UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE TRUSTEES OF GRINNELL COLLEGE	
and	**Case No. 18-RC-228797**
UNION OF GRINNELL STUDENT DINING WORKERS	

MOTION BY THE TRUSTEES OF GRINNELL COLLEGE FOR A STAY OF THE NOVEMBER 27, 2018 ELECTION/IMPOUNDMENT OF BALLOTS

The Union of Grinnell Student Dining Workers filed a petition for representation of a unit of all "student employment positions" at Grinnell College on October 9, 2018. The College opposed the petition on the ground, *inter alia*, that the students whom Petitioner seeks to represent are not "employees" within the meaning of Section 2(3) of the National Labor Relations Act; therefore, no "question concerning representation" is presented.

On November 5, the Regional Director issued a Decision and Direction of Election ("DDE"), directing an election in the petitioned-for unit based on the Board's controversial decision in *Columbia University,* 364 NLRB No. 90 (2016) (herein "*Columbia I*"), which held that "student assistants who have a common-law employment relationship with their university are statutory employees under the Act." 364 NLRB No. 90, slip op. at 2.

Pursuant to Section 102.67(j) of the Board's Rules and Regulations, Grinnell College now moves for a stay of the election scheduled for November 27 or, in the absence of a stay, impoundment of all ballots at the conclusion of the election. Separately, the College will file a post-election request for review of the DDE seeking dismissal of the petition and revocation of any Certification of Representative that may issue if the election goes forward as scheduled.

As demonstrated below, a stay of the election is appropriate as it appears that the current Board is poised to (i) revisit the employee status of student assistants decided in *Columbia I*; and (ii) overrule or modify that unprecedented decision, to the extent that student assistants, including those who are the subject of this petition, "are primarily students and have a primarily educational, not economic, relationship with their university." *Brown University*, 342 NLRB 483, 487 (2004).

The stay should be granted pending the Board's rulings on a request for review filed on October 26, 2018, in *Trustees of Columbia University,* Case No. 02-RC-225405 (herein *Columbia II*), and a motion for summary judgment in *University of Chicago*, Case No. 13-CA-217957, made on July 10, 2018. In both matters, the universities have raised serious issues going directly to the validity of the Board's holding in *Columbia I.* In *Columbia II*, review was requested on the Regional Director's decision, relying on *Columbia I*, that its postdoctoral research scientists and fellows are Section 2(3) employees. Similarly, in its opposition to the General Counsel's motion for summary judgment in *University of Chicago*, the university demonstrated that the Regional Director's certification of a unit of students working in campus libraries was clearly erroneous as it, too, was based on the faulty reasoning of *Columbia I.*[1]

Since *Columbia I* was decided in August 2016, the Board's composition has changed dramatically, with current Members Marvin Kaplan and William Emanuel each making known that they "would, in a future appropriate case, **consider whether and under what circumstances students qualify as 'employees' within the meaning of Sec. 2(3) of the Act.**" *See University of Chicago*, Case No. 13-RC-198365 (Orders dated December 15, 2017 and May 21, 2018) (emphasis added). Copies of both Orders are attached as Exhibits A and B.

Because the employee status of student assistants is in an unquestionable state of flux, prudence dictates that the election be stayed by the Board, or at a minimum that the ballots be

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[1] The related representation case is *University of Chicago*, Case No. 13-RC-198365.

impounded, to avoid the unnecessary burden and expense of an election, as well as the litigation that inevitably would follow, when there is significant reason to believe that the law may soon change and moot the issues presented by the petition.

A stay was granted under similar circumstances in *Pratt Institute*, 339 NLRB 971 (2003), when the NLRB was reconsidering its decision in *New York University*, 332 NLRB 1205 (2000), where it held for the first time in Agency history that teaching and research assistants meet the Act's definition of "employee." In *Pratt*, the UAW had petitioned for a unit of graduate and undergraduate student assistants. At the time of that petition, the Board was actively considering the employee status issue presented in *Brown University*, Case No. 01-RC-21368, which in fact resulted in *NYU*'s reversal the following year.[2] Based on the likelihood that the law was about to change, Pratt sought a stay of the hearing on UAW's petition, which was granted by the Board.

