

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THE TRUSTEES OF GRINNELL COLLEGE

and

**UNION OF GRINNELL STUDENT DINING
WORKERS**

Case No. 18-RC-228797

REQUEST FOR REVIEW BY THE TRUSTEES OF GRINNELL COLLEGE

PRELIMINARY STATEMENT

The Regional Director directed an election in a unit comprised of virtually the **entire undergraduate** student body of Grinnell College, a residential liberal arts college founded in 1846, in Grinnell, Iowa. That action represents an extreme and wholly unjustifiable extension of the Board's highly controversial decision in *Columbia University*, 364 NLRB No. 90 (2016), which wrongly held that certain undergraduate students had a "common-law employment relationship with their university and are statutory employees under the [National Labor Relations] Act." 364 NLRB No. 90, slip op. at 2.

In stark contrast to the facts at Grinnell, the undergraduate students in *Columbia* amounted to a small fragment of both the undergraduate student body and the overall bargaining unit (7.4%), which consisted almost entirely of Ph.D. and Masters students appointed to teaching and research assistantships. These Columbia undergraduates were swept in with the graduate teaching and research assistants, despite the absence of any true community of interest, and with the Board emphasizing -- almost apologetically -- "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.*" *Id.*, slip op. at 20 n.124 (emphasis added). To be sure, the same cannot be said in this case.

Here, the Regional Director's erroneous decision, and the November 27, 2018 vote to unionize that followed, most certainly does have the potential to interfere with Grinnell's role in its undergraduates' "academic or personal development." As to that there can be no doubt. At Grinnell, the academic relationship between undergraduate students and the College does not end at the classroom door, as at many colleges and universities. Rather, the experiential education for which Grinnell enjoys a strong national reputation extends well beyond traditional pedagogical

boundaries. As demonstrated at the pre-election hearing, the “work” that the Regional Director found sufficient to establish a common-law employment relationship, as a result of misapplying *Columbia*, is an integral part of the learning process that occurs both in and out of Grinnell’s classrooms, laboratories and lecture halls.

A bargaining unit of “all student workers” at Grinnell would expand by three-fold the preexisting and altogether different unit of students (and others) working exclusively in on-campus dining services.¹ An astounding 93% of the current Grinnell senior class has served in some student employment during their years at the College. This vast expansion of union representation threatens to undermine Grinnell’s core educational mission as well as its distinctive culture. It does so by inserting a third party with interests that are decidedly economic, not educational, into the learning process outside the classroom, with the potential for profound damage to the educational relationship among the College, its faculty and students, all without furthering any countervailing purpose or policy of the NLRA.

Most importantly, requiring collective bargaining between the College and essentially the entire Grinnell student body would materially diminish the flexibility necessary to provide a range of meaningful co-curricular learning options to students in a manner that meets their individual needs, thereby altering the developmental and educational opportunities provided through on-campus employment, not to mention the potential adverse impact on the availability of financial aid. The *Columbia* Board could not have intended such dire consequences to undergraduate education.

¹ The UGSDW’s 2016 petition for a unit of dining service workers, which is not limited to Grinnell undergraduate students, raised none of the same concerns and, therefore, was **not** opposed by the College. (Tr. 30:13-31:6 (Kington) (“When we were approached about the possibility of forming a union . . . , we didn’t oppose it because we asked ourselves, what impact would it have on our mission, and there was no connection, really, no credible case that forming that union would affect our -- our mission.”))

For these reasons and others, Grinnell seeks review of the November 5 Decision and Direction of Election (“DDE”), establishing what appears to be an unprecedented campus-wide unit of undergraduate student workers. The Board majority made plain in *Columbia* that its holding was *not* to be interpreted as any pronouncement 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.*” *Id.*, slip op. at 4 (emphasis added). The Regional Director obviously did not heed that important limitation on *Columbia*’s reach. Rather, upon finding a common-law employment relationship to exist, without more, she reflexively directed an election in the petitioned-for unit. This was clearly erroneous.

As demonstrated in *Point I*, review should be granted because the Regional Director stretched the *Columbia* holding to cover almost all Grinnell undergraduates, ignoring evidence demonstrating that the petitioned-for students are distinguishable from undergraduates found to be employees in *Columbia*. Here, the College frequently designs the positions for the benefit of the students -- to enhance their academic opportunities and to enable them to acquire skills necessary for the careers that they aspire to enter. Although these positions carry no academic credit, they are largely academically-oriented and part of the Grinnell experience.

Unlike at Columbia, where graduate assistants (and a relatively insignificant number of undergraduate assistants) are required to teach and assist with undergraduate core curriculum classes outside their area of study, and in fields with which they may have little, if any, familiarity, Grinnell undergraduates typically select positions that align with their academic interests and/or are relevant to building fundamental skills. They are not unilaterally assigned to jobs to meet the College’s business needs or to make an outside hire unnecessary. On the

contrary, for nearly all Grinnell undergraduates the work ties in to their education in some way, shape or form. That certain attributes of employment may inhere, does not negate the educational nature and purpose of the positions. *See Brown University*, 342 NLRB 483, 489 (2004).

To support her direction of an election, the Regional Director mechanically applied *Columbia's* common-law test of employee status, discounting the academic aspects of the relationship between students and the College. Most significantly, she effectively ignored the connection between the “job” and the student’s coursework and preparation for life after Grinnell -- including even jobs that are purposely structured to afford students the opportunity to study on duty so that they can keep up with Grinnell’s rigorous academic requirements. All this led to an incorrect result that must now be corrected by the Board.

If the Board needs to go further in its analysis -- and Grinnell respectfully argues it does not; that the DDE can and should be reversed based upon Grinnell’s arguments in *Point I* (*see*, pp. 8-15) -- then for all the reasons discussed in *Point II* (*see*, pp. 15-35), *Columbia* should not be applied to undergraduate students in experiential learning situations like those at Grinnell, where the duties are related to their education and are fundamentally different in nature than graduate teaching and research assistants.

As then-Member Miscimarra emphasized in his incisive dissenting opinion in *Columbia*, the majority’s misguided application of the NLRA ignored admonitions by both the Supreme Court and the Board in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) and *Syracuse University*, 204 NLRB 641 (1973), that “the lecture hall is not the factory floor, and the ‘industrial model cannot be imposed blindly on the academic world.’” 364 NLRB No. 90 slip op. at 24 (citations omitted).

In his view, the majority's disregard for the realities of the student-university relationship, and its imposition of a collective bargaining framework on that relationship, was "ill-advised," as it interferes with students' -- particularly undergraduate students' -- focus on the timely completion of their studies and would likely lead to myriad "unfortunate consequences" affecting the students' relationship with their faculty and the College. *Id.* at 24, 30-31.

It is apparent that -- especially when applied to undergraduates -- *Columbia* represented an abrupt and unjustified reversal of Board precedent by holding that students who provide services to the school in connection with their academic programs are "employees" under the NLRA. As the Board had held for nearly its entire history, the Act is intended to apply to *economic* relationships, not those that are *primarily educational* in nature. Moreover, the application of the NLRA to student workers -- who are drawn to Grinnell and other schools for an education, not an hourly paid job -- is contrary to the Act's underlying policies and purposes.

That view evidently is held by the current Board. Over the last year, Chairman Ring and Members Kaplan and Emanuel, none of whom served on the NLRB when the *Columbia* decision was issued, each has expressed that he "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-CA-217957 (Order dated Dec. 4, 2018); *University of Chicago*, Case No. 13-RC-198365 (Orders dated Dec. 15, 2017 and May 21, 2018). Grinnell submits that this is the "appropriate case" to address that.

