

BEFORE THE NATIONAL LABOR RELATONS BOARD

TRUSTEES OF GRINNELL COLLEGE,  Employer,  and  UNION OF GRINNELL STUDENT DINING WORKERS,  Petitioner.	Case No. 18- RC - 228797  AMENDED STATEMENT OF ISSUES AND THE POSITION OF GRINNELL COLLEGE
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For the reasons set forth below, The National Labor Relations Board should refrain from exercising jurisdiction in this matter.

## **Grinnell College: Introduction**

The mission of Grinnell College is to graduate individuals who can think clearly, who can speak and write persuasively and even eloquently, who can evaluate critically both their own and others ideas, who can acquire new knowledge, and who are prepared in life and work to use their knowledge and abilities to serve the common good. Grinnell aims to use its resources for students today and generations of students in the future. Students attend Grinnell College to learn in and out of the class room through an individually-advised and experiential education, live in a residential, learning community, and launch careers, and life in service after graduation.

Access and diversity are key to the success of Grinnell College. The College tries to enroll talented, independent, curious students regardless of their financial status. Grinnell has a need-blind admission policy and meets 100% of demonstrated financial needs of students who come from the across United States. At Grinnell College, where a student hails from and what that student's family can afford is not important. It is what the student brings to the table that matters.

Grinnell College strives to reduce the impact of inequality in the College community. Staff, faculty and students don't know who receives financial aid. Opportunities to mentor, tutor, research and other work are available to all students regardless of financial need. The enrollment statistics at Grinnell College demonstrate the institution's success in recruiting and educating talented, independent, curious students of all financial walks of life.

A quarter of the student population at Grinnell College are students of color from the United States. Nearly 20% of Grinnell students are Pell Grant eligible. Nearly 15% of Grinnell's student body are the first members of the family to attend college. Approximately 19% of the student body are international students. The average SAT test score is 1423.

Grinnell College's financial structure including its large endowment support the schools' mission and values of access and diversity. Most of the students at Grinnell College will receive financial aid. In

fact, 85% of the student body will receive some form of financial assistance. Nearly a quarter of Grinnell College students receive enough grant aid so that they don't have to pay any tuition.

Nearly half of Grinnell students graduate without any student debt. Those who do have to borrow are on the average required to borrow less than \$20,000.00-the lowest in Iowa and among the best in the nation. Grinnell College awards nearly \$60 million dollars in financial aid every year with the average financial aid package being \$47,561.00 the average need base grant at Grinnell College is \$41,344.00. The total student employment awarded at Grinnell College in 2017 was \$2,647,800.00. Federal funding for such student employment was \$168,500.00.

Grinnell students enroll at the College to learn, live and launch a life-not to work. Grinnell is unique in its approach to learning. It provides individually advised highly experiential inquiry based global education. Grinnell is a residential, learning community. Students live in a close knit community where they take their studies and leadership roles seriously to a self-governance model. Grinnell is a national leader in integrating the educational experience with student's post-graduation plans for careers, life and service.

The majority of work performed by students employed on campus is tied directly to academics, community and careers. Research assistance, language mentors, writing tutors, etc. The majority of the work at Grinnell College is educational-not labor.

Studies come first at Grinnell College. Schedules are modified to meet academics. Decentralized, very flexible structures allow opportunities to be created for students. Attached as Exhibit A is a slide deck outlining the facts described and referred to herein.

**Issue One: The Board should conclude the unit in question is inappropriate because student workers are not “employees” under the National Labor Relations Act (“NLRA”)?**

- I. Undergraduate students who are employed by Grinnell College in campus employment positions are not “employees” under the National Labor Relations Act.
  - A. Undergraduates holding campus employment positions have a primarily educational relationship to Grinnell College.

The NLRA, Section 2(3) defines the word “employee” to include “any employee.” 29 U.S.C. § 152(3). Section 2(3) does not further define the term, and the Act does not define “employee” elsewhere.<sup>1</sup> Based on sound policy considerations, some categories of employees are excluded from the Act’s coverage. Undergraduate workers in the petitioned-for unit, as students with a primarily educational relationship to Grinnell College, are rightfully among such categories of employees.

Because Section 2(3) “contains no detailed provisions for determining statutory employee status,” whether a worker is a statutory employee “must be examined in the context of the Act’s overall purpose.” *Brown University*, 342 NLRB 483, 492 (2004). *See also Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971) (when interpreting the NLRA, “[i]n doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) with meaning.”). *See also id.* at 167 (“The term ‘employee’ must be understood with reference to the purpose of the Act and the facts involved in the economic relationship.”) “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.” *WBAI Pacifica Found.*, 328 NLRB 1273, 1275 (1999).