While acknowledging that representation cases normally are decided expeditiously and that stays are rarely granted, the *Pratt* Board nevertheless concluded that "other policy considerations outweigh[ed] the desire for expedition," and stayed the processing of UAW's petition to represent student assistants at Pratt, explaining as follows:

> In the instant case, a hearing would be long and expensive. That hearing may prove unnecessary. That is, if, in the pending cases, the Board holds that graduate assistants are not entitled to representation through NLRB processes, a hearing herein will be unnecessary. We will have saved money and time, both for the U.S. taxpayer and for the private parties. Accordingly, on balance, we believe that it is prudent in this particular case to stay the hearing until a decision is made as to the employee status of graduate assistants. [Footnote omitted.]
>
> Further, even if the decisions in *Brown* and *Columbia* uphold extant law or hold only that the graduate assistants *in those cases* are not employees entitled to representation through NLRB processes, those decisions would at least give guidance to the parties herein.

[2] The Board also had granted review in *Trustees of Columbia University*, Case No. 02-RC-22358, an earlier petition involving graduate students at Columbia University -- not the case decided in August 2016 -- where the Board erroneously concluded that the petitioned-for students were employees within the meaning of the Act.

> [Emphasis in original.] The parties could therefore litigate with greater focus and greater expedition. For this reason as well, we believe that a stay is appropriate.

339 NLRB at 971.

Although the stay in *Pratt* was granted prior to a hearing in that case and after requests for review had been granted in both *Brown* and *Columbia*, the Board's observations in staying that proceeding pertain here as well. While it is too late to stay a hearing, it is not too late to stay voting. Neither the Board nor the parties would be well-served by running a complicated and expensive election, with over 900 eligible voters, results of which may be rendered entirely moot. *See, University of Chicago*, at p. 3, *supra.*

Based on the NLRB's practical analysis in *Pratt*, the Board should stay the election until there has been a ruling in *Columbia II* or *University of Chicago*. If as anticipated the Board concludes, as it did in 2004 in *Brown*, that students are not statutory employees, it will be dispositive of the issue here, obviating any need for further litigation.

At a minimum, if the election is allowed to proceed on November 27, the ballots should be impounded until the current Board resolves the critical question previously posed by Members Kaplan and Emmanuel, *i.e.*, "whether and under what circumstances students qualify as 'employees' within the meaning of Sec. 2(3) of the Act." *University of Chicago*, Case No. 13-RC-198365 (Order dated May 21, 2018). To do otherwise would result in additional waste of Agency resources and will predictably lead to even more disruption, turmoil and distraction for students, faculty and administrators than already exists on many campuses, including Columbia, The New School and the University of Chicago, where strikes have occurred or been threatened as the end of the semester approaches.[3] The pressure is mounting at Grinnell, too, where Petitioner has

[3] At Columbia, the Graduate Workers of Columbia University union declared that if Columbia does not agree to bargain by November 30, 2018, the students will strike on December 4, 2018. *See* Press Release, *Strike Deadline, Nov 30* (Nov. 1, 2018), *available at* https:s//columbiagradunion.org/2018/11/01/strike-deadline-nov-30/ (attached as

threatened to strike unless the University immediately commits to waiving its right to request review of the DDE, which it has no intention of doing. *See* Letter from UGSDW dated Nov. 13, 2018 (attached as Exhibit E).

It is time for the uncertainty surrounding the status of student assistants to end. Final resolution of the Section 2(3) issue presented here as well as in *Columbia II* and *University of Chicago* is enormously important to colleges and universities across the nation. Unfortunately, since *Columbia I* was decided, the current Board has consistently been deprived of multiple opportunities to revisit the issue, as unions concertedly withdrew their petitions and allowed their Certifications of Representative to be revoked rather than risk *Columbia I*'s reversal and a return to *Brown*.[4] This circumvention of the NLRB's processes must not be allowed to continue.