Until now, that opportunity has been frustrated by the unions that have actively organized student workers since *Columbia* was decided -- *i.e.*, AFT, UAW, UNITE-HERE and others. In February 2018, over the course of less than two weeks, and in what was undoubtedly a coordinated effort by organized labor to deprive the NLRB of the ability to reconsider its

Columbia decision, this trio of national unions serially withdrew petitions at four universities: (i) UAW withdrew its petition in *Boston College* (Case No. 01-RC-194148) while the university's request for review was pending; (ii) UNITE-HERE withdrew its petitions in *Yale University* (Case Nos. 01-RC-183014, *et seq.*) while the university's request for review was pending; (iii) AFT withdrew its petition in *University of Chicago* (Case No. 13-RC-198325) while the university's request for review was pending; and (iv) also did so at the *University of Pennsylvania* (Case No. 04-RC-199609), before the election was even held. The unions' strategically-timed and coordinated withdrawals, following extensive litigation -- and even elections and certifications -- involving considerable expenditure of resources by the parties and the NLRB, circumvented the Board's procedures for the final resolution of "questions concerning representation" in furtherance of the unions' institutional interests.

The national unions' withdrawal strategy has even been utilized where a national union was not outwardly involved. In *Reed College* (Case No. 19-RC-213177), the petitioning union -- an independent and unaffiliated student union -- withdrew its petition on June 27, 2018, shortly after Reed filed its request for review.

Grinnell College requests that the Board grant review of the DDE pursuant to Section 102.67 of the Rules and Regulations, because:

1. The Regional Director ignored substantial evidence in the record as a whole differentiating Grinnell's undergraduates from the student assistants in *Columbia*, which if properly considered would have resulted in a finding that the petition fails to raise a "question concerning representation" of employees within the meaning of the Act; and
2. To the degree *Columbia* is found to properly apply to Grinnell, there are compelling reasons for the Board to revisit and reconsider its *Columbia* decision as it specifically applies to undergraduates because it is unsupported by the statute and ignores significant policy considerations.

PROCEDURAL HISTORY

The UGSDW filed its petition on October 9 for certification in a bargaining unit of all “student employment positions” at Grinnell College, excluding positions that it already represents in dining services. (DDE at 1.)² In addition, the Union sought an *Armour-Globe* election to accrete the petitioned-for students to the existing unit of dining service workers, in the event that a majority of the votes cast were for representation by the Union. *Id.*

The College opposed the petition on the grounds, *inter alia*, that *Columbia* was wrongly decided and that the students in question were not “employees” as defined in Section 2(3); that imposing a collective bargaining obligation with respect to campus work opportunities would significantly impair Grinnell’s ability to fulfill its educational mission and negatively impact its unique culture among elite liberal arts colleges; that the proposed bargaining unit is inappropriate as there is no “community of interest” among the petitioned-for students; and, that exercise of jurisdiction by the NLRB would conflict with other federal laws under which the College must operate. (Bd. Ex. O.)

A hearing on the issues raised by the College was conducted on October 17 and 18. On November 5, the Regional Director issued the DDE, directing an election on November 27. The Director found that the petitioned-for students were employees under Section 2(3) of the Act; that the unit sought was appropriate; and, that a vote for representation by UGDSW would be deemed a vote for inclusion in its existing unit of dining service workers.

² During the pre-election hearing, the Petitioner amended its petition to exclude student interns who work off campus, service learning work study participants, mentored advanced project (MAP) participants, and non-student temporary workers. (DDE at 1.) The Hearing Officer granted the amendments to the petition.

On November 19, Grinnell moved to stay the election or, in the absence of a stay, for impoundment of all ballots at the conclusion of the voting. The Union filed its opposition the following day. The Board has yet to rule on the motion, which is now moot.

The election was conducted on November 27. Of the 716 eligible voters, 274 cast ballots for the Union and 54 against.

ARGUMENT

I. THE REGIONAL DIRECTOR ERRED IN FINDING THAT UNDERGRADUATE STUDENTS AT GRINNELL COLLEGE ARE EMPLOYEES EVEN UNDER *COLUMBIA*'S COMMON LAW TEST.

Despite material, dispositive differences between Grinnell's undergraduates and the student assistants found to be employees in *Columbia*, the Regional Director concluded (i) that *Columbia* was controlling, and (ii) that Grinnell's undergraduates are statutory employees under the common law test that was adopted by the Board. (DDE at 7.) The Regional Director ignored extensive record evidence to the contrary and, as a result, extended *Columbia* far beyond its intended scope.

In *Columbia*, the Board held that graduate students who performed teaching and research services for the university were employees under the "common law" test, which "generally requires that the employer have the right to control the employee's work, and that the work be performed in exchange for compensation." 364 NLRB No. 90, slip op. at 15 (citation omitted). The Board erroneously found that the facts in *Columbia* "d[id] not suggest a primarily educational relationship," but rather one that had a "salient economic character." *Id.* at 15-16. And, although the petitioned-for unit at *Columbia* consisted primarily of graduate student assistants, the Board included a relatively small number of undergraduate teaching assistants, rejecting longstanding precedent to the effect that undergraduate student workers are temporary

employees who should be excluded from a bargaining unit of regular employees. *San Francisco Art Institute*, 226 NLRB 1251, 1252 (1976).

However, the *Columbia* majority limited its holding to the specific facts in that case: “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.” *Id.* at 4 (emphases added). Thus, the Board never purported to make any findings with respect to the employee status of *all students* at all other colleges or universities, including Grinnell. More importantly, with respect to the miniscule number of undergraduate student assistants (approximately 7.4%) who were included in the unit at Columbia, the Board noted “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.*” *Id.*, slip op. at 20 n.124 (emphasis added).

Despite these explicit limitations, the Regional Director reflexively applied *Columbia* to Grinnell’s undergraduates -- none of whom serve in positions akin to the student assistants at Columbia -- finding them to be statutory employees entitled to union representation, without considering the resulting interference with the College’s relationship with its students insofar as their “academic or personal development” was concerned. The analytical flaw that led to that conclusion was the Regional Director’s focus on certain aspects of the student workers’ relationship to the College to the exclusion of others, most importantly the nature and purpose of the positions and the close connection, in most instances, between the “work” performed by the students and their academic pursuits.

As is clear from the record, Grinnell’s mission is to provide an individually-advised and experiential liberal arts education, in which “work” on campus plays a major role. (Tr. 27:24-28:6; 28:14-18; 29:8-22); Employer Exhibit K (Student Employment Handbook at 6 (“The mission of the College guides us to embrace the following values in student employment: Education — learning beyond the classroom.”); *id.* at 7 (“Academics at Grinnell are the top priority of our students.”)); Employer Exhibit F (Information Technology Services Student Technology Consultants Handbook at 1) (“We encourage you to use your time as a student tech consultant as a learning opportunity as well as a job.”).

In furtherance of this educational mission, the College often **creates** on-campus employment opportunities to serve the academic interests of the student body. (*See* Tr. 105:9-106:2; 109:20-25). The vast majority of the positions (approx. 78%) are clearly educational and include, among many others, language mentors, peer tutors and assistants to faculty members. (Tr. 55:3-23) (Kington); (Tr. 54:7-13) (Kington). These positions are developed specifically for students; the College does not hire non-students to fill them, in contrast to non-academic category of jobs (*e.g.*, dining services). (Tr. 50:17-19) (Kington); (Tr. 57:4-7.) (Kington). In some instances, the College actually structures positions for students who may be struggling academically **to enable them to study on the job**. (Tr. 110:21-111:1) (Tapias); (Tr. 68:24-69:14) (Kington); (Tr. 202:22-203:2) (Watts).