The purpose of the Act is 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 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 Univ.*, 444 U.S. 672, 680-81 (1980) (citation omitted). Likewise, the Board has

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<sup>1</sup> The definition includes exceptions.

acknowledged that the NLRA establishes a statutory scheme applicable to the economic relationship between employer and employee. *WBAI Pacifica Found.*, 328 NLRB at 1275; *see also 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.”).

Applying relevant economic facts or policy concerns, the Board and reviewing courts have interpreted the Act’s definition of “employee” and held that some workers fall outside the statutory definition.

In *Bell Aerospace*, the Court held that “managerial employees” are not covered by the Act, even though they fall within the common-law employee definition and Section 2(3) does not specifically exclude them. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974). *See also NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980) (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”).

In *Brevard Achievement Center*, the Board declined to include workers with disabilities at a rehabilitative facility within the definition of “employee” because the employer’s relationship with the individuals at issue was not guided by economic business considerations, but rather was “primarily rehabilitative.” *Brevard Achievement Ctr., Inc.*, 342 NLRB 982, 989 (2004). Similarly, the Supreme Court upheld the Board’s refusal to extend collective-bargaining rights to “confidential employees.” *NLRB v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 178-79 (1981). The Supreme Court declined to exercise jurisdiction over teachers at church-operated schools because doing so would necessarily entangle the Board in matters of

religious education and run afoul of the First Amendment. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 495-96, 499 (1979).

More recently, in *Northwestern University*, the Board declined to exercise jurisdiction over student employees who play football.<sup>2</sup> 362 NLRB No. 167 (2015). The Board explained “it would not promote stability in labor relations to assert jurisdiction” even if scholarship players were found to be statutory employees.<sup>3</sup> *Id.*, slip op. at \*3. Similarly, it seems likely the Board will decline to assert jurisdiction over students with a primarily educational relationship to their college, like undergraduate work-study students at Grinnell College.

Other federal law and court decisions provide strong support for the “primary relationship” test applied in *Brown* and throughout most of the Board’s history. Like the NLRA, the analogous Fair Labor Standards Act (“FLSA”) defines “employee” as “any individual employed by an employer.” 29 U.S.C. § 203(e).<sup>4</sup> In deciding whether students in a variety of settings should be considered employees under the FLSA, courts have adopted a “primary beneficiary” test similar to the “primary relationship” test under *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

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<sup>2</sup> In declining to exercise jurisdiction, the Board did not have occasion to reverse the Regional Director’s decision that students playing football were employees within the meaning of the Act.

<sup>3</sup> 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.

<sup>4</sup> *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.’”).

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.”); *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).

The Tenth Circuit considered whether “Resident Advisors” were “employees” under the FLSA. *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324 (10th Cir. 1981). In that case, “Resident Advisors” provided “educational and support services” to their fellow residents and “promot[ed] safe and secure accommodations.” *Id.* at 1326. They were required to attend a training workshop prior to the beginning of the fall semester and several training programs throughout the school year. *Id.* They had administrative duties such as telephone coverage, mail distribution, and unlocking doors. *Id.* They also had broad responsibilities in maintaining discipline and order within dormitories and promoting student participation in campus activities. *Id.* The court noted that, although the Resident Advisors did not work a specified number of hours per day, they were generally available in the halls for an estimated “twenty hours a week.” *Id.* In exchange for their role as an Resident Advisor, Regis provided the students with a reduced rate on their rooms and a \$1,000 tuition credit. *Id.*

In finding that the Resident Advisors were not employees, the Tenth Circuit rejected the Department of Labor’s contrary contention of employee status. The court noted that the

government “ignore[d] not only the broad educational purpose of [the college], but also the expressed educational objectives of the student resident assistant program.” *Id.* at 1327. “The mere fact that [the college] 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.” *Id.* The *Regis* court further noted the unique role that Resident Assistants played in the university community, finding that they “did not displace other employees” whom *Regis* would otherwise have been required to hire. *Id.* The court dismissed the notion that the university’s residence life program could be achieved by “hiring non-students as ‘peer’ counselors” to replace Resident Assistants. *Id.* The fact that Resident Advisors provide a “service” and receive a stipend did not “override the educational benefits of the program” and must be “considered within the full educational context.” *Regis*, 666 F.2d at 1327.

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 to the common-law definition of employee, but must analyze “the underlying fundamental premise of the Act,” *i.e.*, that the Act is designed to cover economic relationships, as the Board properly recognized in *Brown*. 342 NLRB at 488. *See also Columbia*, 364 NLRB No. 90, slip op. at 25 (then-Member Miscimarra, dissenting) (“I agree with the Board majority’s reasoning in *Brown*.”).

1. Applying the NLRA to Undergraduates holding campus jobs does not promote the NLRA’s purpose.

The essential elements of the relationship between Grinnell College and Undergraduates are decidedly educational, not economic. The primarily educational relationship should not be seriously in dispute. Applying the NLRA to the primarily educational relationship between the Undergraduates and Grinnell College does not promote the purpose of the NLRA.