The result has been enormous tension, divisiveness and a fracturing of relations among students and faculty on many campuses, all of which threatens to permanently alter an educational

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Exhibit C). The union has previously declared that it will pursue "'relentless disruption' as a means of escalating pressure on Columbia given the University's continued refusal to bargain," and called for students to "'prepare for further strike action' and escalate existing means of protest." *See* Columbia Spectator, *Union to Pursue "Relentless Disruption" Instead of Further Legal Action* (Aug. 1, 2018), *available at* https://www.columbia spectator.com/news/2018/08/01/union-to-pursue-relentless-disruption-instead-of-further-legal-action/.

At The New School, students have held a rally and strike preparation meetings, and announced a strike deadline of November 26, 2018. *See* SENS-UAW Twitter announcement (attached as Exhibit D). Students have previously announced that "[i]f the university continues to hold up bargaining –failing to respond to our simplest proposals and refusing to respect our economic demands – we have no choice but to exercise our legal right to go on strike." *See* FAQ for Students – Fall 2018, *Strike Prep Fall 2018 FAQ for Students* (Oct. 25, 2018), *available at* https://sensuaw.org/latest-updates/.

And, at the University of Chicago, the Graduate Students United union, stated "[work stoppages] are always on the table for a union seeking a contract." To that end, the union and graduate students engaged in a walkout on October 18, 2018. *See* Chicago Maroon, *GSU May Consider Work Stoppages if UChicago Refuses to Bargain* (Sept. 25, 2018), *available at* https://www.chicagomaroon.com/article/2018/9/26/gsu-may-consider-work-stoppages-uchicago-refuses-b/; Chicago Maroon, *Hundreds of Graduate Students Participate in Pro-Union Walk Out* (Oct. 18, 2018), *available at* https://www.chicagomaroon.com/article/2018/10/18/hundreds-graduate-students-participate-pro-unioniz/.

[4] *See* Colleen Flaherty, "Realities of Trump-Era NLRB," *Inside Higher Ed* (Feb. 15, 2018) ("[T]hree unions withdrew petitions pending review by the board within the last week . . . [saying] they'd rather continue to seek voluntary union recognition from their institutions . . . than risk an unfavorable legal decision under the Trump-era NLRB."); BNA Daily Report, "Chicago Grad Workers Drop Union Bid, Other Campuses to Join" (Feb. 14, 2018) ("The Graduate Students United in Chicago withdrew the petition out of concern their case could be overturned by the NLRB and that the board would use its case to overturn the 2016 Columbia decision.")

model that for many decades has well served students, the educational mission of Grinnell College, and higher education generally. The purpose of the NLRA was to prevent "industrial strife;" that purpose has been ill-served by *Columbia I.*

The unfortunate errors of the past two years should not be compounded by running yet another election here, only to have the Petitioner later withdraw in a strategic ploy to thwart the Board's desire to reconsider *Columbia I.* Too many resources, both public and private, already have been wasted as a result of the unions' maneuvering.

For all these reasons, "extraordinary circumstances" exist justifying an immediate stay of the election. If the election is allowed to proceed, the ballots cast should be impounded pending the Board's decisions in *Columbia II* and *University of Chicago,* to ensure that the Board's decision on review of the DDE is made on the merits, unaffected by the election outcome.

Dated: November 19, 2018
New York, New York

Respectfully Submitted,

By: _____

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Attorneys for The Trustees of Grinnell College

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNIVERSITY OF CHICAGO
Employer

and Case 13-RC-198365

TEAMSTERS LOCAL 743
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Supplemental Decision and Certification of Representative raises substantial issues with respect to Objection 2 that can best be resolved after a hearing. Accordingly, the Request for Review is granted with respect to Objection 2, and the case is remanded to the Regional Director for consideration of Objection 2. In all other respects, the Request for Review is denied.[1]

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[1] Contrary to our dissenting colleague, we find that the Employer has shown that it could produce evidence at a hearing that, if credited, may warrant setting aside the election. Thus, the Employer's offer of proof identifies witnesses who directly observed alleged surveillance by the Petitioner's agents at each of the two voting locations, in addition to photographs of the agents and the signs they displayed. The offered testimony indicates that the Petitioner's agents stationed themselves where voters had to pass in order to vote at the SSA location. A hearing would help determine whether, among other things, the agents at the Regenstein location likewise stationed themselves in areas voters would be forced to pass.