Most positions in which students serve are tied to their individual educational interests. (Tr. 152:1-413 (Lindberg) (“[W]e try to . . . match the student’s academic interests with the jobs that they participate in. . . . So students . . . are free to find jobs on campus that meet their . . . academic interests.”). *See also* (Tr. 113:11-18 (Tapias) (explaining that professors generally select students who have taken their class or been in their tutorial or majors in general)); (Tr.

129:11-17 (Tapias) (“When I hire students to help me, I was thinking of students that were planning to go on to graduate school in medical anthropology. I was thinking of students that would benefit from learning . . . how research takes place . . . [h]ow an ethnography is . . . developed and comes to . . . publication.”); (Tr. 68:17-19 (Kington) (“[Students] are increasingly hired for substantive, intellectual work related to [a] topic, and related to their interests usually.”)); (Tr. 134:6-10 (Tapias) (explaining that the position provided a student with an “indispensable opportunity” to learn more about the field of medical anthropology)); *See also* Employer Exhibit L (laboratory assistant for social psychology requires “interest in psychology, prior psychology course work;” herbarium assistant requires “course work in plant biology and/or evolutionary biology;” research assistant in Developmental Psychology requires “course work in psychology and a psychology (or intended) major;” curatorial intern requires “coursework in art history and/or history” and preferably an “[i]nterest in exploring a curatorial career;” laboratory assistant for social psychology requires “[i]nterest in psychology [and] prior psychology course work”).

It is beyond dispute that the College offers its students “employment” opportunities to enhance their classroom experience and to develop skills that will serve them well in future placements. For instance, President Kington explained that Grinnell hires students majoring in economics to assist in managing the College’s endowment, preparing them for careers in investment banking. (Tr. 59:23-60:7.) President Kington elaborated that students are gaining skills and education that they would not get in the classroom or from a summer internship; these are “nexus positions between the real world and academic world” that are “really important parts of the educational experience.” (Tr. 60:19-61:4.) *See also* (Tr. 57:18-24 (Kington) (“[T]here are lots of employers now who won’t even look at a resume unless there are two internships, two.

That's how competitive it is in many of these jobs. So we help students get experiences that prepare them to make the case that they can be a good hire.”); (Tr. 54:7-12 (Kington) (“[V]ery explicit learning jobs like being a research assistant or a language mentor or a tutor, helping with writing, peer tutoring with writing and reading and math, and -- and those skills, those are experiences in which we know students learn themselves by helping other students learn.”)); (Tr. 194:13-19) (Watts) (explaining that the goal is to “prepare students to be good employees when they leave Grinnell College”); (Tr. 199:14-18) (Watts) (explaining that students are encouraged to find a “work opportunity that allows them to work in an area that would help them along the way.”); Employer Exhibit F a 1 (Information Technology Services Student Technology Consultants Handbook) (describing the skills that students would learn on the job, including problem-solving, equipment repair and working with others).

Further evidence of the connection between student employment and education is found in the numerous student job descriptions that were received in evidence at the pre-election hearing, which describe not only the necessary qualifications for the position -- in many cases specifying that coursework in a particular discipline is required -- but also the specific skills acquired/developed by the student in the position, underscoring their academic orientation. (*See* pp. 36-37 for a list of illustrative Student Job Descriptions included in Employer Exhibit L).

Based on the record, it is clear that these co-curricular learning opportunities are not motivated by economic or business concerns of the College, but rather by Grinnell's commitment to “integrat[e] career preparation into the . . . educational experience.” (Tr. 54:1-3.) (Kington); (Tr. 84:21-24) (Kington) (“[W]e have this very thoughtful . . . system in which students learn on jobs while they're working here . . . toward their goal of education.”); (Tr. 84:10-13) (Kington) (“We would not create the jobs if they weren't educational.”). The

opportunities are part and parcel of the students' academic education at Grinnell College. As President Kington explained, work on campus is such an integral part of Grinnell's culture that almost 75% of the students work in any given semester. (Tr. 34:12-19.). *See also* (Tr. 51:6-10 (Kington)) ("[S]tudents see it not just as a way to earn money. It's also a way to build a resume and to learn how to work in a capacity that's related to their education and to prepare them."). Indeed, 93% of Grinnell's current senior class has served in some student employment role over their college tenure.

By contrast, at Columbia, undergraduate students, regardless of major, were generally hired as Teaching Assistants to "run labs or problem sections that are ancillary to very large classes." *See Columbia University*, Case No. 02-RC-143012, Supplemental Decision and Order Dismissing Petition (Oct. 30, 2015). The graduate student assistants were likewise hired to staff sections of Columbia's signature core curriculum for all undergraduate students, regardless of their course of study. *Columbia*, 364 NLRB No. 90, slip op. at 14. As such, the Board found that the students' work "advances a key business operation of the University: the education of undergraduate students," and that "[t]he delegation of the task of instructing undergraduates, one of a university's most important revenue-producing activities," suggested that the student assistants' relationship to the university had a "salient economic character." *Id.* at 15-16.

At Grinnell, however, there is no "salient economic character" to the relationship between the College and its students. Rather, the relationship is strictly academic, with on-campus employment opportunities offered as learning experiences for the benefit of the students, not the College.

The funding received by Grinnell's undergraduates is, in fact, a form of financial aid that helps the students pay for their education; it is not compensation for services rendered. (Tr.

151:5-13 (Lindberg) (“[T]he point of work study . . . [is] to provide opportunity for students to work on campus to earn funds towards their education.”); (Tr. 146:17-20 (Lindberg) (explaining that self-help by students with respect to financial aid takes two forms: student loans and student employment). Notably, post-secondary education 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.” *Columbia*, 364 NLRB No. 90, slip op. at 23 (Member Miscimarra, dissenting). Significantly, as tuition increases, Grinnell does not expect its need-based students to work more to cover the costs, instead increasing other aspects of the students’ financial aid, including grants from Grinnell.

In sum, the College funds positions to provide experiential learning that enhances traditional classroom instruction. The goal is to produce well-rounded graduates, positioned to secure employment or prepared to transition into graduate studies. That students receive funding to support their academic pursuits does not convert these learning experiences to “jobs.” As such, there is no common law employment relationship between Grinnell and its undergraduates, even under the Regional Director’s erroneous and overbroad application of *Columbia*’s definition of employee.

* * *

Although the Board in *Columbia* did not purport to decide that all students at every college and university are statutory employees, here, the Regional Director applied the decision wholesale, without considering material differences between student assistants at *Columbia* and the undergraduates at Grinnell. Specifically, she did not consider that, unlike at *Columbia* and many other large universities, Grinnell’s undergraduates do not serve as a labor pool for the College. To the contrary, the campus employment opportunities at Grinnell are driven by its

mission of educating and graduating well-rounded students. The aid that students receive from the College supports their overall academic education; that funding is **not** pay for a job. This academic year, 70% of Grinnell students receive need-based financial aid with the average grant (no requirement to pay back) of \$45,077.³ These students are given the opportunity (not requirement) to add \$2,200 in work-based aid.⁴ When tuition is raised, aid is raised, not expectations regarding work. As such, there is no “salient economic character” to the relationship between Grinnell’s students and the College. The Regional Director erred in ignoring substantial record evidence that contradicted her conclusion.

II. TO THE EXTENT THE BOARD FINDS THAT THE REGIONAL DIRECTOR PROPERLY APPLIED COLUMBIA TO GRINNELL’S UNDERGRADUATES, COLUMBIA SHOULD BE MODIFIED OR OVERRULED.