Students at Grinnell College must be students first. The intense focus on rigorous scholarship at Grinnell College and Grinnell College's devotion to the intrinsic value of intellectual pursuit and critical thought mandates that Undergraduates are students first. While other colleges and universities engage in the endeavor of higher education, Grinnell College has an elevated focus on intense student scholarship.

The fundamental nature of the Undergraduates' s relationship to Grinnell College is educational/academic, rather than economic. Such a relationship does not fit the into a traditional common-law employer-employee framework. Forcing the Act on a primarily educational relationship does not promote the purpose of the Act. Indeed, as noted in then-Member Miscimarra's dissent in *Columbia University*, substantial policy reasons counsel against treating students with an educational relationship to their school as employees, and he warned in *Columbia University*, "collective bargaining and, especially, the potential resort to economic weapons protected by our statute fundamentally change the relationship between university students . . . and their professors and academic institutions." *Columbia Univ.*, 364 NLRB No. 90, slip op. at 23. The risks are inherent in the Act's system of collective bargaining, which is predicated on the threat, and in some cases the actual use, of economic warfare as the means for resolving disputes. These risks were well articulated by Member Miscimarra in *Columbia University*:

I believe collective bargaining and its attendant risks and uncertainties will tend to detract from the primary reason that students are enrolled at a university—to satisfy graduation requirements, including in many cases the satisfactory completion of service in a student assistant position. And in some cases involving student assistants, it is predictable that breakdowns in collective bargaining will occur, and the resulting resort to economic weapons may have devastating consequences for the students....

*Id.*, slip op. at 29.

Applying the Act's system of collective bargaining to these relationships presents an important policy choice that could alter the nature of these relationships in a way that could be detrimental to all parties that have a stake in these relationships.

The Board's procedures in representation and unfair labor practice cases are cumbersome and time-consuming. They are a poor fit with education. *Columbia Univ.*, 364 NLRB No. 90, slip op. at 31 (then-Member Miscimarra, dissenting). Litigating unfair labor practice cases can extend for years before the Board issues a decision. Grinnell College operates on a shorter academic calendar. In that time, the Undergraduates would likely no longer hold employment with the College, having graduated.

Additionally, forcing a bargaining relationship on Grinnell College and a unit of Undergraduates does not promote the purposes of the NLRA due to the finite period of time that students may serve as Undergraduates. Although the Board majority in *Columbia University* overruled its decision in *San Francisco Art Institute*, 226 NLRB 1251 (1976), that decision is nonetheless instructive. In that case, two students worked as janitors for approximately three years and worked an average of 35-45 hours per week. *San Francisco Art Institute*, 226 NLRB at 1254 n.2. The Board found that "no student janitor has ever stayed on past graduation to assume a position as a full-time janitor." *Id.* at 1251-52. Due to "the rapid turnover that regularly and naturally occurs among student janitors," the Board found that a bargaining unit of student janitors would not be appropriate. *Id.* at 1252.

While the Board majority in *Columbia University* overturned *San Francisco Art Institute* in a footnote, the majority still acknowledged that it must consider "whether and to what extent [students'] tenure affects ... their ability to engage in meaningful bargaining." *Columbia Univ.*, 364 NLRB no. 90, slip op. at 20. The Board held that although the Master's and undergraduate

assistants in that case had relatively short tenure at the university, they were properly included in a bargaining unit with the Ph.D. students who remain at the university between *five to nine* years. *Id.*

A bargaining unit of Undergraduates is much different than a bargaining unit of graduate teaching assistants who may remain at the university for five to nine years. A bargaining unit of Undergraduates is *guaranteed* to turn over completely within four years. It is undisputed that there will be a high degree of turnover within an Undergraduate bargaining unit each year, and complete turnover every four-year cycle. Therefore, if a four-year collective bargaining agreement is negotiated, no Undergraduate who was involved in the negotiation of that agreement will remain in the bargaining unit when the next agreement is negotiated. This means that there will be no institutional memory within the bargaining unit concerning the meaning of the agreement that was negotiated, and few members of the bargaining unit will have any knowledge of the agreement or past practice from year-to-year. This is a recipe for unstable labor relations, which is contrary to the Act's purposes. It seems likely the Board would decline to assert jurisdiction in these circumstances. *See Northwestern Univ.*, 362 NLRB No. 167.

2. *Columbia University* is incorrect and will most likely be reversed.

*Columbia University*, 364 NLRB No. 90 (2016) ("*Columbia University*") represents an abrupt reversal of longstanding Board precedent that students cannot be statutory employees within the meaning of the Act because they have a primarily educational, not economic, relationship with their university. The Board has held for nearly its entire history that the Act was not intended to apply to relationships that are primarily educational, rather than economic in nature. In *Brown University*, the Board held that the Act does not apply to relationships that are primarily educational. 342 NLRB 483 (2004).

