD

⁵⁷ See fn. 35, *supra*.

EXHIBIT
“E”

112-3 **Composition**

a. **Composition of Title**

An academic title includes a term that broadly indicates the major function of the position. In appropriate circumstances and in accordance with University policy, certain modifying terms may be added to clarify important aspects of the position.

b. **Modifying Terms**

Certain conditions of an academic position are indicated by modifying terms. Modifying terms are customarily used to indicate:

- (1) Rank, when rank is not implicit in the title itself (i.e., *Associate Professor*, *Junior Supervisor of Physical Education*, *Junior Home Economist*).
- (2) The special status of an appointment as compared to other ranks in the same series (i.e., *Acting Assistant Professor*, *Visiting Astronomer*, *Emeritus Professor*).
- (3) That the appointment is held in a particular station, institute, or unit when this is not implicit in the title (i.e., *Agronomist on the Kearney Foundation*; *Research Sociologist, Institute of Human Development - Guidance Study*).
- (4) That the appointee holds a specifically endowed chair in the University (i.e., *Emanuel S. Heller Professor of Law*).
- (5) When necessary, the specialty field of the appointment if this is not implicit in the title (i.e., *Assistant Research Historian*, *Associate Professor of social welfare in medicine*).

112-4 **List with Definitions**

- a. Academic titles of the University included within the scope of APM - 110-4 are listed in 112-4-b below. A title for which there is a separate policy section is defined in that section. Information on titles not listed in APM - 112-4-b may be obtained from the Office of the Provost and Executive Vice President--Academic Affairs.

b. The list of titles together with their description is as follows:

(1) **Academic Administrator Series**

[See APM - 370.](#)

(2) **Academic Coordinator Titles**

[See APM - 375.](#)

(3) **Acting Titles**

[See APM - 235.](#)

(4) **Adjunct Professor Series**

[See APM - 280.](#)

(5) **Agronomist Series**

[See APM - 320.](#)

(6) **Associate University Librarian and Assistant University Librarian**

[See APM - 365.](#)

(7) **Astronomer Series**

The astronomer series is used for those appointees who are primarily researchers in the field of astronomy at Lick Observatory, although appointees may carry some teaching responsibilities in the graduate program conducted at the Observatory.

(8) **Clinical Affiliate**

Clinical Affiliate is a non-salaried academic appointment reserved for foreign medical doctors who wish to participate in University programs similar to those described for the Clinical Associate (see APM - 112-4-b(8)). These persons, by State law, are not permitted to care for patients and therefore serve as observers only.

(9) **Clinical Associate**

See [APM - 350](#).

(10) **Clinical Professor Volunteer Series**

[See APM - 279](#).

(11) **Continuing Educator Series**

[See APM - 340](#).

(12) **Cooperative Extension Advisor Series**

[See APM - 335](#).

(13) **Coordinator of Field Work**

An academic appointee who holds the title Coordinator of Field Work is a member of the faculty in the School of Social Welfare to whom is delegated the over-all responsibility of the maintenance of the education standards and effective functioning of the field work course. Other academic duties include serving on academic and administrative committees of the School.

(14) **Curator Series**

Titles in the curator series are held by members of the faculty who are actively engaged in the affairs of a museum. Curators carry on research on museum collections, give advice and suggestions in matters of administration and policy relating to the maintenance of the collections, acceptance of donations, and approval of loans and exchanges in those areas of a museum interest in which they have special competence.

(15) **Deans**

[See APM - 240](#).

(16) **Demonstration Teacher**

A Demonstration Teacher is a teacher of broad and exceptional success who is employed in University Elementary Laboratory Schools or in cooperating schools to demonstrate good teaching procedures and practices to the University student observers. A Demonstration Teacher also assists these students in other assignments they may have.

(17) **Department Chairs**

[See APM -245.](#)

(18) **Faculty Administrators (Positions Less than 100%)**

[See APM - 241.](#)

(19) **Faculty Administrators (100% Time)**

[See APM - 246.](#)

(20) **Faculty Consultant**

[See APM - 380.](#)

(21) **Faculty Fellow**

[See APM - 358.](#)

(22) **Field Work Consultant**

An academic appointee who holds the title Field Work Consultant is a member of the faculty in the School of Social Welfare. Based on the campus, the principal duties consist of: advising and counseling graduate professional students about their programs, consulting with Field Work Supervisors about the student's field work experience, and helping determine the field work grade; consulting with social welfare agencies about arrangements for the field work course. Other academic duties include serving on academic and administrative committees of the School.

(23) **Field Work Supervisor**

An academic appointee who holds the title Field Work Supervisor is a member of the faculty in the School of Social Welfare. Based in a social welfare agency, the appointee teaches the essentials of professional social work practice to a section of the field work course consisting of several graduate professional social welfare students. Other academic duties include serving on academic and administrative committees of the School. The appointee is responsible to the social welfare agency for the caseload assigned to the student unit and for such other duties and

responsibilities as may be mutually agreed upon by the agency and the School.

(24) **Graduate Student Assistant Researcher**

A Graduate Student Assistant Researcher is a graduate student who is trained in research techniques under the supervision of a Principal Investigator on a research project that is not necessarily related to the student's degree program.

(25) **Graduate Student Researcher**

A Graduate Student Researcher is a graduate student who performs research related to the student's degree program in an academic department or research unit under the direction of a faculty member or authorized Principal Investigator.

(26) **Health Sciences Clinical Professor**

[See APM - 278.](#)

(27) **Intern - Dietetic**

The academic title Dietetic Intern is used for an appointee who is participating in a postgraduate program in fulfillment of the professional requirements of dietetics. The intern through practice and classroom instruction under the direction of professionally qualified dietitians learns to perform duties and to gain an understanding of the profession of dietetics.

(28) **Intern - Hospital Administrative**

The academic title Hospital Administrative Intern is given to appointees who are assigned to trainees in hospital administration. They are given no specific duties or responsibilities but are oriented completely and in detail to all of the major departments of the hospital and generally study and work under the direction of the hospital administrator or the administrator's assistant.

(29) **Intern - Pharmacy**

The academic title Pharmacy Intern is used for appointees who as graduates of accredited schools and colleges of pharmacy seek a

continuation of their educational program through participation in the operation of the University Hospital Pharmacy in conjunction with a limited program of study.

(30) **Lecturer**

[See APM - 283.](#)

(31) **Lecturer with Security of Employment Series**

[See APM - 285.](#)

(32) **Librarian Series**

[See APM - 360.](#)

(33) **Nursery School Assistant**

The Nursery School Assistant is a graduate student who assists in the teaching and activity programs of the nursery school for one half-day session throughout the academic year.

(34) **Nursery School Teacher**

The Nursery School Teacher is responsible for planning the programs of teaching and activity of the nursery school. This appointee supervises the work of the several nursery school assistants, cooperates with individual faculty members and research staff in integrating the programs of the nursery school with established teaching and research programs, administers standard intelligence tests as part of the maintenance of research records, and confers with parents of the children on matters relating to individual children.

(35) **Postdoctoral Scholar**

[See APM - 390.](#)

(36) **Post-MD I (Resident)**

The academic title Post-MD I is used for those appointees who have been awarded the degree Doctor of Medicine and who gain practical experience in the practice of medicine through service in a hospital for a period of one year as a physician.

(37) **Post-MD II-IV and Chief Post-MD Officer (Resident)**

The academic titles Post-MD II-IV and Chief Post-MD Officer are used for appointees who have received the Doctor of Medicine degree, have served the period of internship required by law, are eligible for licensure to practice medicine in California according to the rules established by the State Board of Medical Examiners and are “in residence” at a hospital undertaking a detailed study of a particular specialty or sub-specialty in the field of medicine.

(38) **Professional Research Series**

[See APM - 310.](#)

(39) **Professor Series**

[See APM - 220.](#)

(40) **Professor-in-Residence Series**

[See APM - 270.](#)

(41) **Professor of Clinical (e.g., *Medicine*)**

[See APM - 275.](#)

(42) **Program Coordinator**

A Program Coordinator is responsible to a Cooperative Extension Specialist and coordinates individual programs of the University Extension.

(43) **Project Scientist**

[See APM - 311.](#)

(44) **Reader**

[See APM - 420.](#)

(45) **Regents' Lecturer**

[See APM - 290.](#)

(46) **Regents' Professor**

[See APM - 290.](#)

(47) **Research Assistant**

A Research Assistant is a graduate student in the University with high scholarship standing who serves with or without salary but whose appointment must be part time. This appointee does research under the direction of a faculty member and may or may not collaborate in the publication of research as determined by the faculty member directing the work.