The College maintains that its undergraduates are distinguishable from the student assistants in *Columbia*. However, if the Board does not reverse the Regional Director on this basis, then it should modify or overrule *Columbia* as is necessary to find Grinnell’s undergraduates to be students, not workers. In holding that students who conduct teaching and research at a university are statutory employees under Section 2(3) of the Act, the *Columbia* Board improperly rejected the relevance of the educational relationship existing between students and the university, as well as the significant policy considerations that weigh heavily against the intrusion of collective bargaining into that relationship.

For most of the Act’s history, these considerations led the Board to exclude students, particularly undergraduates, from the Act’s coverage. In *Columbia*, the Board failed to identify

³ See Grinnell College, Common Data Set, available at <https://www.grinnell.edu/about/offices-services/institutional-research/resources/cds> (last visited Dec. 7, 2018).

⁴ See Grinnell College, Student Employment, available at <https://www.grinnell.edu/student-employment> (last visited Dec. 7, 2018).

any significant changed circumstances to support its complete reversal of that historical position. Even worse, it broadly extended its holding to undergraduate assistants, with only a brief footnote cursorily overruling decades of Board precedent. The decision furthers no legitimate purpose of national labor policy, while threatening serious harm to academic decision making at private colleges and universities across the United States. It should be reconsidered for the many reasons elucidated in the dissenting opinion of Member Miscimarra, and the sound reasoning of *Brown* should be reinstated.

A. *Columbia* Represents an Unwarranted Departure From Decades of Nearly Uninterrupted Board Precedent Recognizing the Primarily Educational Relationship Between Students -- Particularly Undergraduates -- and Their College or University.

With the exception of a four-year period following its decision in *New York University*, 332 NLRB 1205 (2000) (“*NYU*”), the Board consistently has held that students engaged in teaching or research as part of their education are not statutory employees.⁵ As the Board explained in *Brown*, (which overruled *NYU*), this was because the nature of the relationship between the students and the university is “primarily an educational one, rather than an economic one.” 342 NLRB at 489. In support of its well-reasoned conclusion, the Board cited the following undeniable facts:

- Student assistants are admitted into the university as students, not hired as employees;
- Student assistants must be students actively enrolled in the university to receive an instructional or research appointment;

⁵ See *Adelphi University*, 195 NLRB 639, 640 (1972) (excluding graduate students serving as teaching and research assistants from a unit of full-time faculty members because they were “primarily students” who were “working toward their own advanced academic degrees”); *Leland Stanford Junior University*, 214 NLRB 621, 623 (1974) (holding that physics research assistants who performed various research tasks both independently and under faculty supervision, and who received financial aid in the form of a living allowance, were “primarily students” and “not employees” within the meaning of the Act).

- Student assistants focus principally on obtaining a degree, *i.e.*, being a student, and service time is capped so as not to interfere with their studies;
- Student assistant positions, whether in teaching or research, are directly related to the core elements of the students' degree and educational objectives;
- Student assistants perform their service under the direction and control of department faculty members, who typically also act as the students' advisors or mentors;
- The university provides financial support only to students, and only for the period during which the students are enrolled; and,
- The vast majority of students receive financial aid.

Brown, 342 NLRB at 485, 488-89. Thus, the Board concluded that treating student assistants as employees would be incompatible with the purposes of the Act. *Id.* at 488-90. Indeed, the *Brown* Board opined that “there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process.” *Id.* at 493.

Further, with respect to undergraduate students, the Board had long held that undergraduates should be excluded from the bargaining units of regular employees. In *San Francisco Art Institute*, the Board held that a unit composed of undergraduate student janitors was inappropriate and would “not effectuate the policies of the Act” because the students did not manifest a sufficient interest in the terms and conditions of their employment to warrant representation. 226 NLRB 1251, 1252 (1976). The Board rested its conclusion on “the brief nature of the students’ employment tenure, . . . the nature of compensation for some of the students, and . . .the fact that students are concerned primarily with their studies rather than with their part-time employment.” *Id.* In the Board’s judgment, “[t]he fact that the student janitors who presently seek representation attend the institution for which they work brings into sharp

and special focus the very tenuous secondary interest that these students have in their part-time employment.” *Id.*⁶

On August 23, 2016, the *Columbia* Board overruled *Brown* by a 3-1 vote (with former Chairman Miscimarra dissenting), holding that students -- including a miniscule number of undergraduates performing similar tasks to the graduate student assistants -- who perform various teaching and research tasks in connection with their academic degree programs at Columbia University are “employees” within the meaning of the Act. The Board majority in *Columbia* purported to justify its decision to revisit the issue that had been laid to rest 12 years earlier in *Brown* on the conclusory assertion that changes in higher education over time justified a fresh look at the employment status of students, *Columbia*, 364 NLRB No. 90, slip op. at 8-9, effectively disregarding the fact that the essential nature of the relationship between students and the university was unchanged. Although reconsideration of *Brown* should have had no effect on the status of undergraduate students because *Brown* (and *NYU*) dealt exclusively with graduate student assistants, the Board went out of its way to overrule *San Francisco Art Institute*, explaining, in a cursory footnote, that it was “incompatible with our holding here today” and thereby extending its misguided decision to undergraduates. *Id.* at 20 n.130. (“To the extent that cases like *San Francisco Art Institute* . . . 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

⁶ See also *Saga Food Service of California*, 212 NLRB 786, 787 n.9 (1974) (excluding students from a bargaining unit of food service employees and pointing out that “[i]n view of the nature of [the students’] employment tenure and our conclusion that their primary concern is their studies rather than part-time employment, we find that it would not effectuate the policies of the Act to direct an election among them. . . .”); *Macke Co.*, 211 NLRB 90, 91 (1974) (“It is evident that the primary concern of the students is the completion of their studies, which prepare them for different occupations or fields of endeavor, and that their present employment is only incidental to their academic objectives.”).

‘tenuous,’ such cases are incompatible with our holding here today and are overruled.”
(emphasis in original)).⁷

As demonstrated below, the current Board should revisit the employee status issue and modify or overrule *Columbia* because it misapplied the common law definition of employee, ignoring the realities of higher education, the practical implications of its decision, and the policy considerations long deemed to require the exclusion of undergraduates from the Act’s coverage.

B. Relevant Policy Considerations Establish That Students Who Perform Some Services as Part of Their Educational Programs Are Not Employees.

1. The Board Must Consider the NLRA’s Purpose in Determining Its Reach.

Section 2(3) of the NLRA tautologically defines the term “employee” to include “any employee.” 29 U.S.C. § 152(3). It does not further define the term, nor is “employee” defined elsewhere in the Act.⁸ As the Supreme Court has recognized, it is a bedrock principle of statutory interpretation that “a reviewing court should not confine itself to examining a particular statutory provision in isolation.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *Brown*, 342 NLRB 483, 488 (2004). The Board has a duty “to construe statutes, not isolated provisions.” *King v. Burwell*, 576 U.S. ___, 135 S. Ct. 2480, 2489 (2015) (quoting *Graham County, Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)). And, the Court has cautioned that “[i]n doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) with meaning.” *Allied Chem. & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971); *see id.* at

⁷ Likewise, although there has been no significant change in the past 43 years in the structure of research grants and the role of research assistants who work on those grants, the Board’s decision in *Columbia* also overruled *Leland Stanford*, which held that research assistants in science departments are not employees because they perform research that is inseparable from that required to complete their dissertations.

⁸ The definition includes a number of exceptions, none of which is relevant here.

167 (“The term ‘employee’ must be understood with reference to the purpose of the Act and the facts involved in the economic relationship.”); *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999) (“At the heart of each of the Court’s decisions is the principle that employee status must be determined against the background of the policies and purposes of the Act.”). Because Section 2(3) “contains no detailed provisions for determining statutory employee status,” that issue “must be examined in the context of the Act’s overall purpose.” *Brown*, 342 NLRB at 492.