In any event, *Columbia University* is not controlling because there are significant factual differences between the graduate assistants at Columbia University and the undergraduates-at Grinnell College. That would be a dramatic expansion of *Columbia University* to a factually distinct group of students. At Grinnell College, undergraduates are clearly students first, with a primarily educational relationship to Grinnell College.

*Columbia University* requires inquiry into factual distinctions between the role of Undergraduates and that of graduate teaching assistants in *Columbia University*. The *Columbia University* test should not be interpreted and extended to mean that Undergraduate students perform services for the benefit of Grinnell College under its direction and control, are compensated for such services, and thus are indistinguishable from the graduate student teaching assistants considered in *Columbia University*.

In *Columbia University*, the Board majority found that student teaching assistants had a common-law employment relationship with their university because they were not trained or mentored but were “thrust wholesale into many of the core duties of teaching” undergraduate classes. 364 NLRB No. 90, slip op. at 16. The Board majority specifically found that it was “[t]he delegation of the task of instructing undergraduates, one of a university’s most important revenue-producing activities, . . . suggests that the student assistants’ relationship to the University has a salient economic character.” *Id.* Here, the undergraduates’ primary role is not that of instructing undergraduate students. Rather, Undergraduates perform a broad variety of tasks, including research.

Also in *Columbia University*, the Board majority found that externally funded research assistants were subject to Columbia University’s direction and control because students had to “fulfill[] the duties defined in the [external] grant” and, therefore, “performance of defined tasks

[was] a condition of the grant aid.” 364 NLRB No. 90, slip op. at 18. In contrast, there is no evidence of any external required duties for these undergraduate jobs. The nature of an Undergraduate student holding a work-study position is entirely distinct from that of a graduate student acting as a teaching assistant. *Columbia University* should not be interpreted to create a presumption that all students providing any form of support or resource to a higher educational institution are employees; regardless of what form the support or resource takes.

3. *Columbia University* represents an unwarranted departure from board precedent recognizing the primarily educational relationship between graduate student assistants and their universities.

With the exception of a four-year period following its decision in *New York University*, 332 NLRB 1205 (2000) (“*NYU*”), the Board has consistently held that students who serve as teaching and research assistants at private universities covered by the Act are not statutory employees. In *Adelphi University*, the Board excluded 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.” 195 NLRB 639, 640 (1972). The Board observed that, unlike the largely autonomous nature of the work performed by regular faculty, graduate student assistants were “guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members.” *Id.*

After the Board’s decision in *Adelphi University*, in 1974, Congress amended the Act to include a new category of employer. After the Board’s early decision applying the “primarily students” analysis to student employees, Congress did not alter the definition of “employee.” The Board and courts should “accord great weight to the longstanding interpretation . . . especially so where Congress has re-enacted the statute without pertinent change.” *NLRB v Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274 (1974) (holding Congress intended to exclude from

the Act's protections all employees properly classified as managerial). Similarly, the Board should return to longstanding precedent and apply the "primarily students" test under the Act. In *Bell Aerospace*, the Supreme Court stated subsequent Board decisions also provide necessary guidance. *Id.*

Two years later, in *Leland Stanford Junior University*, the Board relied on *Adelphi* and held that physics research assistants pursuing graduate degrees who performed various research tasks both independently and under faculty guidance, and who received financial aid in the form of a living allowance, were "primarily students" and "not employees within the meaning" of the Act. 214 NLRB 621, 623 (1974). The Board reasoned, "we believe these research assistants are like graduate teaching and research assistants who we found were primarily students in *Adelphia University* . . . and we conclude they are not employees within the meaning of. . . the Act." *Id.*

For the next twenty-five years, this precedent remained unchanged. In *NYU*, the Board departed from this longstanding precedent and held that graduate students who served as teaching and research assistants were employees under the Act. 332 NLRB at 1206. The *NYU* Board based its decision on *Boston Medical Center Corp.*, which had held that members of a medical house staff were employees, but also carefully noted that "while house staff possess certain attributes of student status, they are unlike many others in the traditional academic setting." 330 NLRB 152, 161 (1999).

The flawed *NYU* decision survived for only four years. In *Brown*, the NLRB overruled *NYU*, recognizing once again that 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. *Brown* noted several aspects of the student/teacher relationship that contributed to its basic incompatibility with collective bargaining. Specifically, collective bargaining is "fundamentally

an economic process,” which does not belong in a relationship “predicated upon a mutual interest in the advancement of the student’s education, and thus academic in nature.” *Id.* at 489 (citing *St. Clare’s Hosp. & Health Ctr.*, 229 NLRB 1000, 1002 (1977)). The academic concerns that dominate the relationship are “largely irrelevant to wages, hours, and working conditions,” making collective bargaining “not particularly well suited to educational decisionmaking.” *Id.* Additionally, graduate and professional education is “intensely personal,” both for the student and the faculty, while the collective treatment of individuals represents “the very antithesis of personalized individualized education.” *Id.* at 489-90. The Board also recognized that the essential purpose of collective bargaining is “to promote equality of bargaining power, a[] concept that is largely foreign to higher education.” *Id.* at 490.