Our decision to direct a hearing finds support in *Transcare New York, Inc.*, 355 NLRB 326 (2010). In that case, the Petitioner offered to produce evidence that, among other things, managers stationed themselves in view of voters accessing the polling sites. Further, the Petitioner allegedly sent an email to a Board agent complaining about the conduct. The Board found, as we find on similar offered proof in this case, that there was sufficient evidence warranting a hearing.

Houston Shell and Concrete Division, 118 NLRB 1511 (1957), relied on by our dissenting colleague, does not warrant a different result. That case involved allegations that union representatives conversed with voters "on company premises," but not necessarily in the polling place, before the voting began or "the morning that the voting started," and that they were in a polling place when the election began but not necessarily during the election. The Board found the conduct unobjectionable. Here, by contrast, the Petitioner's agents allegedly stationed themselves just outside the two voting locations during the election.

Chairman Miscimarra dissented from the Board's prior denial of the Employer's pre-election Expedited Request for Review and Motion to Stay the Election and/or Impound Ballots, in which the Employer raised issues similar to those presented in

PHILIP A. MISCIMARRA, CHAIRMAN

WILLIAM J. EMANUEL, MEMBER

Dated, Washington, D.C., December 15, 2017.

MEMBER PEARCE, dissenting:

Contrary to my colleagues, who grant the Employer's request for review of the Regional Director's dismissal of the Employer's Objection 2, and remand that objection to the Regional Director for a hearing, I would deny the Employer's request for review in its entirety. The Employer has not established any basis under Section 102.67(d) of the Board's Rules and Regulations for granting its Request for Review, nor has it "present[ed] evidence that raises substantial and material factual issues" warranting a hearing. *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1 (1992).

The Employer's Objection 2 alleged that agents of the Petitioner stationed themselves in locations voters would be forced to pass in order to vote. I agree with the Regional Director that the evidence described in the Employer's offer of proof does not constitute grounds for setting aside the election if introduced at a hearing. Even

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Objections 3 and 4, and as to these issues, Chairman Miscimarra adheres to the views stated in his prior dissent. Nevertheless, Chairman Miscimarra concurs in the denial of review with respect to Objections 3 and 4 on the basis that the Employer's more recent request for review fails to identify extraordinary circumstances warranting reconsideration of the Board's prior action with respect to these matters.

Member Emanuel did not participate in the Board's denial prior to the election of the Employer's Expedited Request for Review and Motion to Stay the Election and/or Impound Ballots, or, in the Alternative, For Remand to the Regional Director, and does not reach the merits of the issues raised there.

Member Emanuel further notes that he would, in a future appropriate case, consider whether and under what circumstances students qualify as "employees" within the meaning of Section 2(3) of the Act.

Member Kaplan is not on the panel and took no part in deciding this case.

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accepting the Employer's assertion in its offer of proof that three of the Petitioner's representatives stood outside the main entrances to both of the libraries during the polling, this would not warrant setting aside the election. The mere presence of union representatives outside a building where polling is taking place, without proof of electioneering or other improper conduct, does not constitute objectionable conduct. See *Houston Shell and Concrete Division, McDonough Corp.*, 118 NLRB 1511, 1516 (1957). Further, even if I were to apply *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001), I would not find that the Petitioner's conduct was objectionable. Unlike in that case, the evidence described in the Employer's offer of proof does not establish that the Petitioner's representatives were located in a no-electioneering zone, that they engaged in conduct contrary to the instructions of a Board agent, or that employees had to pass by the Petitioner's representatives in order to vote.