Section 1 of the Act sets forth a policy to encourage “practices fundamental to the friendly adjustment of industrial disputes” to avoid “industrial strife or unrest.” 29 U.S.C. § 151. The Supreme Court has recognized that the “Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry,” and that “principles developed for use in the industrial setting cannot be ‘imposed blindly on the academic world.’” *NLRB v. Yeshiva University*, 444 U.S. 672, 680-81 (1980). The Board has similarly acknowledged that the Act envisions a statutory scheme applicable to the economic relationship between employer and employee. *WBAI Pacifica Foundation*, 328 NLRB at 1275 (“A central policy of the Act is that the protection of the right of employees to organize and bargain collectively restores equality of bargaining power between employers and employees and safeguards commerce from the harm caused by labor disputes. *The vision of a fundamentally economic relationship between employers and employees is inescapable.*” (emphasis added)); see *Columbia*, 364 NLRB No. 90, slip op. at 26 (Member Miscimarra, dissenting) (“Congress did not adopt our statute to advance the best interests of college and university students.”).

The Board and reviewing courts have routinely applied these principles to the analysis of employee status, and have held that persons who might otherwise fall within the Act’s definition

of “employee” may nonetheless be denied collective bargaining rights, based on relevant economic facts or policy concerns. Thus, in *NLRB v. Bell Aerospace Co.*, the Court held that “managerial employees” are not covered by the Act, even though they are not specifically excluded under Section 2(3). 416 U.S. 267 (1974). Similarly, in *Pittsburgh Plate Glass*, the Court excluded retirees from the Act’s coverage, reasoning that inclusion of retirees would not further the Act’s policy of preventing disruption to commerce caused by interference with the organization of active “workers.” 404 U.S. at 166. See also *Yeshiva University*, 444 U.S. at 686 (recognizing the tension between the Act’s inclusion of “professional[] [employees]” and its exclusion of “managerial employees” in the context of full-time university faculty); *Retail Clerks Int’l Ass’n v. NLRB*, 366 F.2d 642, 644-45 (D.C. Cir. 1966) (employees closely aligned with management excluded from coverage because of “potential conflict of interest between the employer and the workers”).

More recently, in *Northwestern University*, 362 NLRB No. 167, slip op. at 3 (2015), the Board declined jurisdiction over a representation case involving student football players, explaining that “it would not promote stability in labor relations to assert jurisdiction” even if scholarship players were found to be statutory employees.⁹ The Board should apply that same deference here to **undergraduate** programs.

Notably, well-established case law under analogous provisions of the Fair Labor Standards Act (“FLSA”) provides strong support for the “primary relationship” test applied in *Brown*. Like the NLRA, the FLSA defines “employee” as “any individual employed by an

⁹ The appropriateness of such policy considerations in construing the scope of the NLRA was not affected by the Supreme Court’s decision in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995) (cited in *Columbia*, 364 NLRB No. 90, slip op. at 4), which simply established that the Board could – but was not required to – apply the common law agency definition of employee as a means for determining whether paid union organizers were protected by the Act. Indeed, the Supreme Court in *Town & Country* examined the underlying purposes of the Act when determining employee status. 516 U.S. at 91.

employer.” 29 U.S.C. § 203(e).¹⁰ In deciding whether students in a variety of settings should be considered employees under that statute, courts have adopted a “primary beneficiary” test very similar to the “primary relationship” test of *Brown*. See, e.g., *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 526 (6th Cir. 2011) (students at a vocational boarding school are not employees; “identifying the primary beneficiary of a relationship provides the appropriate framework for determining employee status in the educational context”); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (finding that students were not “employees” because the chores that they were required to do were “primarily for the students,’ not the [school’s], benefit”); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) (“[T]he proper legal inquiry in this case is whether [the employer] or the [trainees] principally benefited from the weeklong [training] arrangement.”); *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1326-27 (10th Cir. 1981) (comparing respective benefits of the student resident assistants and the college to determine whether the resident assistants were “employees” of the college and noting that “[t]he mere fact that the College [employer] may have derived some economic value from the [resident assistant] program does not override the educational benefits of the program and is not dispositive of the ‘employee’ issue”).

In *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016), the U.S. Court of Appeals for the Second Circuit recently held that student interns working for a motion picture company were not FLSA “employees” notwithstanding that they possessed several indicia of employee status. In reaching that conclusion, the court adopted a “primary beneficiary”

¹⁰ See *Patel v. Quality Inn South*, 846 F.2d 700, 702-03 (11th Cir. 1988) (finding the statutory definitions of “employee” in the NLRA and FLSA to be analogous); *Berger v. NCAA*, 843 F.3d 285, 290 (7th Cir. 2016) (“Section 203(e)(1) [of the FLSA] defines ‘employee’ in an unhelpful and circular fashion as ‘any individual employed by an employer.’”).

standard, which “focuses on what the intern receives in exchange for his work” and “accords courts the flexibility to examine the economic reality as it exists between the intern and the employer.” *Id.* at 536. The court also identified a list of non-exhaustive factors to determine the primary beneficiary, including “[t]he extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit” and “provides training that would be similar to that which would be given in an educational environment.” *Id.* at 537; *see also Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1212 (11th Cir. 2015) (adopting *Glatt*’s “primary beneficiary test”); *Berger v. NCAA*, 843 F.3d 285, 291 (7th Cir. 2016) (determining that student-athletes are not employees under the FLSA because of the history of amateurism in college sports and because “factors [to determine employment status] used in the trainee and private-sector intern context fail to capture the nature of the relationship between” student athletes and the university).

These court decisions interpreting the definition of “employee” under the FLSA further support the consistent rulings under the NLRA that the Board should not look solely at the common law definition of employee, but rather must analyze “the underlying fundamental premise of the Act,” *i.e.*, that the Act is designed to cover economic, not educational, relationships. *Brown*, 342 NLRB at 488. “[F]or students, the least important consideration is whether they engage in collective bargaining regarding . . . an incidental aspect of their education.” *Id.* The overarching goal and consideration is to receive academic training and obtain a degree enabling students to secure and succeed in employment in a number of competitive fields. The Board has neither expertise nor regulatory authority in these matters. *Id.* at 25, 26.

2. Applying the NLRA to Grinnell Undergraduates Would Not Promote the NLRA's Purposes.

Just as the Board found in *Brown*, the essential elements of the relationship between Grinnell and its undergraduate students are decidedly educational – not economic. This primarily educational relationship is not seriously in dispute. (Tr. 448:2-5 (Union's closing argument) ("While it is clear that students in the petitioned for unit have an educational relationship with the employer, that's not relevant."); DDE at 3 (the "[student employment] handbook clearly states that a primary goal of student employment is to further the educational experience of the students."). Students attend Grinnell to obtain a degree. The College, through various departments and units across campus, provides students with meaningful work opportunities; *first* to advance their academic and professional goals, and *second* to assist them in funding their education. For the most part, the opportunities are related to the students' academic discipline or something close to it, and provide a learning experience that broadens and deepens students' understanding of their field and related areas of study. Even when the opportunities are not closely connected to the students' area of study, they acquire or develop valuable skills that would serve them well in the future.

That students derive earnings as part of a financial aid package is of limited consequence in determining whether they should be deemed employees. "[F]ull-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." *Columbia*, 365 NLRB No. 90, slip op. at 23 (Member Miscimarra, dissenting). Recognizing this important policy consideration, Grinnell regularly creates student-specific positions across campus to ensure that meaningful co-curricular learning is available for any undergraduate interested in working, regardless of reason. The earnings that many

undergraduates derive are part of a comprehensive financial aid program that both enhances the students' academic pursuits and makes their education more accessible and affordable. True to its commitment to champion education, access and social justice, Grinnell spends approximately \$2 million annually on undergraduates' wages, only a tenth of which comes from federal funding. (DDE at 4.)