*Brown* thus concluded that treating graduate student assistants as employees would be incompatible with the purposes of the Act. *Id.* at 488-90. Indeed, the 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.

In *Columbia University*, the Board overruled this well-reasoned precedent by holding that students who perform various teaching and research tasks in partial fulfillment of their graduate degree programs are “employees” under the Act. Though *Columbia University*, the Board asserted that changes in higher education over time justified a new look at the employment status of graduate students, the Board failed to appreciate that the fundamental nature of the relationship between graduate student assistant and the university remains unchanged. *Columbia University*, 364 NLRB No. 90, slip op. at 8-9. The *Columbia University* Board erroneously applied the common-law definition of employee without regard to the realities of the higher education environment or the policy considerations that had justified their exclusion 40 years

earlier in *Adelphi*, *Leland Stanford*, and *Brown* with a change in Board Composition it is likely Columbia will be reversed.

4. Empirical evidence relied upon by the *Columbia University* majority does not support extending the Act to Undergraduates at Grinnell College.

The Board majority in *Columbia University* asserted that “the relevant empirical evidence” supported its conclusion. *Columbia University*, 364 NLRB No. 90, slip op. at 4. That is not the case for the Undergraduates at Grinnell College. The majority 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 University*, 364 NLRB No. 90, slip op. at 9. Any reliance on the empirical evidence to extend *Columbia University* to a unit of Undergraduates at Grinnell College is completely unsupported.

Furthermore, the *Columbia University* majority’s reliance on empirical evidence is misplaced. For example, it does not account for the state laws like Iowa’s that govern public sector bargaining and generally impose limits on the right to strike and on the scope of bargaining. *Brown*, 342 NLRB at 492 n.31. State laws thus significantly mitigate the risks that concerned the Board in *Brown* and dissenting then-Member Miscimarra in *Columbia University*.

II. Grinnell College’s Undergraduates are distinguishable from Columbia University’s graduate students.

- A. Undergraduates are not similarly situated to graduate assistants at Columbia University.

In *Columbia University*, the Board addressed whether “student assistants who have a common-law employment relationship with their university are statutory employees under the Act.” Slip op. at 1. However, this standard is not controlling on the issue of whether the Undergraduates are “employees” within the meaning of Section 2(3) of the Act. The Board in

*Columbia University* did not purport to decide that all graduate student teaching and research assistants, let alone undergraduate students, at every college and university throughout the United States are statutory employees under the Act. Indeed, the Board majority expressly acknowledged in *Columbia University* that it had not decided that question across the board:

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.

*Columbia University*, 364 NLRB No. 90 at 4 (emphasis added).

The petitioned-for bargaining unit in *Columbia University* included the following categories of teaching and research assistants, but it did *not* include Undergraduates:

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

*Id.*, slip op. at 16 n.97.

*Columbia University* did not address any Undergraduate roles, so it is not controlling here. Instead, for Undergraduates, the Board should apply the standard from *Brown University*, which applied a standard focused on the relationship between the student and College, and held if the relationship was primarily one as a student, then the student was not an employee within the meaning of the Act. The Board's decision in *Brown University* was consistent with over thirty years of Board precedent, which treated students as beyond the scope of Section 2(3) of the Act. See *Adelphi Univ.*, 195 NLRB 639 (1972); *The Leland Stanford Junior Univ.*, 214 NLRB 621, 623 (1974). As explained in detail below, under the standard in *Brown University*, the record clearly establishes Undergraduates at Grinnell College primarily have an

educational/student relationship with Grinnell College. Accordingly, Undergraduates are in roles beyond the scope of “employees” within the meaning of the Act.

Under the *Brown University* standard, Undergraduates should not be treated as employees within the meaning of Section 2(3) of the Act because their relationship with Grinnell College is primarily as a student and is educational, and not economic. Undergraduates performing work cannot be separated from their identity as students; if they were not students, the work opportunity would not be available to them. The relationship between Undergraduates and Grinnell College is primarily educational and, therefore, they are not employees under the Act.