(48) **Research Associate**

[See APM - 355.](#)

(49) **Research Fellow**

[See APM - 355.](#)

(50) **Research Professor in the Miller Institute Series**

This title is generally limited to academic appointees in the Miller Institute for Basic Research in Science. An appointee holding a title in this series generally devotes full time to research, and, ordinarily, is relieved of all teaching, University, or public service responsibilities.

(51) **Resident - Hospital Administrative**

The academic title Hospital Administrative Resident is used for appointees who have received the Master of Hospital Administration degree, have completed the required internship training and are "in residence" at a hospital undertaking a program of assigned duties and responsibilities designed to provide practical experience and application of their professional knowledge.

(52) **Senior Lecturer**

[See APM - 283.](#)

(53) **Specialist Series**

[See APM - 330.](#)

(54) **Specialist in Cooperative Extension Series**

[See APM - 334.](#)

(55) **Substitute Teacher**

This title is used for personnel employed on a short-term basis to provide instructional coverage in the University Elementary School and the University Nursery School on the Los Angeles campus in the absence of regularly assigned teachers.

(56) **Supervisor of Physical Education Series**

[See APM - 300.](#)

(57) **Teaching Assistant**

[See APM - 410.](#)

(58) **Teaching Fellow**

[See APM - 410.](#)

(59) **University Professor**

[See APM - 260.](#)

(60) **Visiting Scholars and Other Visitors**

[See APM - 430.](#)

(61) **Visiting Titles**

[See APM - 230.](#)

Revision History

March 7, 2019:

GENERAL UNIVERSITY POLICY
REGARDING ACADEMIC APPOINTEES
Academic Titles

APM - 112

- Technical revisions to update existing titles and to conform with recent revisions to APM - 285, Lecturer with Security of Employment Series.
- Minor technical revisions to grammar and formatting.

For details on prior revisions, please visit the Academic Personnel and Programs website:
<https://www.ucop.edu/academic-personnel-programs/academic-personnel-policy/policy-issuances-and-guidelines/index.html>.

EXHIBIT
“F”

**IN THE MATTER OF
GRIEVANCE ARBITRATION
BETWEEN**

**GRADUATE EMPLOYEE UNION, LOCAL
6950 – INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (GEU-UAW)**

-AND-

**UNIVERSITY OF CONNECTICUT
BOARD OF TRUSTEES**

**GRIEVANCE: FAILURE TO INCLUDE
GRADUATE STUDENT TRAINING FELLOWS
IN BARGAINING UNIT**

AWARD

The grievance is procedurally and substantively arbitrable, and it is upheld. The functional relationship between Nexus Training Fellows Shannon Kelley and Cheryl Lyon and the University of Connecticut was substantially identical to that of Graduate Assistants beginning at least in September, 2019 through the end of school year 2020. Therefore, the University violated Article 1 of the collective bargaining agreement between Graduate Employee Union, Local 6950 – International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (GEU-UAW) by failing to include Shannon Kelley and Cheryl Lyon in the bargaining unit.

The grievants shall be included in Article 1 and covered by the collective bargaining agreement. The grievants shall be forthwith made whole as to all contract rights and benefits flowing from their inclusion in Article 1 of the collective bargaining agreement effective from the beginning of school year 2019-2020 to its end and thereafter. Ms. Kelley is entitled to such relief only for school year 2019-2020 as she transferred from the Nexus Training Fellow program at the end of school year 2019-2020. The specifics of the remedy are remanded to the parties for their calculation. The arbitrator retains jurisdiction of the case for a period of thirty (30) calendar days from the award date only for remedial implementation purposes.

Dated: 11/12/20

**_____
/s/ Richard G. Boulanger, Esq.
Arbitrator**

**IN THE MATTER OF
GRIEVANCE ARBITRATION
BETWEEN**

**GRADUATE EMPLOYEE UNION, LOCAL
6950 – INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (GEU-UAW)**

-AND-

**UNIVERSITY OF CONNECTICUT
BOARD OF TRUSTEES**

**GRIEVANCE: FAILURE TO INCLUDE
GRADUATE STUDENT TRAINING FELLOWS
IN BARGAINING UNIT**

The grievance was heard virtually by Arbitrator Richard G. Boulanger, Esq. on August 18, 2020.

The Graduate Employee Union, Local 6950 – International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (GEU-UAW)(Union) was represented by Mr. Kenneth Lang. The following individuals were called as witnesses by the Union: Ms. Ashley Robinson; Ms. Shannon Kelley; and Ms. Cheryl Lyon.

The University of Connecticut Board of Trustees (University) was represented by Ms. Alison Cutler, Esq.. The University called Dr. Kent Holsinger and Dr. Michael Coyne as witnesses.

The parties were given full opportunity to present evidence and make arguments.

Witnesses were sworn

The stipulated issue is as follows:

Whether the grievance is arbitrable?

If so, was the functional relationship between the Nexus Fellows Shannon Kelley and Cheryl Lyon and the University substantially identical to Graduate Assistants, and therefore, in violation of Article 1 of the Collective Bargaining Agreement between the University of Connecticut and the Graduate Employee Union, Local 6950 – International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (GEU-UAW)? If so, what shall be the remedy under the CBA?

I. COLLECTIVE BARGAINING AGREEMENT

- A. **ARTICLE 1:** **RECOGNITION**

- B. **ARTICLE 3:** **UNIVERSITY PREROGATIVES AND ACADEMIC RIGHTS**

- C. **ARTICLE 8:** **JOB POSTING**

- D. **ARTICLE 25:** **GRIEVANCE AND ARBITRATION**

- E. **ARTICLE 26:** **SUBCONTRACTING**

II. SUMMARY OF THE CASE

Graduate students who receive an appointment as Nexus Training Fellows in the University's Department of Education are not included by the University in the Graduate Assistant (GA) bargaining unit, and do not receive contractual rights and benefits.

The Union argues that Nexus Training Fellows Shannon Kelley and Cheryl Lyon (grievants) have a functionally identical relationship with the University as do Graduate Assistants. Therefore, they should be included in the GA bargaining unit, and covered by the collective bargaining agreement.

The University contends that the grievants do not have a substantially identical functional relationship to the University as do GAs, and are properly excluded from the GA bargaining unit.

The arbitrator ruled that the grievance is arbitrable. On the merits, the arbitrator determined that the grievants, as Nexus Training Fellows have a substantively identical functional relationship with the University as do GAs.

III. FACTUAL BACKGROUND

GAs were organized in 2014, and recognized by the University in the 2015-2018 collective bargaining agreement, and in the 2018-2021 collective bargaining agreement. (See Joint Exhibit # 1 and Union Exhibit #8.) GAs receive compensation and benefits for teaching and research activities. (See Joint Exhibits #3-#5.) GA teaching and research activities are directed by a faculty member, and their efforts are for the benefit of the University. Nexus Training Fellows receive financial support from grants, including scholarships, travel expenses, laptops, books, etc.. (See University Exhibits #1 and #2, Joint Exhibit #5, and Union Exhibits #9 and #10.) Training Fellows are also eligible for University health insurance coverage. Training Fellow research and teaching activities is to be determined collaboratively between the Training Fellow and his/her faculty advisor. The purpose of Training Fellow teaching and research activities is to satisfy the competencies of a Training Fellow's academic program. (See University Exhibit #4.)

The grievants were recruited as University doctoral candidates in the Department of Educational Psychology pursuant to a Federal Department of Education (DOE) grant. They began their University studies in September, 2018 with a concentration in special education. In connection with their academic work, they were assigned to teaching activities and research projects. (See Union Exhibits #4, #5, #14-#16.) Dr. Devin Kearns was the grievants' advisor. In 2019, a dispute arose between the parties as to the University's failure to include the Training Fellows in the bargaining unit. During the early Fall of 2019, Ms. Kelley met with Dr. Michael Coyne, Department Head of Educational Psychology to discuss the possibility of securing funds to pay for certain fees associated with their academic programs. (See University Exhibit #3.) Ms.

Ashley Robinson, a fifth year graduate student and Vice-President of the Union, testified that she accompanied Ms. Kelley to her meeting with Dr. Coyne on September 11, 2019. (See Union Exhibit #19.) She stated that the meeting was a productive one, and that Dr. Coyne addressed Ms. Kelley's concerns. (See Union Exhibit #19.) Consequently, a grievance was not filed in September, 2019. However, in late October, 2019, Ms. Kelley contacted Ms. Robinson, and indicated that her concerns had resurfaced. Consequently, a grievance was filed by the Union on November 22, 2019, challenging the University's refusal to consider Training Fellows as bargaining unit employees. (See Joint Exhibit # 2.) The grievance was not resolved during the course of the parties' grievance procedure, and it was appealed to arbitration. (See Joint Exhibit # 2.)