At all times, however, the paramount purpose of undergraduate enrollment is successful completion of the students' coursework and progress towards their degree. Campus "work" is a part of that and schedules are modified to meet the students' needs. They are not permitted to put in more than 20 hours per week total, regardless of the number of positions held. (DDE at 4.) This limit ensures that students focus first on their studies, as should be the case.

Plainly, the fundamental nature of this relationship is not economic, nor does it fit into a traditional employer-employee framework. Indeed, there are substantial policy reasons for treating student assistants as students, not employees. *See generally Columbia*, 364 NLRB No. 90, slip op. 22-34 (Member Miscimarra, dissenting). Collective bargaining rights under the NLRA could serve as an economic weapon that if fully utilized would thwart students' primary goal, *i.e.*, to obtain a degree. *See id.* at 29 ("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"); *see also id.* at 27 ("[C]ollective 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.").

Imposing collective bargaining on the academic relationship between Grinnell and its undergraduate students would have untold negative consequences. Among others, it would

undermine Grinnell’s mission by impairing the College’s ability to pursue its core educational purpose and maintain its distinctive culture, in which individually-advised learning takes place both in and out of the classroom. It would further impede learning by inserting a third party whose priorities are economic, not educational, into learning outside the classroom, having a potentially profound impact on the educational relationship among the College, faculty and students. *Brown*, 342 NLRB at 490; *see id.* at 492 (“[T]he broad power to bargain over all Section 8(d) subjects would, in the case of graduate student assistants, carry with it the power to intrude into areas that are at the heart of the educational process.”). For example, with over three quarters of its undergraduates in the union in any given semester, it likely would be a mandatory subject of bargaining for Grinnell to discuss a union demand to expand the Fall break from one week to two weeks. But the academic calendar is determined through shared governance; the Grinnell faculty, as part of the College’s shared governance system, develops and recommends the calendar.¹¹ *See Yeshiva*, 444 U.S. at 688 (“[T]he ‘business’ of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions.”). Hence, NLRA’s obligations could easily clash with academic governance, demonstrating the danger of retrofitting the NLRA on the College.

A union would also undermine Grinnell’s flexibility to provide meaningful co-curricular learning opportunities to undergraduates in ways that meet their individual needs. (Tr. 63:10-15) (Kington) (explaining that flexibility in creating student jobs would be impacted by unionization); (Tr. 77:19-78:12) (Kington) (describing that there would have to be centralized

¹¹ *See* Grinnell College Faculty Handbook at 2, Part One, I, C.5 (Apr. 2018), available at <http://web.grinnell.edu/dean/Handbook/FacultyHandbook.pdf> (last visited Dec. 7, 2018).

oversight and increased costs); (Tr. 121:20-24) (Tapias) (explaining that unionization would lead to reduced flexibility); (Tr. 122:1-10) (Tapias) (stating that unionization could lead to increased expense that would eat into a faculty member's budget, reducing employment opportunities); (Tr. 164:7-12 (Lindberg) (explaining that unionization could cause cost of student employment to rise, resulting in limitation of employment to those with financial need, which could in turn result in identification of students who are financial aid recipients, information that is not disclosed today).

These consequences would result from the college or university's expansive duty, as employer, to bargain over the "terms and conditions" of students' employment. *See Kendall College*, 228 NLRB 1083, 1088 (1977) (rejecting College's argument that the "law requiring bargaining on mandatory subjects requires a different interpretation in the halls of academia than it does in an industrial shop"), *enfd*, 570 F.2d 216 (7th Cir. 1978); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979) (noting that "nearly everything that goes on in the schools affects teachers and is therefore arguably a 'condition of employment'") (citation and quotation omitted). Literally any identifiable "term" or "condition" of students' service could be subject to mandatory bargaining. *Brown*, 342 NLRB at 490; *Columbia*, 364 NLRB No. 90, slip op. at 25 (Member Miscimarra, dissenting). Moreover, bargaining would likely interfere with "broad academic issues involving class size, time, length, and location," as well as issues over students' "duties, hours, and stipends." *Id.* Because these opportunities at Grinnell College are often created as part of the students' financial package, bargaining over "wages" would also necessarily have a major impact on the ability of the College to continue to allow the student employment program to continue in its current state.

Other aspects of labor-management relations demonstrate that it is ill-suited for application to undergraduate students in campus employment positions. The use of strikes and other economic tactics could lead to the loss, suspension, or delay of academic credit; suspension of tuition waivers; potential replacement; loss of tuition previously paid; and, academic suspension. *Columbia*, 364 NLRB No. 90, slip op. at 29-30 (Member Miscimarra, dissenting). Accordingly, resort to accepted forms of economic leverage when bargaining breaks down could disrupt undergraduates' academic progress. These tools are necessary components of the statutory scheme for resolving bargaining disputes, *see NLRB v. Int'l Union of Marine, Shipbuilding and Shiprepairing Workers*, 361 U.S. 477, 489 (1960), but in the context of undergraduate education, they could have a severe impact on the academic relationship, impeding the students' academic progress. *See Columbia*, 364 NLRB No. 90, slip op. at 29 (Member Miscimarra, dissenting).¹²

Additionally, the NLRB's procedures in unfair labor practice cases are cumbersome and time-consuming; they are a poor fit with undergraduate education. 364 NLRB No. 90, slip op. at 31. Litigation of unfair labor practice cases can extend for years before the Board issues a decision. In that time, "the academic world may experience developments that dramatically change or even eliminate entire fields of study." *Id.* Additionally, students may no longer hold their positions, may be in different departments, and may even have graduated by the time a Board case affecting them is resolved. "In these respects, treating student assistants as employees under the NLRA is especially poorly matched to the Board's representation and ULP procedures." *Id.* at 32 (Member Miscimarra, dissenting). At Grinnell, since November 27, the

¹² This has not been a problem in graduate student bargaining in public sector universities given that most states prohibit strikes by public employees. *See, e.g.*, Conn. Gen. Stats., Title 10, Ch. 166, § 10-153e; *see also* Milla Sanes & John Schmitt, Center for Economic and Policy Research, Regulation of Public Sector Collective Bargaining in the States (March 2014), available at <http://www.cepr.net/documents/state-public-cb-2014-03.pdf> (only twelve states allow teachers to strike).

Union has filed six unfair labor practice charges against the College. (*See* Case No. 18-CA-231333; Case No. 18-CA-230918; Case No. 18-CA-230481; Case No. 18-CA-232020; in addition to two currently un-docketed charges filed on December 5 and December 7).

Furthermore, “current Board law, if applied to university student assistants, may contradict federal educational requirements,” including the Family Educational Rights and Privacy Act (“FERPA”), Pub. L. 93-380 (1974); 20 U.S.C. § 1232g), which restricts the disclosure of students’ educational records, and the Higher Education Act of 1965, which restricts the use of data collected on financial aid forms, Pub. L. 89-329 (1965). *Columbia*, slip op. at 27. (*See* Tr. 82:22-83:3) (Kington) (explaining the conflict with FERPA); (Tr. 161:24-162:16) (Lindberg) (describing conflict with FERPA and other privacy laws).