In the alternative, if the standard from *Columbia University* is applied to Undergraduates, Grinnell College maintains *Columbia University* was wrongly decided, and it should be reversed. Nevertheless, *Columbia University* supports a finding that Undergraduates are not employees. Here, the undisputed facts show that Undergraduates perform entirely different functions than the graduate assistants in *Columbia University* and, indeed, have a completely different relationship with Grinnell College. Columbia University’s teaching assistants, also known as Instructional Officers, are a mix of Ph.D., Master’s degree, and undergraduate students. *Id.*, slip op. at 15. Their duties generally include “grading papers and holding office hours, leading discussion or laboratory sessions, or assuming most or all the teaching responsibilities for a given course.” *Id.* In fact, many of the doctoral students taught courses designed for undergraduates, taking on a role “akin to that of faculty.” *Id.*, slip op. at 16. This included designing and grading exams and assignments in their courses and assigning final grades to their students. *Id.* Other graduate students who did not teach their own classes assisted Columbia University’s faculty by “administering classes, performing clerical tasks, proctored exams,

printing and collecting homework, answering students' questions, and occasionally grading assignments." *Id.*

By contrast, Undergraduates' responsibilities are inseparable from their role as students, and a prerequisite is to be a student at Grinnell College. As demonstrated by the record, Undergraduates are *students first*.

Undergraduates' roles are vastly different than the job responsibilities of the teaching and research assistants in *Columbia University*. There, the teaching assistants operated as *de facto* faculty by teaching classes, grading papers, and developing courses. *Columbia Univ.*, slip op. at 16. Often times, the teaching assistants would "assum[e] most or all the teaching responsibilities for a given course"—essentially performing the same functions as faculty. *Id.*, slip op. at 16. The teaching assistants occupied the role of superiors, not peers, who delivered course content and judged the students' academic performance.

Unlike the graduate assistants in *Columbia University*, Undergraduates are an integral part of the student experience, and relationship to Grinnell College. This experience benefits both Undergraduates in their own development and education as students, as well as the students they support and mentor. Therefore, even under the *Columbia University* standard, Undergraduates are significantly different from graduate assistants. Only undergraduates receiving tuition and other financial aid perform work-study jobs, which is dependent on their status as an Undergraduate student. Consequently, they are beyond the scope of the holding in *Columbia University*.

In sum, the nature of the Undergraduate role at Grinnell College is inseparable from the Undergraduate's status as a student, and the appropriate standard to find Undergraduates are not

employees within the meaning of the Act comes from the Board long precedent that students are beyond the scope of Section 2(3) of the Act.

B. Undergraduates do not fit the common-law definition of employee.

The factual difference between the teaching and research assistants at *Columbia* and Undergraduates at Grinnell College establish that Undergraduates at Grinnell College do not meet the common-law definition of employee.

As the Supreme Court has held, the common-law test for employee-employer relationships involves a multi-factored analysis that examines the totality of the relationship. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (using common-law test to distinguish between “employee” and “independent contractor” under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*). The common-law analysis considers a non-exhaustive list of factors:

We consider the hiring party’s right to control the manner by which the product is accomplished . . . the skill required, the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) (citing Restatement (Second) of Agency § 220(2) (1958)) (footnotes omitted).

When applying these factors, the Supreme Court has made clear that the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968).

Undergraduates are not employees under the common-law test. When applying the common-law test to Undergraduates and their relationship with Grinnell College, the Region should consider “all of the incidents of the relationship . . . with no one factor being decisive.” *United Ins.*, 390 U.S. at 258. An analysis of those factors demonstrates Undergraduates are not employees.

1. Right to control the manner of work.
2. Instrumentalities, tools, and location of work.
3. Discretion over when and how long to work.
4. The regular business of the hiring party.

To the extent that Grinnell College is engaged in a business, it is in the business of educating and developing its students. Undergraduates are very much involved in the academic mission of Grinnell College; however, Undergraduates are not in the “regular business” of Grinnell College. While Undergraduates performing jobs perform needed tasks, which is valuable to the overall educational experience, they cannot be placed in the same category as the coursework offered by Grinnell College, and the academic instruction delivered by College faculty.

Taking all of these common-law factors together, it is apparent that Undergraduates are not employees. All the incidents of their relationship with Grinnell College are rooted in education and the Undergraduates’ identity as students. Their role as Undergraduates, and the expectations that come with it, cannot be separated from their role as students in the academic system.

- C. The NLRA does not mandate that all students who perform services for higher education institutions are “employees.”

The NLRA has never been interpreted to require that all students at every college and university, regardless of their undergraduate or graduate position and the role they serve, must be found statutory employees. *See, e.g., Loyola Univ. Chicago*, 13-RC-189548, 2017 WL 2963203, at \*1 (NLRB July 6, 2017) (Chairman Miscimarra, dissenting) (stating that the Chairman would have granted the university's request for review based on his belief that student assistants are not employees within the meaning of the Act); *The New School*, Case 02-RC-143009, 2017 WL 2963205, at \*1 (NLRB July 6, 2017) (Chairman Miscimarra, dissenting) (stating that the unit is inappropriate for the reasons expressed in his dissents in *Columbia University* and *Yale Univ.*); *Univ. of Chicago*, 13-RC-198365, 2017 WL 2402773, at \*1 (NLRB June 1, 2017) (same). *See also Duke Univ.*, 10-RC-187957, 2017 WL 971643, at \*1 (Feb. 23, 2017); *Yale Univ.*, 365 NLRB No. 40, at \*1 (2017); *The New School*, 2016 WL 7441005, at \*1 (NLRB Dec. 23, 2016).