IV. SUMMARIES OF THE PARTIES' ARGUMENTS

A. ARBITRABILITY

1. UNIVERSITY:

The University contends that the grievance is not arbitrable as it was not timely originated. Moreover, the grievants were not GAs, and had no standing to file a grievance as they were not bargaining unit employees. The University also argues that when the Union processed the grievance to arbitration, it selected the incorrect forum to resolve the dispute. Additionally, the Union's grievance implicates the University's exclusive academic and management authority, which judgment is not subject to the grievance and arbitration procedure.

2. UNION:

The Union asserts that the grievance was filed in compliance with contractual time limits. The Union has standing to process the grievance in behalf of the grievants. The grievance and arbitration procedure is the appropriate forum to resolve the Union's claim. The grievance is substantively arbitrable, and the University's management and academic rights do not nullify arbitrability. Article 26 (**Subcontracting**) is inapplicable to the instant case, and does not undermine substantive arbitrability.

B. MERITS

1. UNION:

The University violated Article 1 when it failed to include the grievants into the GA's bargaining unit because their functional relationship to the University, was, and is, substantially identical to that of the GA's relationship with the University. The inclusion of Article 34 in the parties' second collective bargaining agreement reveals the intent of the parties to include graduate students other than GAs, in the bargaining unit, such as the grievants. The research and

teaching paths of the grievants track the GA's career path included within the contractual classification formula. The grievants provide substantially identical teaching and research support to the University as do GAs with the grievants moving in and out of the bargaining unit, underscoring the substantially identical functional connection to the University as is the GA relationship. Based on their teaching and research duties, the grievants satisfied the Article 1 definition of "graduate students whose functional relationship to the university is substantially identical to GAs" and should have been included in the bargaining unit by the University.

Dr. Kearns' assignment of the grievants to the CARING research project was motivated by the needs of the project, and not the "leadership competencies" of the grievants. The arbitrator should take notice that Dr. Kearns was not called by the University as a hearing witness. Dr. Kearns' consistent assignment of GA duties to the grievants demonstrates that a substantially identical GA functional relationship exists between the grievants and the University. Fellows such as the grievant who have the same functional relationship with the University as do GAs must be included in the bargaining unit.

The arbitrator should ignore any University testimony regarding taxation as a determinant of bargaining unit status. The University has also misapplied its own policy by excluding the grievants from the bargaining unit. NEXUS Training Fellow grants do not prevent the University from providing to the grievants those contractual benefits that they seek. The arbitrator should conclude that the functional relationship of the grievants to the University is substantially identical to that of GAs. The grievants are bargaining unit employees covered by the collective bargaining agreement. The Union requests that the grievance be upheld. The Union also seeks a make whole remedy for the grievants.

2. UNIVERSITY:

The University asserts that the functional relationship of the grievants to the University is not substantially identical to that of University GAs. Consequently, there is no basis for the University to consider the grievants as bargaining unit employees. GAs are both students and employees of the University. However, as Training Fellows, the grievants are University students, but not employees, and therefore, there was no violation of Article 1. GAs provide research and teaching support to the University in order that the University can reach its teaching and research goals. The grievants, as Training Fellows, on the other hand, rely on the University to provide their course work and training so that their competencies reach the University level upon graduation. GA teaching and research assignments are determined by the University based on GA expertise. GA appointments are typically for one semester or a full academic year. In comparison, Training Fellows such as the grievants, are chosen from a University recruitment effort. They begin their four (4) year guaranteed fellowship when they enroll in their academic programs. The Training Fellows' academic program is determined collaboratively by them and their advisors.

The collective bargaining agreement identifies the GA appointment procedure as well as GA compensation and obligations. The relationship between the University and the Training Fellows, including their obligations and benefits, is determined by the funding agencies and the Department to which they are assigned. Moreover, the University has the academic and management right to determine what the fellows teach, the nature of their research, and the overall nature of their assignments. These functions are not subject to the grievance and arbitration procedure. The Union failed to show how the grievants' assignments violate an express contractual provision. Therefore, the Union's grievance is not substantively arbitrable.

The assignments of the Training Fellows by the University were made in September, 2018. They were related to their academic program, and they were consistent with the Nexus grant that bars the grievants from receiving GA compensation. The grievance is moot as to Ms. Kelley as she is no longer a Training Fellow. Nexus Training Fellows must be US citizens, and they must fulfill a service obligation, which prerequisites are contrary to collective bargaining agreement terms and conditions for GAs. The University requests that the grievance be denied for all of the reasons specified above.

V. FINDINGS AND OPINION

A. ARBITRABILITY

1. CONTRACT STANDARD

The University asserts that the Union's grievance was not filed in conformance to contractual time limits. Article 25 (**Grievance and Arbitration**) includes the following pertinent grievance filing and processing terms and conditions:

Section 1. A grievance is a claim by an individual GA, a group of GAs or the Union that the University violated a specific term of this Agreement. Grievances shall be processed according to this Article.

Section 2. The parties support the resolution of problems at the lowest possible level and, therefore, encourage informal discussions to resolve problems without the grievance procedure. The GA, and a Union representative if the GA so desires, shall discuss the grievance with the GA's immediate supervisor at the time of the occurrence or at the time the employee learns of the occurrence in an effort to resolve the grievance. The University and the Union may agree to bypass this step or to have the informal discussion with another supervisor. Requests to waive the informal step shall not be unreasonably denied. If the grievant is alleging sexual harassment or sexual assault by their supervisor, the University shall automatically grant the request to bypass the informal step. Resolutions from pre-grievance discussions, although final, shall not be precedential.

Section 3. **Step 1.** If the grievance is not resolved through such informal discussion, it must be reduced to writing, dated, and presented to the department head (or dean for non-departmental schools) within thirty (30) calendar days after the event or after the grievant becomes aware or should have become aware of the event giving rise to the grievance.

Section 5. **Step 3** govern the arbitrator's authority as follows:

(a) If the grievance is not resolved at Step 2, the Union may, within twenty-one (21) calendar days from receipt of the written step 2 decision, appeal the decision to arbitration by written request to the University.

(b) The parties agree to a panel of six (6) arbitrators who will preside over grievances appealed to arbitration. The panel is comprised of Peter Adomeit, Rich Boulanger, Sharon Henderson Ellis, Roberta Golick, Mark Irvings, Lee Williamson.

(c) The labor arbitration rules of the American Arbitration Association (AAA) shall apply to the arbitration. The arbitrator shall issue a decision within thirty (30) calendar days of the close of the hearing. The parties agree that any decision issued within sixty (60) calendar days of the close of the hearing shall be valid. By mutual agreement, the parties may extend this time limit.

(d) The expense of such arbitration (cost of meeting room, if any, arbitrator's fee and expenses, and transcript of cost, if any) shall be split equally between the parties.

(e) The parties shall make reasonable efforts to schedule arbitration hearings promptly, and, where feasible, within forty-five (45) calendar days of the designation of the arbitrator.

Section 6. In rendering a decision, the arbitrator shall be governed and limited by the provisions of this Agreement. The arbitrator shall have no authority to add to, subtract from, or modify this Agreement or to decide matters outside the issue submitted to arbitration. In disciplinary cases, the remedy available to the arbitrator shall not exceed making the GA whole for the remainder of the GA's appointment period. The decision of the arbitrator shall be final and binding subject to statutory provisions.

a. TIMELINESS

As indicated above in Section 3 Step 1, if a grievable matter is not informally resolved, it must be reduced to writing, dated, and presented to the Department head "thirty (30) calendar days after the event, or the grievant becomes aware of, or should have become aware of the event giving rise to the grievance." The grievance was filed by the Union on November 22, 2019. (See Joint Exhibit # 2.) The University contends that the Union was aware of the grievable matter on August 30, 2019. The Union was copied on an August 30, 2019 email from Ms. Kelley indicating that she believed that Training Fellows should be covered by the collective bargaining agreement based on their assignments. (See University Exhibit #3.)

Ms. Robinson testified that she and Ms. Kelley met with Dr. Coyne to discuss Ms. Kelley's concerns on September 11, 2019. Ms. Robinson testified that she believed Dr. Coyne

would resolve the issues raised by Ms. Kelley. (See Union Exhibit #19.) However, in an October 25, 2019 email from Dr. Kearns regarding the grievants' Spring, 2020 schedule, Ms. Kelley realized that her concerns had not been resolved by Dr. Coyne, and she contacted Ms. Robinson. (See Union Exhibit #12.) According to the Union, October 25, 2019 is the date that it became aware of the grievable incident. Consequently, it timely filed its grievance on November 22, 2019. (See Joint Exhibit # 2.)