To illustrate the point, Member Miscimarra identified FERPA in particular as one such federal statute that is in tension with the NLRA and has the potential to create thorny legal predicaments for unsuspecting employers. That has come to pass at Grinnell. On December 5, Cory McCartan, a Grinnell student, member of the soon-to-be certified expanded bargaining unit and UGSDW representative, wrote to the College’s Registrar intimating that the College violated FERPA by posting online an email that Mr. McCartan sent to Grinnell’s President days earlier in which he sought to have the College recognize and bargain with the union. Mr. McCartan claimed that he was bringing his alleged FERPA complaint in his “capacity as a student worker and representative of UGSDW” and that FERPA was violated because the email he sent to the President contained information relating to him as a “student.” Mr. McCartan believed that his email to the President, in spite of the fact that he was using his UGSDW email address, was thus transformed into an “educational record” protected from disclosure under FERPA.

Mr. McCartan's claimed FERPA violation brings into sharp contrast the legal quandary Member Miscimarra anticipated. Here, Mr. McCartan is attempting to use his putative status as an "employee" under the NLRA as a sword while simultaneously using his status as a "student" under FERPA as a shield against an unarmed College that has one hand tied behind its back. This duplicitous gamesmanship and unfair imbalance is clearly not a result that was intended by Congress.¹³

In their totality, these "unfortunate consequences" demonstrate the adverse effects of unionization on campus life. UGDSW's victory on November 27 has already left its mark at Grinnell. With final exams just two weeks away, student workers have threatened to strike and have engaged in disruptive and hostile unprotected activity designed to coerce the College into waiving its right to file this Request for Review of the DDE. *See* Kathy A. Bolten, "Grinnell student union members to vote whether to strike Friday after administrators refuse to meet with them," *Des Moines Register* (Dec. 6, 2018) (available at

¹³ Notably, Congress has passed "an array of federal statutes and regulations [applicable] to colleges and universities, administered by the U.S. Department of Education, led by the Secretary of Education." *Columbia*, 364 NLRB No. 90, slip op. at 23 (Member Miscimarra, dissenting). The Higher Education Act of 1965, Pub. L. 89-329 (1965), for instance, authorizes most federal student assistance programs for students in postsecondary and higher education. The Higher Education Act has been reauthorized multiple times, including by the Higher Education Opportunity Act of 2008, which, among other things, added provisions that improve access to postsecondary education for students with intellectual disabilities. Pub. L. 110-315 (2008). Congress also passed the Family Educational Rights and Privacy Act ("FERPA"), which restricts the disclosure of students' educational records. Pub. L. 93-380 (1974); 20 U.S.C. § 1232g. Congress thus has addressed – and has the authority to continue to address -- the interests of students in multiple contexts outside of the NLRA, suggesting that it did not intend the NLRA to apply to this setting. *FDA v. Brown & Williamson*, 529 U.S. 120 (2000). The Board should not "disregard [its] responsibility to accommodate this extensive regulatory framework." 364 NLRB No. 90, slip op. at 23.

There is an obvious conflict between FERPA and NLRA requirements regarding University disclosure of certain personal employee information to the union, *e.g.*, voter list data and, in the context of ongoing representation, other personal information required under § 8(d) of the Act. FERPA protects students' "education records" and the information contained in education records cannot be disclosed by the school absent consent of the students or an exception to FERPA. Indeed, the Board majority acknowledged this conflict and concluded "that the Act recognizes that a union's right to information may, in a particular context, be subordinated to a legitimate confidentiality interest." *Id.* at 13 n.93.

Grinnell and Petitioner are no strangers to conflicts between FERPA and NLRA, as evidenced by Petitioner's previous unfair labor practice charge against the College over its refusal to violate FERPA by providing Petitioner with students' personal confidential information. (*See* Tr. 274:12-22 (McCartan)).

<https://www.desmoinesregister.com/story/news/education/2018/12/06/union-grinnell-college-student-workers-unionize-iowa-nlrb-labor-relations-board-university-school/2230009002/>) (last visited Dec. 6, 2018).

In sum, collective bargaining involving students is a fraught process from many angles. *Columbia*, 364 NLRB No. 90, slip op. at 34 (Member Miscimarra, dissenting). Accordingly, the Board should not interpret the Act to govern the educational relationship between students and their universities “merely because student may occupy a variety of academic positions in connection with their education.” *Id.*; *see also id.* at 23 (The students’ “positions do not turn the academic institution they attend into something that can fairly be characterized as a ‘workplace.’”).

C. Empirical Evidence Relied Upon by the *Columbia* Board Does Not Support Extending the Act to Grinnell Undergraduates

The Board majority in *Columbia* asserted that “the relevant empirical evidence” supported its conclusion, but that, in fact, is not the case. *See Columbia*, 364 NLRB No. 90 slip op. at 4.

First, the Board noted that some 64,000 students had organized at 28 public-sector institutions, and that the parties “successfully have navigated delicate topics near the intersection of the university’s dual role as educator and employer.” *Columbia*, 364 NLRB No. 90, slip op. at 9. However, evidence regarding the experience of public university unions -- which is not new and was available when *Brown* was decided -- sheds no light on how undergraduate unions would be regulated under the NLRA. These relationships were established under state laws, which, unlike the NLRA, often impose limits on the right to strike and the scope of bargaining. *Brown*, 342 NLRB at 492 n.31 (collecting sources); *Lamphere Schools v. Lamphere Federation of Teachers*, 252 N.W.2d 818, 821 (Mich. 1977) (example of state law significantly restricting

the right to strike); *Sch. Comm. of Boston v. Boston Teachers Union, Local 66*, 389 N.E.2d 970, 973 (Mass. 1979) (“It is by now well recognized that the subjects of public sector collective bargaining are more restricted than those in private sector labor relations.”); *see also supra* n.10, n.12. Thus, state laws significantly mitigate the risks that concerned the Board in *Brown* and dissenting Member Miscimarra in *Columbia*, while no similar checks and balances exist in the private sector.

Second, the Board relied upon a biased study -- virtually commissioned by then-Chairman Wilma Liebman -- for the proposition that there is “‘no support’ for the contentions [in *Brown*] that graduate student unionization ‘would harm the faculty-student relationship’ or ‘would diminish academic freedom.’” *Columbia*, 364 NLRB No. 90, slip op. at 9 (quoting 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) (“Rogers Study”)).¹⁴ The Rogers Study, aimed directly at *Brown*’s reversal, ignored the Board’s concerns that graduate student unionization would restrict the freedom of faculty and administration to make academic decisions. *See Brown*, 342 NLRB at 490. The result-oriented study focused solely on students, with no attention whatsoever to faculty concerns. *See Rogers Study* at 495 (“In this study we will explore the impact on the academic freedom of graduate students themselves, and on their perception of overall academic freedom in the institution *but not specifically the academic freedom of faculty who work with them or the institution in which they work*” (emphasis added)). As faculty did not participate, the

¹⁴ Notably, the Rogers study resulted from a suggestion by then-Chairman Wilma Liebman made directly to Dr. Voos and others regarding the kind of evidence needed to bolster her dissent in *Brown*. *See Motion for Recusal*, at 2-4, *New York University*, Case No. 02-RC-23481 (August 11, 2011).

study provides no basis for any conclusion about academic freedom from the important perspective of faculty or university administration.

The study also did not counter the *Brown* Board’s concern about harming student-faculty relations. Although the study examined student-teacher relations, it did not conclude that unionization would not have an adverse effect on these relationships at private universities. Indeed, expert testimony in *Columbia* showed that one cannot “learn anything at all from [the Rogers Study,] one way or the other – good or bad – about what would happen at Columbia were graduate students to unionize.”¹⁵ Indeed, the majority in *Columbia* acknowledged that Columbia’s evidence showed that “neither harm nor benefit from collective bargaining can be ruled out” by the study, but nevertheless somehow concluded that the “the dire predictions of the *Brown University* Board are undercut.” *Columbia*, 364 NLRB No. 90, slip op. at 9.¹⁶

Finally, the Board’s reliance on the experience of NYU as a “case in point,” also was misplaced. *Id.* at 10. The Board wrongly discounted evidence from three cross-campus committees at NYU that had studied the school’s experience with graduate assistant collective bargaining and concluded that the threat posed by continued union representation posed an unacceptable risk to the university. The committees expressly recommended withdrawal of recognition to safeguard the university’s academic freedom.¹⁷ Specifically, the Faculty Advisory Committee on Academic Priorities (comprised of senior faculty members who advise the Provost) expressed “concern” that grievances filed under the Graduate Assistant CBA “threatened to impede the academic decision-making authority of the faculty” over issues such as

¹⁵ See Br. on Review of Columbia University, *Columbia*, Case No. 02-RC-143012, at 28 (February 29, 2016).