*Columbia* does not hold that all students at every private college or university in the United States serving in some role for the academic institution are necessarily employees within the meaning of the Act. Indeed, under *Columbia*, careful factual analysis is *always required* to determine whether students at any given college or university should be considered employees.

**Issue Two: Imposing the National Labor Relations Act would significantly impact Grinnell College's ability to serve its educational mission.**

The concept of collective bargaining is completely inconsistent with the current education model used at Grinnell College. Campus employment, with the exception of the dining services positions, is intended to be an intricate part of a co-curricular educational approach. The educational and employment aspects are inextricably intertwined. At Grinnell College, studies come first. Campus employment obligations and schedules are modified to meet academic needs.

Under the current model, faculty and staff often create jobs within various departments using departmental and research funds. These jobs are literally created “on the fly.” They are created to address an immediate need and to further an educational goal. Students are selected because they are uniquely positioned to address the need and further the educational goal for the institution and for the student involved in the campus employment.

Each of the various positions is unique. There is simply no way to remove one “student worker” from an assignment and replace that student with another. That is due in part because a number of campus employment opportunities are tailored to a student’s unique interests, academic field and academic needs.

Grinnell College actually created a position-HR Training and Student Employment Coordinator-in 2014 with the goal of providing good service to students engaged in campus employment. The coordinator supports the educational goals associated with campus employment. The coordinator also handles regulatory compliance associated with work study positions and campus employment in general.

To impose the collective bargaining construct on the unique Grinnell educational model would necessarily cause a shift away from the mission of an individually advised, experiential, residential, liberal arts education. It would reduce the importance of campus employment as an educational experience. It would eliminate the flexibility that currently exists for staff and faculty to create the educational opportunities that are at the very heart of the current system. Simply put, the destruction of a successful educational model cannot be the goal of the National Labor Relations Act.

**Issue Three: There is no “community of interest” within the petitioned for unit because campus employment opportunities are unique and educational in nature.**

The positions in the petitioned for unit are unique. Research assistants, language mentors, tutors, writing specialists, reading tutors, math tutors, teaching mentors and numerous other campus employment opportunities are unique unto themselves. There is simply no way to aggregate these opportunities to make them “uniform” in any way shape or form.

Campus employment opportunities include serving as peer mentors, peer educators and student leaders. There is no way that this “square peg” can be fit into the “round hole” of the NLRB and collective bargaining.

Many of the Grinnell College campus employment opportunities involve tasks dedicated to career, life and service. The “labor” associated with the campus employment opportunity is tied directly to career goals and skills including community service and paid internships. There is simply no way to categorize this in any way except as an integral part of the education experience. It is certainly not “work” within the contemplation of the National Labor and Relations Act.

The proposed unit is inappropriate. *PCC Structuralists*, slip op. at 7. When determining whether to include other roles in an appropriate unit, the board must look to whether the interests of the petitioned-for employees are *sufficiently distinct* from the excluded employees to warrant forming a separate bargaining unit. *Id.* (citing *Wheeling Island Gaming*, 355 NLRB 642 (2010)). Specifically, the inquiry is whether “excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.’ *Id.* In its assessment, the Board must consider:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*United Operations, Inc.*, 338 NLRB 123 (2002).

**Issue Four: Imposing collective bargaining on the petitioned for unit would negatively impact the egalitarian culture Grinnell College.**

As explained earlier, because of the unique way Grinnell allocates student campus employment opportunities, there is no way to determine at Grinnell whether a student is holding down a campus employment opportunity because they simply want to or because they absolutely have to due to their financial status. A student's financial status is not disclosed to faculty and staff. Imposing the collective bargaining construct on undergraduate employment at Grinnell College would, as explained earlier, have the unavoidable result of prioritizing campus employment opportunities for needy students, thus disclosing student financial status to the union.

This concern about stratification cannot be dismissed as simply "high minded" academic social justice concerns. Such stratification would have a real, measurable, concrete adverse impact on the student body at Grinnell College.

Grinnell College does an excellent job on closing the gap with regard to graduation rates for low income and wealthy students. Grinnell College also does its best to ensure that nothing occurs at the College that serves to distinguish students based upon their social economic status. That is because Grinnell College is aware of the very real deleterious impact revealing students' incomes or in general disclosing the status of a student as low income in the educational setting. As one author explained, "for many low income and first generation students, the transition to college parallels a transition in social class where new challenges and questions can arise, such as; 'I don't belong here' or 'Am I cut out for this. ...'"