The terms of Article 25 §2 and §3 encourage informal resolution of problems without accessing the grievance procedure. It was appropriate for Ms. Kelley and Ms. Robinson to discuss Ms. Kelley's concerns with Dr. Coyne. The Union was copied on Ms. Kelley's August 30, 2019 email. The discussion with Dr. Coyne took place on September 11, 2019. It is not as if Ms. Kelley or the Union delayed unnecessarily in scheduling the appointment with Dr. Coyne to discuss Ms. Kelley's issues. (See University Exhibit #3.) Dr. Coyne testified that he agreed to attempt to resolve Ms. Kelley's issues. Ms. Robinson testified that progress was made during the September 11, 2019 meeting with Dr. Coyne. Her notes taken during that meeting support her opinion. (See Union Exhibit #19.) Ms. Robinson testified that Ms. Kelley's concerns had been addressed by Dr. Coyne. Therefore, a grievance was not filed on or about September 11, 2019.

It was not until October 24, 2019 when Ms. Kelley and Ms. Lyon received an email from Dr. Kearns notifying them of their Spring, 2020 assignments, which like assignments had prompted the discussion with Dr. Coyne on September 11, 2019, that Ms. Kelley became aware that her concerns remained. (See University Exhibit #3 and Union Exhibit #12.) It was on October 24, 2019 that Ms. Kelley realized that the matter had not been resolved by Dr. Coyne and she notified Ms. Robinson. (See Union Exhibit #12.) Furthermore, Ms. Robinson became aware that Ms. Lyon was also included in the assignment email. (See Union Exhibit #12.)

Consequently, the grievance was timely filed on November 22, 2019, within thirty (30) calendar days of Ms. Kelley's and Ms. Robinson's awareness that the grievable matter had not been resolved per §3 Step 1.

As the grievants' issues surfaced in the Fall semester of 2019, the University was put on notice of financial exposure beginning in September, 2019. Relief, if any, should be effective no earlier than the beginning of school year 2019-2020. Ms. Kelley is entitled to such relief only for school year 2019-2020 as she transferred from the Nexus Training Fellow program at the end of school year 2019-2020. The University argues that the Union's remedy may violate grant terms and contractual provisions, and the grievance is not therefore viable. However, fashioning an appropriate remedy that flows from the nature and scope of a contract breach, if any, does not by itself render the grievance procedurally or substantively non-arbitrable.

b. STANDING

The Union has standing to file a grievance in behalf of Ms. Kelley and Ms. Lyon per Section 1 of Article 25:

“A grievance is a claim by an individual GA, a group of GAs or the Union that the University violated a specific term of this Agreement. Grievances shall be processed according to this Article. (Emphasis added.)

Furthermore, as a bargaining unit inclusion grievance, it is particularly appropriate that the Union exercise its right to file and pursue the instant grievance to arbitration.

c. FORUM

Dr. Kent Holsinger, Vice Provost for Graduate Education and Dean of the Graduate School, testified that grievances, other than the instant one, have been filed claiming violations of Article 1. The Union's grievance alleges that the University violated Article 1 conforming to Article 25 §1 requirements. As memorialized in §1, the parties further agreed that “Grievances

shall be processed according to this Article,” which is Article 25 itself. Article 25 contains the parties’ arbitration provision which limits the arbitrator to interpreting contract terms. Moreover, the parties negotiated and included the functional relationship standard in Article 1 to allow for bargaining unit inclusion of University graduate students other than GAs, if they satisfied the standard. Per Section 6, the arbitrator is authorized to apply that standard to the facts of the instant case. Pursuant to the terms of Article 25, Article 1 is not excluded from the arbitration process. Similarly, Article 1 does not bar arbitration of its terms. Therefore, arbitration is an appropriate forum to resolve the parties’ dispute.

d. MANAGEMENT RIGHTS

The University argues that the grievance is substantively non-arbitrable by virtue of the following provisions of Article 3 (**University Prerogatives and Academic Rights**):

Section 1. The parties acknowledge that Graduate Assistants ("GAs") have attributes of employees, particularly with regard to economic issues such as stipends and benefits, but that Graduate Assistants are also students with rights and obligations that are predominately academic.

Section 2. Management of the University is vested exclusively in the University. Except as otherwise provided in this Agreement, the Union agrees that the University has the right to establish, plan, direct and control the University's missions, programs, objectives, activities, resources, and priorities; to establish and administer procedures, rules and regulations, and direct and control University operations; to alter, extend or discontinue existing equipment, facilities, and location of operations; to determine or modify the number, qualifications, scheduling, responsibilities and assignment of Graduate Assistants; to evaluate, to determine the content of evaluations, and to determine the processes and criteria by which Graduate Assistants' performance is evaluated; to establish and require Graduate Assistants to observe University rules and regulations; to discipline or dismiss Graduate Assistants; to establish or modify the academic calendars, including holidays and holiday scheduling; to assign work locations; to schedule hours of work; to recruit, hire, or transfer; to determine how and when and by whom instruction is delivered; to determine in its sole discretion all matters relating to faculty hiring and tenure and student admissions; to introduce new methods of instruction; to subcontract all or any portion of any operations except as

restricted by Article 26 of this agreement; to establish tuition, fees, and charges of general application, and changes in such matters, provided such tuition, fees, or charges of general application shall be waived or remitted for Graduate Assistants pursuant to Article 20; and to exercise sole authority on all decisions involving academic matters.

Section 3. Except as otherwise provided in this agreement, the University also has the right to establish, maintain, modify and enforce standards of performance, conduct, order and safety by which GAs shall abide. The University shall also have the right to establish or revise disciplinary policies to address violations of these rules. The Union may grieve the reasonableness of such rules and policies.

Section 4. Decisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University. Other questions of academic judgment that shall remain in the University's discretion are: decisions regarding a GA's academic progress and standing, including the determination of whether or not to continue or renew a GA on academic grounds; decisions regarding research methodology and materials; decisions about academic standards and whether to create, eliminate, combine, or modify academic, outreach, service and research programs; decisions regarding the selection and assignment of faculty and all positions, including GAs, that support teaching and research; and decisions regarding grants including application, selection, funding, administration, usage, accountability and termination.

Section 5. The above enumeration of management rights is not exhaustive and does not exclude other management rights not specified herein, nor shall the exercise or non-exercise of rights constitute a waiver of any such rights by the University.

Section 6. Except as provided in Section 3 above, no action taken by the University with respect to a management or academic right shall be subject to the grievance or arbitration procedure unless the exercise thereof violates an express written provision of this agreement. (See Joint Exhibit #1.)

In Article 3, the University reserved its rights to manage itself, including terms specifying particular rights “except as otherwise provided in this Agreement.” Pursuant to Article 3 provisions, it is clear that the University has among other rights, the “authority to determine or modify the number, qualifications, scheduling, responsibilities and assignment of Graduate Assistants...” The University contends that it determines teaching/research and other

assignments to Training Fellows, GAs, and others, which right is not arbitrable. However, the focus of the parties' dispute is not based on the right of the University to assign, but rather whether by virtue of Training Fellow teaching and research assignments is there a functional relationship with the University that is substantially identical to that of GAs. Moreover, per Section 6 terms, the parties agreed that the exercise of such a right by the University, which results in a violation of an express contract article, is grievable and arbitrable. Per Article 1, the parties agreed that non-GA graduate students who share a "substantially identical functional relationship with the University" must be recognized by the University as bargaining unit employees. The Union's grievance claims a violation of Article 1, and not Article 3. Similarly, the parties' stipulated issue to the arbitrator is limited to Article 1. Pursuant to Section 6 of Article 25, the arbitrator's authority is limited to a resolution of the issue, here whether Article 1 is violated by the University's failure to include the grievants in Article 1. (See Joint Exhibit #2.) Consequently, the grievance is not barred by the terms of Article 3.

e. **CONCLUSION**

The grievance is procedurally and substantively arbitrable for all of the reasons specified above.

B. **MERITS**

1. **CONTRACT STANDARD**

The Union's claim is that the grievants as Nexus Training Fellows are engaged in a substantially identical relationship with the University as are GAs pursuant to Article I (**Recognition**):

As reflected in the Connecticut State Board of Labor Relations Case #30888, the University recognizes the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local Union, Graduate Employee Union-UAW Local 6950 (GEU-UAW Local 6950), as the exclusive bargaining representative for employees in the bargaining unit. The bargaining unit shall include all University of Connecticut Graduate Assistants (GAs), including Teaching Assistants (TAs), Research Assistants (RAs) and other Graduate Assistants who are not TAs or RAs. The bargaining unit shall also include graduate students whose functional relationship to the university is substantially identical to GAs even if another term is used by the University to describe their position.