Because the alleged conduct, even if proven, would not warrant setting aside the election, I find that the Regional Director properly overruled the objections without a hearing. Accordingly, I dissent.

MARK GASTON PEARCE, MEMBER

Exhibit B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNIVERSITY OF CHICAGO
Employer

and Case 13-RC-198365

TEAMSTERS LOCAL 743
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Supplemental Decision on Remand from the Board and Certification of Representative is denied as it raises no substantial issues warranting review.[1]

MARK GASTON PEARCE, MEMBER

MARVIN E. KAPLAN, MEMBER

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[1] In finding that the Petitioner did not engage in objectionable surveillance, we also rely on the fact that the Petitioner's agents, who were stationed outside the libraries containing the polling rooms, could not have distinguished between students entering the libraries to study during the final exam period and voters entering the libraries to proceed through the hallways to the polls. See *J. P. Mascaro & Sons*, 345 NLRB 637, 639-640 (2005) (finding no objectionable surveillance where the employer's president, who was stationed in front of the facility, had no direct view of the room where the election was taking place and therefore "had no way of knowing who was entering to vote and who was entering to perform job-related duties or to eat and drink in the vending/snack room"); *Blazes Broiler*, 274 NLRB 1031, 1032 (1985) (finding no objectionable surveillance where the employer's president, who was stationed in front of the hallway leading to the polling place, "had no way of knowing who was entering the hallway to vote and who was entering to perform job related duties, or heading to the time clock to check in or out").

In its prior Requests for Review, the Employer argued that the proposed unit members, who are students at the Employer's university, are not employees for the purposes of the Act. Although the Employer raises this issue again in its current Request for Review, the Board does not consider repetitive requests for review, and the student employee issue is thus not before the Board at this juncture. See Sec. 102.67(h)(i)(1) of the Board's Rules and Regulations. Members Emanuel and Kaplan note that they would, in a future appropriate case, consider whether and under what circumstances students qualify as "employees" within the meaning of Sec. 2(3) of the Act.

WILLIAM J. EMANUEL, MEMBER

Dated, Washington, D.C., May 21, 2018.

Exhibit C

contact us: columbiagradunion@gmail.com

Strike Deadline, Nov 30

During our strike in April, over 1,500 graduate workers withdrew their labor and marched on the picket lines, and when the strike ended, we knew what our next steps would be. We continued organizing over the summer and vowed to escalate in the fall, prepared to strike again until Columbia respects our labor, our rights as workers, and our democratic election, and agrees to negotiate a contract with us. Despite nine private universities agreeing to bargain with their graduate workers–including contracts won at Brandeis, Tufts, and New York University and contract negotiations underway at Harvard University and The New School–Columbia continues to stand on the wrong side of history.

We have sent President Bollinger a letter demanding that the university declare its intention to bargain by 5:00 pm on November 30. If the university continues to defy both labor law and the democratic voice of its workers and does not agree to bargain by that date, we will go on strike on December 4.

Department leaders will continue to reach out to their colleagues over the next month to develop more detailed plans, and we will host a general body meeting to answer questions about the strike this Thursday (tomorrow), November 1, at 12:30 pm (Philosophy Hall, Room 716) and at 6:30 pm (International Affairs Building, Room 707).

Please let us know if you need childcare or any other accommodation in order to attend, by responding to this email.

We urge Columbia to begin bargaining and avert a strike—we came to graduate school because we care about the work that we do, and we intend to continue that work with all the security a union contract provides. For that very reason, we are prepared to strike if Columbia makes such an action necessary.