¹⁶ Other studies cited by the Board in *Columbia* were available at the time of the *Brown* decision and are, in any event, similarly inconclusive. *Columbia*, 364 NLRB No. 90, slip op. at 9.

¹⁷ See Br. on Review of Columbia University, *Columbia*, Case No. 02-RC-143012, at 25-27 (February 29, 2016).

staffing the undergraduate curriculum, the appropriate measure of academic progress, and terms and conditions of fellowships that do not involve assistantships.¹⁸ The Faculty Advisory Committee also noted the union’s willingness to arbitrate such grievances, as well as the possibility that an arbitrator not familiar with the workings of a University would restrict academic freedom.¹⁹ Similarly, the NYU Senate Academic Affairs and Executive Committees (each comprised of students, faculty and administrators) expressed concern that “[o]ver time, a number of these grievances, if successful, have the potential to impair or eviscerate the management rights and academic judgment of the University faculty to determine who will teach, what is taught, and how it is taught.”²⁰ Contrary to the *Columbia* Board’s assertion, the experience at NYU under the Graduate Assistant Collective Bargaining Agreement *confirmed* the concern in *Brown* about the impact of collective bargaining on academic freedom and student/faculty relations.

In sum, there was no empirical evidence to support the *Columbia* majority’s rejection of the well-founded concerns of the Board in *Brown* that permitting collective bargaining between students and their schools would present serious risks to both academic freedom and student-faculty relationships.

* * *

For all these reasons, the Board’s decision in *Columbia* was clearly erroneous and should be modified or overruled, particularly as applied to undergraduates. In holding that students at a college or a university are statutory employees under Section 2(3) of the Act, the majority simplistically applied the common law definition of “employee,” dismissing the primarily

¹⁸ *Columbia*, 02-RC-143012, Empl. Ex. 20 at 2.

¹⁹ *Id.*

²⁰ *Columbia*, 02-RC-143012, Empl. Ex. 21 at 8.

educational relationship between students and their schools, and the significant policy considerations that weigh heavily against the intrusion of collective bargaining into that relationship. The mistakes made by the majority in *Columbia* should not be compounded here, where Petitioner is seeking a unit that would include virtually the entire undergraduate student body of Grinnell College.

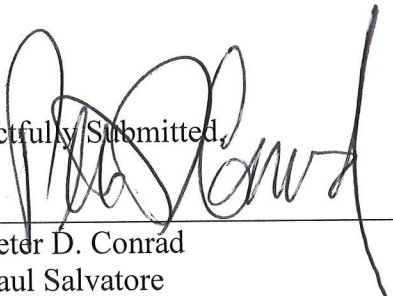
CONCLUSION

The Board should (i) grant Grinnell College’s Request for Review, (ii) find that no “question concerning representation” of employees exists, (iii) dismiss the petition, and (iv) revoke any certification that may have been issued by the Regional Director.

Dated: December 7, 2018
New York, New York

Respectfully Submitted,

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Illustrative Student Job Descriptions²¹

Title	Comments
Student Content Producer	“[H]ighly rewarding job and great place to build a portfolio.” <u>Skills Acquired/Developed</u> : Communication, computer, research, time management and organizational skills, etc.
Media Relations Assistant	“[W]e’ll try to provide experiences that will support your plans for life and work after Grinnell.” <u>Skills Acquired/Developed</u> : Competent research skills; working autonomously; applying Associated Press style book; working under pressure within designated boundaries, etc.
Vivero Digital Scholarship Fellow	“Fellows will develop and complete a plan for skill development in consultation with superiors.” <u>Skills Acquired/Developed</u> : Communication; report writing; CV preparation; statistical skills; preparing and giving presentations; working in groups.
Research and Cataloguing Assistant	<u>Skills Acquired/Developed</u> : “This student will learn how to properly handle ancient artifacts and to catalogue items according to classification rubrics.”
Curatorial Intern	“The intern will have the opportunity to job-shadow all members of the Faulconer Gallery staff.” <u>Skills Acquired/Developed</u> : Research; reading/writing; and organizational skills.
ALSO Tutor	“Tutors receive instruction in foreign language methodology, learning styles, classroom management, use of technology in the classroom, creating syllabi . . . and communicating course goals and objections with peers.” <u>Skills Acquired/Developed</u> : Use of P-web; facility with presentation software (PowerPoint or Prezzi); openness to using emerging technologies of interest to languages teaching and learning.
BCC Archivist and Librarian	<u>Skills Acquired/Developed</u> : Archiving and librarian related skill sets; programming design; interpersonal dialogue and facilitation skills; multicultural compliance, etc.
Laboratory Assistant	“The assistant will work with student research groups to help them design their experiments, develop their materials, and analyze their data”; <u>Skills Acquired/Developed</u> : Communication; computer skills; report writing; presentation skills, etc.

²¹ All “Student Job Descriptions” were received in evidence as Employer “Exhibit L” on October 17, 2018.

Auxiliary Services and Economic Development Student Research Assistant	“This is a great opportunity for a student who is interested in business or economics.” <u>Skills Acquired/Developed</u> : Accessing the internet, competent reading/writing skills; strong research skills.
3D Artist (GC Immersive Environments Lab)	<u>Professional Development</u> : “To assist in development of industry recognized skills, the 3D artist will be provided access to Autodesk 3DS Max Certified User Training and Linda.com training.”
Software Developer (GC Immersive Environments Lab)	<u>Professional Development</u> : “To assist in development of industry recognized skills”; access to Unity Certified Developer Courseware.
Individual Tutor (Social Services and Humanities)	<u>Skills Acquired/Developed</u> : Communication; intervention; listening; report writing.
Rootstalk Editorial Assistant	<u>Skills Acquired/Developed</u> : Editorial and publication design; web design and social media experience, etc
Organizational Mentor	<u>Skills Acquired/Developed</u> : Development of mentoring and academic coaching skills; academic success strategies and executive functioning techniques, etc.
SGA Assistant Treasurer	<u>Skills Acquired/Developed</u> : Report writing; interaction/presentation skills; time management; working in groups, etc.
Mentor for Physiological Psychology	<u>Qualifications</u> : Prior psychology coursework including PSY 246; <u>Skills Acquired/Developed</u> : Communication; computer skills; report writing; working autonomously; presentation skills, etc.
Production Assistant/Bookkeeper	<u>Qualifications</u> : Some experience working with theater/dance department faculty and staff (in coursework and/or productions); <u>Skills Acquired/Developed</u> : Microsoft Excel or Mac OSX; first aid/CPR
Math Lab Tutor	<u>Qualifications</u> : Strong understanding of introductory mathematics curriculum; successful completion of calculus or statistics; <u>Skills Acquired/Developed</u> : Statistical and math skills, etc.
DASIL Tutor	<u>Qualifications</u> : “Candidates must be recommended by faculty and must have completed appropriate coursework in areas they will be tutoring”; <u>Skills Acquired/ Developed</u> : Strong personal computer skills, spreadsheet, graphics, etc.