GAs with appointments at the University of Connecticut Health Center (Schools of Medicine and Dental Medicine), graduate students performing internships required as an integral component of a graduate educational program (specifically, in the program known during the 2014-2015 academic year as the Provost's Professional Internship Program for Public Outreach, Service and Engagement), confidential employees and managerial employees shall be excluded from the bargaining unit. (See Joint Exhibit #1.)

The substantially identical functional relationship standard manifests the parties' intent that graduate students other than GAs can be included in the Article I bargaining unit. Both GAs and Training Fellows are University graduate students. The Nexus Training Fellows are not expressly excluded from the bargaining unit, unlike other graduate students. (See Article 1, second paragraph.) There is no evidence that the Nexus grant itself or the Federal Register bars bargaining unit inclusion of Training Fellows. Based on the parties' stipulated issue on the merits, the critical inquiry is whether Nexus Training Fellows, such as the grievants, have a substantially identical functional relationship with the University as do GAs. The point of analytical departure is gleaned from the parties' intent when they negotiated the "substantially identical functional relationship" standard. There being no evidence that the parties intended a unique interpretation be ascribed to the standard, its plain, ordinary meaning shall be applied to the facts of the instant case.

As utilized by the parties in the context of the overall interpretation of the word,

“substantially” means “considerably.” The Merriam-Webster Dictionary, Merriam-Webster, Inc., 1997. The word “identical” means “being the same; essentially alike; equivalent, equal, tantamount.” **Id.** The word functional means “special purpose.” **Id.** The word “relationship” is commonly interpreted as follows: “the state of being mutually interrelated or involved.” **Id.** Consequently, the ordinary meaning of the standard as used by the parties in Article I to round out the bargaining unit is that non-GA graduate students must share a considerably equivalent purpose in their role as University graduate students as do GAs to be included in the bargaining unit. In light of the parties’ standard, the grievants’ functional relationship with the University as Nexus Training Fellows must be very close in nature and scope to that of the GAs and the University to be included in Article 1.

a. DEFINITIONS – ASSISTANTSHIP AND FELLOWSHIP

In order to resolve the parties’ dispute, it is necessary to compare the specific elements of the relationship of the grievants and GAs with the University. As the parties’ standard is based on the relationship of a GA with the University, it is essential to specify the GA connection to the University as student and employee. (See Article 3, §1.) The documentary evidence reveals that a University-GA relationship includes the following elements:

The Offices of the Vice Provost for Graduate Education & Dean of the Graduate School and the Vice President for Research have developed the following definitions to provide guidelines in the appointment, roles and responsibilities of graduate students as assistants, fellows and interns.

An assistantship (teaching assistantship or research assistantship) is awarded to a graduate student who provides teaching or research support to the University that is a part of his/her academic program. In recognition of this support, the tuition of the student is provided by the grant/contract funding agency (for research assistants) or the University (for teaching assistants).

Note: all assistantships must be administered through an academic department. (See Joint Exhibit # 3.)

Guidelines for the employment of graduate students is as follows:

Existing Law and Policy

The University defines graduate assistants as graduate students “who provide teaching or research support to the University that is a part of his/her academic program,” and requires that all assistantships be administered through an academic department.

(See <https://grad.uconn.edu/wp-content/uploads/sites/2114/2016/05/Definitions-GA.pdf>.)

This definition is intended to align with the federal Tax Code Section 117(c), which provides that scholarships and tuition reductions are taxable income to the student (and thus potentially subject to withholding like wages) when they represent “payment for teaching, research or other services by the student required as a condition for receiving” the scholarship or tuition reduction.

Graduate assistantships – Academic Year

During the academic year, Graduate Assistants receive a tuition waiver, a stipend, and health insurance in exchange for performing teaching, research, or other duties for the university. Graduate Assistants are members of the GEU-UAW bargaining unit and their employment is governed by the collective bargaining agreement effective July 1, 2015.

Graduate Assistants are expected to work an average of twenty hours per week (considered a “full GA,” or a 100% appointment). Occasionally, units may appoint a Graduate Assistant for less than twenty hours per week, typically fifteen hours (a 75% appointment) or ten hours (a 50% appointment). Under state law, these Graduate Assistants receive a full waiver of their tuition despite their reduced work hours, and thus the University expects units to use these partial appointments very judiciously only to meet special needs, such as to align with the timeline of a research grant or to cover an unexpected teaching need.

As a consequence of the University’s definition of a Graduate Assistant, it is the University’s expectation that all Graduate Assistants will have assignments that substantially involve work that supports the teaching or research missions of the University, or both. Thus, Graduate Assistants are usually assigned as Teaching Assistants or Research Assistants or a combination of the two. Since the University’s teaching mission involves a large array of activities beyond traditional classroom instruction, Graduate Assistants may also be assigned to support implementation of instructional technologies, advising programs, cultural programs, learning communities, and other co-curricular activities.

Graduate assistantships – Summer and Winter Intersession

Graduate students who perform teaching or research activities for the University as part of an academic program during the summer months or the winter intersession are also governed by the GEU-UAW collective bargaining agreement and are hired through special payroll. Graduate Assistants in the summer or intersession who serve as the instructor of record should be hired as Graduate Special Payroll Lecturers.

Graduate Assistants who are providing various levels of instructional support should be hired as Graduate Instructional Specialists. Graduate Assistants who are providing research functions should be hired as Graduate Student Technicians. Detailed information about summer graduate student titles is available at: <http://hr.uconn.edu/special-payroll-manual-offer-letters-forms>.

Graduate assistantships – Not Substantially Related to Meeting Teaching and Research Missions

When a unit seeks to offer work to a graduate student that is not substantially related to meeting teaching or research needs, the University expects units to use one of the mechanisms described below (student labor, or work study,) to employ that student. In particular, work that is predominantly administrative in nature should be accomplished through these means.

There may be exceptional cases when a unit determines that a graduate assistantship is the best means to appoint a student even though the student's work will not substantially involve teaching or research. While inconsistent with University definitions and expectations, Federal regulations do not prohibit Graduate Assistants from performing duties other than as Teaching Assistants or Research Assistants. If a unit seeks to employ a Graduate Assistant for work other than teaching or research, the unit must obtain permission to do so from the Dean of the Graduate School. Further, the unit must inform the student in the appointment offer letter that the tuition waiver they will receive is likely to be taxable, and thus their stipend will be subject to withholding. Units should also be aware that these Graduate Assistants will be members of the GEU-UAW bargaining unit and thus covered by the collective bargaining agreement. (See Joint Exhibit #4.)

The inquiry now turns to the relationship between the University and a Fellow. It is identified as follows:

A fellowship is awarded to a graduate student to pursue his/her academic program, but does not require the student to provide any teaching or research support to the institution. The tuition of a student receiving a fellowship must be paid by the student, the granting organization, the department and/or school/college or through the Office of the Vice President for Research (VPR)

with prior approval. An example of this is the Policy on Competitive Federal Graduate Awards; where the institutional/educational allowance is deposited in the Office of the VPR which is responsible for paying the tuition. (See Joint Exhibit # 3.)

Per the guidelines for the employment of graduate students:

A fellowship is awarded to a graduate student to pursue his or her academic program, but does not require the student to do work for the University. Graduate fellows may receive funding from the University or another source that may cover their tuition and provide stipends and health insurance.

Under certain conditions, scholarships (including health insurance subsidies) provided to interns and fellows may be taxable. In cases where a student is provided a scholarship or tuition waiver that is not connected to employment, however, the University is has no general obligation to report the scholarship income or withhold any tax, except in limited cases involving international students. For the majority of students, it is entirely up to the student to claim scholarship income on his or her tax return. (See Joint Exhibit # 4.)