In order to be fully prepared for this action, we encourage you to:

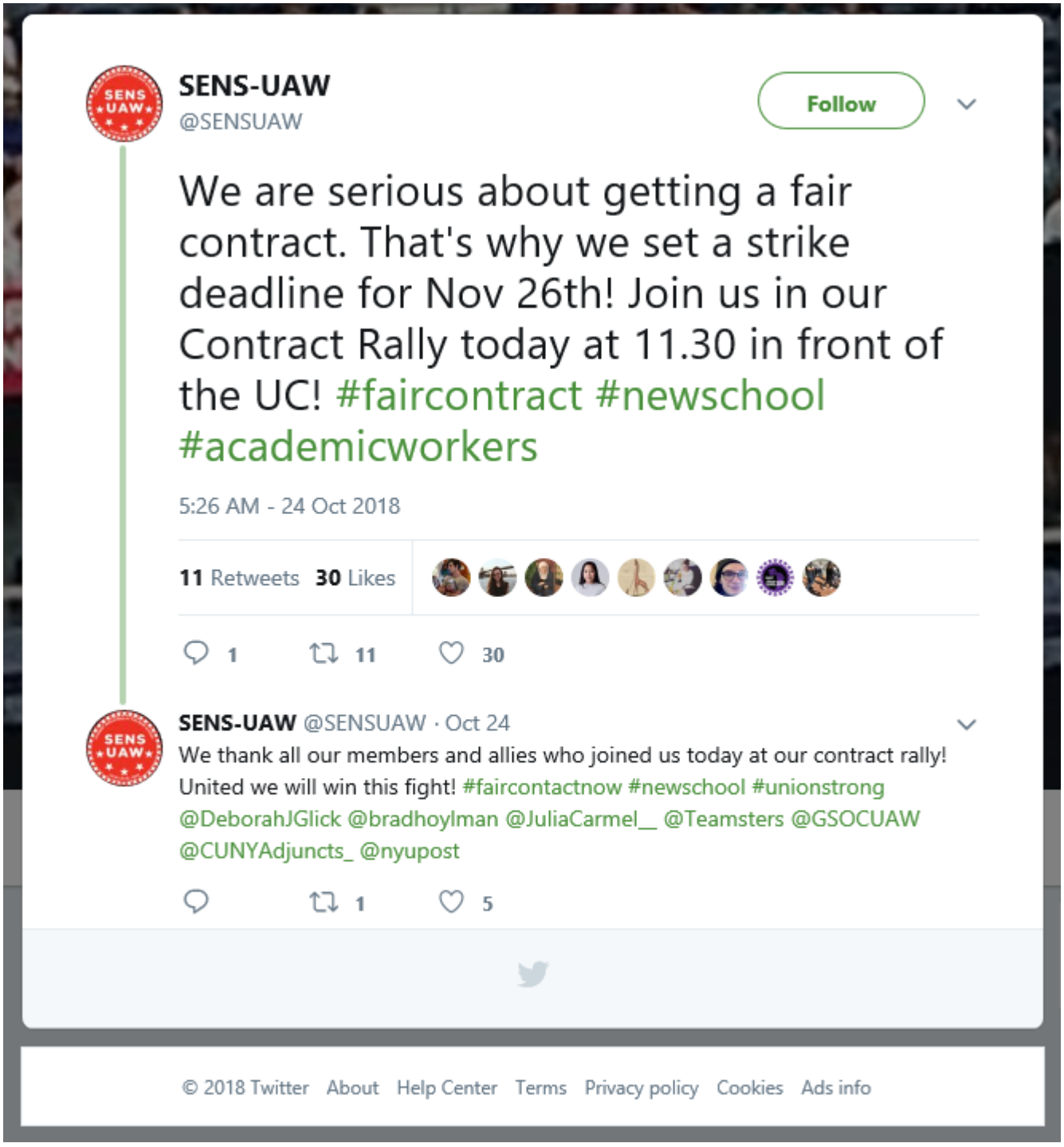
- Read our strike FAQ.
- Look at our suggestions for talking to students about the strike.
- Look at our suggestions for talking to faculty about the strike.
- Plan to join the pickets throughout December! In order to have strong, visible picket lines, it will be important to spend as close as possible to 20 hours on the line in lieu of working. More information on how to sign up for picketing shifts—and other opportunities to participate—will come soon.