The Training Fellow/GA distinctions noted above, are primarily that GAs perform teaching and research support for the University in exchange for tuition waivers and other benefits, while Training Fellows are not required to perform such services for the University. The University argues that the relationship between the University and GAs is determined by the collective bargaining agreement, and the relationship between the Training Fellow and the University is determined by the Funding Agency and the Department. As it relates to the grievants, at the onset of their programs in September of 2018, the lines between GAs and Training Fellows were blurred to such an extent that their roles were substantially identical to each other. A comparison of the GA-University connection and the grievants' relationship with the University as Nexus Training Fellows discloses that the grievants have a substantially identical functional relationship with the University as do GAs because the evidence discloses that they are required to perform teaching and research duties.

b. RESEARCH AND TEACHING DUTIES; TRAINING FELLOWS AND GAs

The University also argues that GAs are students and employees while Training Fellows are students, but not University employees. “Graduate Assistants are expected to work an average of twenty (20) hours per week...” (See Joint Exhibit #4.) Significantly, the grievants were obligated to, and did, devote twenty (20) hours per week to their teaching and research duties beginning in September, 2018. Dr. Kearns assigned the grievants to twenty (20) work hours per week for the CARING research project. (See Union Exhibit #12.) The University does not challenge the assignment of Training Fellows to teaching and research duties per the following Article 26 terms:

The parties recognize that teaching, research and other activities performed by GAs have also been performed and will continue to be performed by others within the University, including faculty members (including adjuncts), visitors, undergraduates, post-doctoral individuals, vendors, laboratory technicians, research assistants, research associates and other employees. The University shall not, however, replace GAs with outside contractors or personnel from outside temporary agencies without bargaining with the Union over the decision to do so and any effects of such replacement.

Even though the University contends that a fellow is not required “to provide any teaching or research support to the institution,” the evidence reveals that beginning in at least the Spring, 2019 semester, the grievants provided teaching and research support to the University. (See Union Exhibits #5, #6, #12, #14-#15.) Ms. Robinson testified without contradiction that Training Fellows and GAs both perform teaching and research tasks. Dr. Coyne testified that a Training Fellow’s research assignment is similar to that of a GA.

While the University asserts that typically Training Fellows collaborate with their advisors relative to teaching assignments and research projects assigned to them, there is no evidence that the grievants had any choice in the Fall of 2018 or thereafter as to which research projects they would be assigned. (See Union Exhibit #12.) They were assigned to

the CARING Project. On September 14, 2018, Dr. Kearns, who did not testify at the arbitration hearing, indicated that the grievants were working twenty (20) hours per week for the CARING project, and he stated that “this means that any time you do not have class, it is available for project work.” (See Union Exhibit #12.) In that September 14, 2018 email, Dr. Kearns goes on to say, “I want to be clear that you are generally expected to be on campus for this work.” (See Union Exhibit #12.) Therefore, the grievants were assigned to project research duties in the same fashion as GAs are assigned to research duties, and the research was considered work. It is not as if the grievants created or selected the CARING project. (See Union Exhibits #12 and #14.) However, while it is clear that the grievants were gaining experience and developing their competencies while performing research work on the CARING Project, their research contributions also benefitted the University. Dr. Coyne testified that the Training Fellow research competencies are aligned with the needs of the project. There is no basis in the evidence to conclude that the grievants’ research benefit to the University was merely incidental. That the grievants were devoting twenty (20) hours per week to the project leads to a finding that their contributions to the project were more than incidental.

Dr. Coyne testified that Research Assistants (RAs), a bargaining unit position and Training Fellows are typically on the same research teams, and perform similar activities. On the CARING Project, the grievants were described as Intervention Specialists. (See Union Exhibit #14.) Ms. Manqian Zhao, a GA, also titled an Intervention Specialist on the CARING Project, worked side by side with the grievants. Dr. Coyne testified without contradiction that the grievants’ duties on the CARING Project and those of Ms. Zhao were identical, contributing support to the finding that based on the grievants research duties, the

grievants were engaged in the same functional relationship with the University as were GAs. (See Union Exhibits #12 and #14.) Dr. Coyne testified that Training Fellows are referred to as GAs in a general sense, but not in a technical manner, and that the Training Fellow and GA titles are used interchangeably.

Significantly, based on the grievants' uncontradicted testimony, in the Summer of 2019, they performed the same duties and responsibilities on the CARING Project, while Graduate Student Technicians in the bargaining unit, as they did in the Spring and Fall of 2019 while Training Fellows and excluded from the bargaining unit. (See Union Exhibits #4 and #16.) The inclusion of the grievants in the bargaining unit does not turn on their Summer or Intersession titles for that period of time. It is based on the duties and responsibilities to which they were and are assigned while performing research for the University. Effective in the Fall of 2020, Ms. Lyon was reassigned from the CARING Project to the OAK Project "based on her prior experience." (See Union Exhibit #12.) Based on the evidence, Ms. Lyon did not choose the OAK Project to develop her competencies. Rather, she was assigned to the OAK Project based on her experience to benefit the University. (See Union Exhibit #12.)

In connection with their academic programs, GAs are similarly assigned to provide teaching support to the University. (See Union Exhibit #2.) In the Fall of 2019, the grievants were assigned to provide such teaching support. (See Union Exhibit #15.) In the Spring of 2020, they were assigned the same duties relative to courses. (See Union Exhibits #5-#6.) The grievants developed syllabi and developed course material for the two (2) courses. They provided technical support to Dr. Kearns, the instructor of record. The grievants' role in providing course teaching support to Dr. Kearns is identical to that task as performed by

GAs. (See Union Exhibit #2.) It is of considerable significance that in both their Fall, 2019 and Spring, 2020 teaching assignments, the grievants are referred to as Teaching Assistants, a bargaining unit classification. (See Union Exhibits #5 and #15.) It is worthy of note, based on the grievants' uncontradicted testimony, that in the Summer of 2020, the grievants provided the same teaching support while classified as Graduate Special Payroll Lecturers included in the bargaining unit, as they did as Training Fellows and excluded from the bargaining unit during Fall, 2019 and Spring, 2020 semesters. (See Union Exhibits #7 and #17.) Therefore, as to teaching and research assignments, the grievants as Training Fellows shared the same functional relationship with the University as did GAs in school year 2019-2020.

C. CONCLUSION

The grievance is procedurally and substantively arbitrable, and it is upheld. The functional relationship between Nexus Training Fellows Shannon Kelley and Cheryl Lyon and the University of Connecticut was substantially identical to that of Graduate Assistants beginning at least in September, 2019 through the end of school year 2020. Therefore, the University violated Article 1 of the collective bargaining agreement between Graduate Employee Union, Local 6950 – International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (GEU-UAW) by failing to include Shannon Kelley and Cheryl Lyon in the bargaining unit.

The grievants shall be included in Article 1 and covered by the collective bargaining agreement. The grievants shall be forthwith made whole as to all contract rights and benefits flowing from their inclusion in Article 1 of the collective bargaining agreement effective from the beginning of school year 2019-2020 to its end and thereafter. Ms. Kelley is entitled to such

relief only for school year 2019-2020 as she transferred from the Nexus Training Fellow program at the end of school year 2019-2020. The specifics of the remedy are remanded to the parties for their calculation. The arbitrator retains jurisdiction of the case for a period of thirty (30) calendar days from the award date only for remedial implementation purposes.

DECLARATION OF ROBERT ACKERMAN

**DECLARATION OF ROBERT ACKERMANN
IN SUPPORT OF STUDENT RESEARCHERS UNITED'S
RESPONSE TO PERB'S INVESTIGATIVE INFORMATION REQUEST**

1. I was a graduate student at UC Santa Barbara from 2008 to 2014. I received my Ph.D. in mathematics in 2014. While at UCSB I was an officer of UAW Local 2865, the union of Teaching Assistants, tutors, and readers, from 2010 to 2014. After graduation, I worked for UAW Local 5810, the Union of Postdocs and Academic Researchers. Today I am a UAW International Representative. I have worked alongside and with Student Researchers throughout both my time as a graduate student and my time as a union representative. I've familiarized myself with the sources of financial support and supervision for Graduate Student Researchers, Trainees, and Fellows.

I am familiar with Student Researchers United's HEERA Representation Petition and related filings submitted to the California Public Employment Relations Board ("PERB" or "Board"). This declaration verifies factual assertions made in the Union's September 8, 2021 Petition for Board Investigation as well as supports the Union's responses to PERB's September 17, 2021 Investigative Information Request. All links identified herein were verified by me as being active at the time of filing and many appear on UC or Federal Agency websites. If called to testify in this action, I could and would competently testify to the facts asserted in this declaration based on my own personal knowledge unless otherwise from information and belief based on my research.

2. Upon information and belief, Graduate Student Researchers (GSRs), Fellows, and Trainees, along with other Student Researchers, helped the UC bring in over \$3.7 billion in federal contract and grant funding in 2020 ([UC Annual Financial Report 19/20](#), p. 37). I am aware that the majority of UC's research funding is sourced through federal contracts and grants, through agencies like the National Institutes of Health (NIH) and National Science Foundation (NSF). The federal agencies that provide the vast majority of funds to support GSRs, Fellows, and Trainees are exactly the same, and thus the University's attempt to exclude Trainees and Fellows from the proposed unit due to the source of funding appears completely arbitrary.

3. Externally awarded research grants commonly support GSRs, and GSRs work under the supervision of a Principal Investigator (PI) to fulfill the requirements of the grant. Usually a GSR's PI and faculty advisor are the same person, and their work as a GSR contributes directly to their dissertation or master's thesis. Financial remuneration, tuition remission, health care

care costs, and other support for GSRs are budgeted for and can be charged to research grants. Each UC campus has a Sponsored Projects Office, Office of Grants Administration, or similar that provides guidance, in accordance with funding agency, state, and UCOP guidelines, for budgeting research grants to employ Graduate Student Researchers. For example, the [UCLA Office of Grants Administration](#) provides specific [guidance for budgeting GSR](#) tuition remission, salaries, and benefits in grant proposals. UC Berkeley provides [budget justification templates](#) to assist PIs with writing grants that include GSRs as grant personnel. The Berkeley Social Welfare, Graduate Student Researcher (GSR) Appointment Request Form, https://socialwelfare.berkeley.edu/sites/default/files/gsrappptform2021_1.pdf, requires the GSR applicant's "Supervising Faculty/PI" to complete on page 3 the "Funding Detail," including "Project/Fund Nickname to Charge," and a "Fund Code." UC Davis provides a [sample appointment letter](#) that notifies a GSR of their funding source. UC Davis further requires that for GSRs, "the fees and tuition remitted must be charged to the contracts or grants on which the student is appointed." ([UC Davis Preparing a Budget Toolkit](#), p. 13). Upon information and belief, UC campuses, such as the University of California at San Diego, categorize "tuition remission" for GSRs to be a "direct cost" – "costs that are specifically identifiable and which can be charged directly to the contract or grant." Budgets – Direct Costs, UC San Diego, Blink, last updated April 19, 2021, <https://blink.ucsd.edu/research/preparing-proposals/budgets/direct.html#Tuition-remission>.

4. Institutional training grants (such as the NIH T32, T35, T90/R90, D43, and D71, the Food and Agricultural Sciences National Needs Graduate and Postgraduate Fellowship (USDA NNF), and the NSF Research Traineeship Program) are awarded to UC to support training in research fields of interest to the granting agency. Like other research awards, institutional training grants are awarded to and managed by UC. For NIH institutional training grants, "A domestic, non-profit public or private organization may apply for a grant to support a research training program in a specified area(s) of research. Support for predoctoral, postdoctoral, or a combination of trainees may be requested" ([NIH GPS](#) 11.3.2.1). For the NSF Research Traineeship program, proposals may only be submitted by "Institutions of Higher Education (IHEs) - Two- and four-year IHEs (including community colleges) accredited in, and having a campus located in the US, acting on behalf of their faculty members." ([NSF NRT Program Solicitation](#), p. 2).

5. Training grants, like other research awards, directly support research at UC by providing for expenses like research materials, equipment, institutional costs, financial remuneration, tuition remission, and health benefits. Allowable costs for NIH institutional training grants include stipends, tuition & fees, training-related expenses "to defray costs such as staff salaries, consultant costs, equipment, research supplies, staff travel, trainee health

insurance (self-only or family as applicable), and other expenses directly related to the training program”, and Facilities and Administration ([NIH GPS](#) 11.3.8). The NSF directs applicants for NSF NRT program awards to “Provide an annual budget for up to five years ... Proposal budgets for both tracks should be consistent with the costs to develop, offer, administer, and evaluate the program elements (e.g., courses, workshops, internships) and the number of trainees supported financially with NRT stipends or from other sources. Indirect costs should be included on all subawards.” ([NSF NRT Program Solicitation](#), p. 9). For each doctoral student placed on the grant, the USDA NNF provides “funding at \$79,500 for each Fellow. This consists of a student stipend of \$24,500 per year for three years, plus \$2,000 per year cost-of education allowance (\$6,000 maximum)” ([USDA NNF Request for Applications](#), p. 12).

6. UC encourages and supports Principal Investigators in applying for institutional training grants, just as they encourage and support Principal Investigators in applying for other research grants. UC San Diego [created a webpage](#) listing its current training grants, who they are intended to support, and who is the Principal Investigator for each (usually a Faculty member). They [promote services](#) to assist PIs in applying for and administering NIH Training Grants, through the Vice Chancellor of Health Sciences Research Service Core. This includes guidance on building a budget. The UCLA School of Medicine also [has a webpage](#) that provides guidance for PIs to apply for training grants. UC Davis has a [webpage](#) with resources for PIs to apply for training grants.

7. UC chooses who to support through training grants, and is responsible for their supervision. For example, the NIH specifies that for institutional awards “The Training PD/PI at the recipient organization will be responsible for the selection and appointment of trainees to the Kirschstein-NRSA research training grant and for the overall direction, management, and administration of the training program, including program evaluation, and submission of all required forms in a timely manner. In selecting trainees, the PD/PI must make certain that individuals receiving support meet the eligibility requirements set forth in this subsection” ([NIH GPS](#) 11.2.3). Upon information and belief, other training grants necessitate similar supervision of trainees by UC faculty.

8. Individual training grants, such as the NIH F31, are structured similarly to institutional training grants except that the awardee is an individual rather than an institution. Like institutional training grants, individual awards are provided to further specific research training objectives. For example, the NIH makes awards to “ensure that a diverse pool of highly trained scientists is available in adequate numbers and in appropriate research areas to carry out the Nation's biomedical, behavioral, and clinical research agenda” ([NIH GPS](#) 11.2.1). While the grant is awarded to an individual, the sponsoring institution is required to provide

supervision and administer the grant: “Before submitting a Kirschstein-NRSA individual fellowship application, the fellowship applicant must identify a sponsoring institution and an individual who will serve as a sponsor (also called mentor or supervisor) and supervise the training and research experience. The sponsoring institution may be domestic or foreign, public or private (for-profit or non-profit), including the NIH intramural programs, other Federal laboratories, and units of State and local governments. The sponsoring institution is legally responsible for providing facilities for the applicant and financially responsible for the use and disposition of any funds awarded based on the application. The sponsor should be an active investigator in the area of the proposed research who will directly supervise the fellow's research” ([NIH GPS 11.2.2.5](#)). Individual training grants also provide UC with funds to cover the costs of research training, including stipends, travel, tuition and fees, and an institutional allowance. The institutional allowance is a fixed amount to which the sponsoring institution (UC) authorizes expenditures on behalf of the fellow according to the institution's (UC's) policy ([NIH GPS 11.2.9.4](#)).

9. NIH training grants explicitly allow for union dues to be deducted from stipends - “Concerning union dues or other similar costs otherwise paid personally by the trainee, if a trainee requests the institution deduct such a cost from the stipend amount, the institution can provide the trainee such a service. However, in no case can such a deduction from the stipend be made automatically without the approval of the trainee and institution.” ([NIH GPS 11.3.8.7](#) for institutional training grants, nearly identical language in [NIH GPS 11.2.9.7](#) for individual awards). This provision highlights the fact that the funding agency anticipates that the Student Researchers funded by the training grant may well be a unionized worker employed by the University.

10. The petitioned for research fellowships share characteristics of training grants. They are all provided by external funding agencies for the purposes of fulfilling agency objectives. For instance, when evaluating NSF GRFP proposals (see [NSF GRFP Program Solicitation](#)), “reviewers will be asked to consider what the proposers want to do, why they want to do it, how they plan to do it, how they will know if they succeed, and what benefits could accrue if the project is successful. These issues apply both to the technical aspects of the proposal and the way in which the project may make broader contributions” ([NSF GRFP Program Solicitation](#), p. 10). With some exceptions, such as DoD NDSEG, fellowship funds are provided to the University and then disbursed to the fellowship recipient. Besides providing financial remuneration in the form of stipends, all petitioned for fellowships provide funds to cover expenses like tuition and fees, healthcare, and other expenses. For instance, the [NSF GRFP](#) provides a “cost of education allowance” of \$12,000 / year and the NASA Space Technology Graduate Research Opportunities Fellowship provides a Faculty Advisor Allowance.