GWC UAW November 1, 2018 Bargaining Committee, GWC-UAW, Latest Updates

← Resolution Opposing the Department of Health and Human Services Memo

Rally: Bargain Now or We'll #CUonStrike →

Exhibit D



SENS-UAW
@SENSUAW

Follow

We are serious about getting a fair contract. That's why we set a strike deadline for Nov 26th! Join us in our Contract Rally today at 11.30 in front of the UC! #faircontract #newschool #academicworkers

5:26 AM - 24 Oct 2018

11 Retweets **30** Likes

1 11 30

SENS-UAW @SENSUAW · Oct 24

We thank all our members and allies who joined us today at our contract rally! United we will win this fight! #faircontactnow #newschool #unionstrong @DeborahJGlick @bradhoylman @JuliaCarmel__ @Teamsters @GSOCUAW @CUNYAdjuncts_ @nyupost

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Exhibit E

UGSDW
GRINNELL, IOWA
(319) 343–7718

JACOB SCHNEYER
EXECUTIVE BOARD MEMBER AT LARGE

November 13, 2018

Frank B. Harty
Nyemaster Goode PC
700 Walnut, Suite 1600
Des Moines, IA 50309

Dear Mr. Harty:

We are in receipt of your letter, and of the Special Campus Memo sent out yesterday which more fully outlines the college's position.

First, I should make it clear that the concessions we offered were conditional on the college choosing not to appeal. While this involves the college "forfeiting it's [*sic*] federally guaranteed legal rights," our concessions themselves represent UGSDW forfeiting its federally guaranteed right to strike and to bargain for whatever wage its members see fit. The concessions were offered by our Board both to address some of the college's specific concerns and to open a dialogue that could lead to an agreement. These concessions remain on the table, and we are willing to be flexible on any other issues the college is concerned about.

To more specifically address your concerns about our supposed inability to bind our successors to these concessions, I would note that the strike and wage concessions are in relation to a first contract, and are therefore something we can commit to with certainty. Regarding UGSDW's affiliation, we are perfectly capable of amending our bylaws and constitution to prevent an affiliation in the next three years. Regarding possible language relating to FERPA and Title IV/HEA, UGSDW is still able to credibly commit to preserving such language. Since these privacy-related issues are not a mandatory subject of bargaining, UGSDW would sign a separate side agreement with the College with a duration of fifteen or twenty years which would cover these non-mandatory issues. We are a legal entity just like the college, and can enter into contracts which may bind our successors.

Second, I would like to clarify what seems to be a misunderstanding regarding our ability to engage in a strike and/or picket. UGSDW will certainly try to bargain a CBA if we win the election, though we question the college's "good faith" commitment to the process, since it plans to pursue an appeal in parallel which would destroy its bargaining obligation. As there is no contract in effect in the petitioned-for unit and no FMCS notification requirements, striking over economic issues would be legal, even if impasse has not yet been reached. However, our members are also concerned with the college's pattern of coercive behavior and other unfair labor practices. Furthermore, handbilling directed at prospective students is protected regardless of the status of bargaining or NLRB processes.

Finally, UGSDW is frustrated in particular about the college's most recent coercive statements, made in the previously-mentioned Special Campus Memo. The hypocrisy exhibited in the memo, which simultaneously threatens students and reiterates that "threats have no place in a community committed to open inquiry and civil discourse," is shocking. Since these coercive statements affect

student workers who work not only in the petitioned-for unit, but also in Dining Services, I am hereby submitting an information request for any and all documents, data, or other information used as evidence in concluding that "As part of that [centralized] control, we would have to insist upon prioritizing work assignments for students with financial need," and that "a union representing all student employees... would interfere with the institution's core educational mission, and ultimately harm students." Please provide this information by noon on Friday, November 16. And please be advised that, should the college choose not to provide this information in a timely manner, UGSDW plans to file another unfair labor practice in response. The college's continued practice of NLRA violations is unacceptable and antithetical to its core mission and its stated desire to foster "open inquiry and civil discourse."

Sincerely,

/s/ *Jacob Schneyer*

Jacob Schneyer

cc: Quinn Ercolani, UGSDW President
Dr. Raynard Kington, Grinnell College President