“To be used to directly enhance the Graduate Researcher’s experience. May be used to cover student travel to technical and scientific meetings; it is expected that the Graduate Researcher will attend at least one technical conference annually for presentation of the work being conducted under the grant. Other permissible charges in this category include expendable laboratory supplies, lab books, page charges for journal articles, printing of a thesis, and similar charges. Faculty advisor time and travel in direct support of the NASA Space Technology Graduate Researcher are permitted. This allowance may not be used to supplement the student stipend.” ([NASA Space Technology Graduate Research Opportunities](#), p. 5 - 6)

Lastly, all petitioned for fellowships require that a faculty sponsor supervise and report on research progress.

11. Through my work I am also familiar with the various training grants and fellowships awarded to Postdoctoral Scholars at the UC. Many of the training grants funding Student Researchers are identical to those received by the Postdoctoral Scholars. In fact, the NIH T32 and T90/R90 are explicitly to support both predoctoral and postdoctoral trainees. Postdocs who receive fellowships, even those which are paid directly to the fellow, are also included within the Postdoctoral Scholars bargaining unit (see for example the [NSF AGS-PRF](#)). I am familiar with at least 13 NIH training grant awards at UC that are funding both predoctoral (Graduate Student) trainees and postdoctoral trainees (who are in the Postdoctoral Scholar bargaining unit). The following is a list of those training grants along with a link to the NIH Reporter showing the project information and details for each project, which I believe to be true and accurate:

(1) Training in Molecular Toxicology, <https://reporter.nih.gov/project-details/10172167>, Project No. 2T32ES015457-11A1;

(2) Multidisciplinary Training in Microbial Pathogenesis, <https://reporter.nih.gov/projectdetails/10192633>, Project No. 5T32AI007323-32;

(3) Molecular Epidemiology Cancer Training Program, <https://reporter.nih.gov/projectdetails/10025195>, Project No. 2T32CA009142-41;

(4) Multidisciplinary training in basic and translational Alzheimer's disease research, <https://reporter.nih.gov/project-details/10143170>, Project No. 5T32AG066596-02;

- (5) Improving the Health of Aging Women and Men, <https://reporter.nih.gov/projectdetails/10179265>, Project No. 5T32AG058529-03;
- (6) Training Program in Cognitive Neuroscience, <https://reporter.nih.gov/projectdetails/9935119>, Project No. 5T32MH020002-20;
- (7) Training Program in Substance Use, HIV and Related Infections, <https://reporter.nih.gov/project-details/10146318>, Project No. 5T32DA023356-15;
- (8) Rheumatic Diseases Research Training Grant, <https://reporter.nih.gov/projectdetails/10149945>, Project No. 5T32AR064194-08;
- (9) Cancer Researchers in Nanotechnology (CRIN), <https://reporter.nih.gov/projectdetails/10151565>, Project No. 5T32CA153915-10;
- (10) Translational Epidemiology - Training for Research on Aging and Chronic Disease, <https://reporter.nih.gov/project-details/9936411>, Project No. 5T32AG049663-05;
- (11) Training Researchers in Clinical Integrative Medicine (TRIM), <https://reporter.nih.gov/project-details/9991753>, Project No. 5T32AT003997-14;
- (12) Biobehavioral Research Training in Symptom Science, <https://reporter.nih.gov/project-details/10205179>, Project No. 5T32NR016920-05;
- (13) Training Program for Interdisciplinary Cancer Research, <https://reporter.nih.gov/project-details/10089944>, Project No. 2T32CA009054-41

12. I have read many UC publications and website postings that tout the UC and its campuses as premier research institutions and the funding of all of the positions petitioned for herein..

Here are just a few that demonstrate this point.

Campus funding for sponsored research tops \$1 billion for first time, Robert Sanders, Berkeley News, Aug. 16, 2021, <https://news.berkeley.edu/2021/08/16/campus-funding-for-sponsored-research-tops-1-billion-for-first-time/>.

UCSF Is Top Public Recipient of NIH Funding for 14th Straight Year, Nina Bai, UCSF, Campus News, February 23, 2021 <https://www.ucsf.edu/news/2021/02/419891/ucsf-top-public-recipient-nih-funding-14th-straight-year>.

UC San Diego Breaks Record with \$1.54B in Research Funding: For 12th consecutive year, UC San Diego earns over \$1B in funding, Michelle Franklin, Aug. 18, 2021, UC San Diego, UC San Diego News Center, <https://ucsdnews.ucsd.edu/pressrelease/ucsd-breaks-record-1.54b-in-research-funding>.

UCLA draws record \$1.4 billion in research funding: Spanning medicine, math and nanomaterials, support for campus scientific studies has grown almost 40% in five years, Bill Kisliuk, Oct. 12, 2020, UCLA, Newsroom, University News, <https://newsroom.ucla.edu/releases/ucla-draws-record-research-dollars-1-4-billion>.

UCI receives record \$529 million in research funding for fiscal 2019-20: 20 percent more than last year, the total reflects strong support for campus mission, Tom Vasich, July 20, 2020, UCI, UCI News, <https://news.uci.edu/2020/07/20/uci-receives-record-529-million-in-research-funding-for-fiscal-2019-20/>.

UC Davis Sets Record With \$941 Million in Research Funding, Lisa Howard, August 31, 2020, UC Davis, <https://www.ucdavis.edu/news/uc-davis-sets-record-941-million-research-funding>.

13. The University Office of the President ([UCOP](#)) has several divisions including the Division of [Academic Affairs](#). Within the Division of Academic Affairs of Affairs is the Department of Graduate, [Undergraduate and Equity Affairs](#) , and under their auspice is the unit of [Graduate Studies](#) (<https://www.ucop.edu/index.html>) Per the UCOP Graduate Studies' site:

“Graduate Studies promotes and advances graduate education at the University of California through strategic planning, analysis, outreach and coordination. We collaborate and coordinate with graduate and professional school leadership throughout the system and with staff at each campus and within the Office of the President. Graduate Studies works particularly close with the [Council of Graduate Deans](#) to facilitate and plan initiatives and programs across the University of California system.

These efforts seek to:

- Promote greater awareness of UC graduate education – quality, opportunities and benefits
- Highlight the impact of UC graduate research
- Develop graduate research and preparation opportunities
- Facilitate graduate student financial support efforts and analyses and advocate on behalf of this critical area
- Increase the diversity of graduate student and postdoctoral scholar populations at UC
- Promote or coordinate policy, planning and analyses of a wide range of graduate education issues in support of maintaining or enhancing the outstanding graduate education enterprise of UC.”

14. On each campus the University has a Graduate Division as well. At the office of the President level these Grad Divisions interact through the Council of Graduate Deans (CoGD) which is comprised of graduate division deans from each of the ten UC campuses. Information on the CoGD and each campus Grad Division can be found <https://www.ucop.edu/graduate-studies/information-resources/index.html> As these sites reflect the role and mission of each Grad Division is much the same. As stated on the UC Berkeley Grad Division web site:

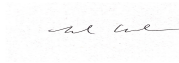
“The Graduate Division oversees graduate admissions, fellowships, grants, academic employment, preparation for teaching, mentoring activities, professional development, academic progress and degree milestones.”

All of the petitioned for Student Researchers fall within the jurisdiction of the Grad Divisions with respect to policies and programs. On a daily basis however, they report to a Principal Investigator, who most often is a member of the Academic Senate.

15. The LBL website (<https://lbl.referrals.selectminds.com/info/page3>) states with respect to their "Graduate Student Research Assistant (GSRA) - Registered graduate student of the University of California (UC), and eligible for a Graduate Student Researcher (GSR) appointment on their campuses. UC rules and regulations pertaining to graduate students in the various disciplines normally apply. GSRA's work a fixed-percentage schedule and receive a flat monthly salary in accordance with their campus department policies. They are also eligible to receive fee remissions, including health insurance benefits, and nonresident tuition as determined by UC policies and as implemented for GSRs on the individual campuses." This further demonstrates that the policies are universal for these employees.

I, the below signatory, declare under penalty of perjury that the statements herein are true and complete to the best of my knowledge and belief.

Executed on September 29, 202 at Los Angeles, California.



Robert Ackermann

By signing and submitting to PERB this declaration, I agree that my electronic signature is the legal equivalent of my handwritten signature on all documents submitted to PERB for filing. I further agree that my signature on this document (hereafter referred to as my “electronic signature”) is as valid as if I signed the document in writing. I also agree that no certification authority or other third-party verification is necessary to validate my electronic signature, and that the lack of such certification or third-party verification will not in any way affect the effect or enforceability of my electronic signature. I am also confirming that I am the individual authorized to sign the document filed with PERB. For purposes of this consent, “electronic signature” means an electronic sound, symbol, or process attached to, or logically associated with, an electronic record and executed or adopted by a person with the intent to sign the electronic record. I further understand that I may withdraw my consent at any time.