<https://www.brookings.edu/blog/brown-center-chalkboard/2017/10/26/using-social-psychology-to-help-first-generation-and-low-income-students-through-college/>.

Simply put, by identifying low income students in the collective bargaining process, Grinnell College and the Union would endanger the academic success of such students. See Gibson, E. L., Barr, R.D. (2017). Building a culture of hope: Exploring implicit biases against poverty. *National youth-at-risk journal*. 2(2).

<https://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=1052&context=nyar>.

Implicit biases are unconscious beliefs, attitudes, or stereotypes which influence our perceptions, words, and actions without our awareness (Kirwan Institute, 2016). Most implicit biases are learned over time, in families, schools, and communities. They come from the media, what we read, movies we watch, and listening to our friends talk. These are deep, unconscious beliefs that influence our actions and interpretations, and they are quite often inaccurate and may contradict our stated, conscious beliefs (Kirwan Institute, 2016).

Implicit biases are often activated involuntarily, without an individual's awareness or intentional control. Addressing implicit biases about poverty and classism is made more difficult because the idea that one can change his or her status in life with hard work is so deeply ingrained in the fabric of our nation, and in the myth of the American dream.

There is a mistaken belief that everyone living in America is provided an equal opportunity to succeed (Yahn, 2012). The implicit bias in this is if people just worked harder, they would not be poor. Poor children and families are unwittingly blamed for their poverty. When students living in poverty arrive at school, they cross paths with middle class staff who may react with largely unconscious class prejudice and subtle racial biases, even if they themselves came from poverty or minority populations. Unaware of these biases, well-meaning

teachers can misinterpret a student's words and actions, confusing the student's learned helplessness or trauma-based anxiety with disrespect or defiance.

Grinnell College is a fairly unique institution. It has the ability to accept and enroll students who have significant financial need. Some Grinnell College students rely upon their wages for necessities such as shampoo or a trip home for family emergencies. Although Grinnell College provides full tuition and room and board to many of its needy students, it is the college education experience that fills in the gaps by providing a little extra for some of life's necessities.

The College will not disclose to faculty members and departments who create or fill positions whether a Grinnell student employed on campus is working because they have need or because they desire the college work experience. Collective bargaining, carried to its logical end, would destroy this egalitarian existence. Students with substantial financial need would be given the campus employment opportunities first because Grinnell College has a duty to ensure that those students' financial needs are addressed.

Grinnell College has a finite budget to support student employment. Unlike most colleges, Grinnell allows everyone attending the school to participate in school related employment. Grinnell also allows its students to work up to twenty hours per week as opposed to the near universal practice of limiting such employment to ten hours. Collective bargaining would unquestionably destroy the system and have a disastrous impact on the Grinnell College core learning experience.

If Grinnell College were forced to conform to the terms of collective bargaining agreement it would predictably have the impact of prioritizing access to school employment to students with financial need. As bargained-for increases consumed more of the total budget, Grinnell College would be obligated to ensure that students with financial need would be the

ones awarded open positions. Other students who may have otherwise been given the opportunity to work and would be excluded from the co-curricular educational experience associated with college employment. This would result in two outcomes: (1) identifying to other students the financial need of student workers; and (2) the exclusion of other students from the valuable co-curricular experience attendant Grinnell College campus employment.

**Issue Five: an exercise of jurisdiction would run afoul of other federal laws.**

The collective bargaining process is entirely inconsistent with legal obligations and norms related to the higher education environment. Federally mandated privacy rights related to student records and student financial aid clash with collective bargaining obligations under the National Labor Relations Act.

The collective bargaining process requires the exchange of information concerning bargaining subjects. The obligation makes sense in the context of traditional collective bargaining. The rationale goes that without the exchange of relevant information, the collective bargaining process cannot function properly. It is axiomatic that an employer's refusal to supply relevant information is an unfair labor practice. *See Sparks Nugget, Inc. v. NLRB* 968 F. 2<sup>nd</sup> 991 (9<sup>th</sup> Cir. 1992). The employer's duty to furnish information is imposed because without such information the Union would be unable to perform its statutory obligations as a bargaining agent. *See Chesapeake and Potomac Tel. Co. v. NLRB*, 678 F. 2<sup>nd</sup> 633 (2<sup>nd</sup> Cir. 1982).

It goes without saying that a union representing Grinnell College students would assert the right to a vast amount of confidential student information in order to fulfill its obligation to bargain on behalf of students. For example, where certain employment opportunities are reserved for students who receive grants or financial aid, the union would argue its entitlement to such information in order to fulfill its bargaining duty. Likewise, where certain assignments are

reserved for students who are struggling academically, the union would necessarily demand information regarding the academic performance of the students it is bargaining for. This information is arguably relevant to the relationship between an employer and a union representing students. *See NLRB v. Item Co.*, 220 F. 2<sup>nd</sup> 956 (5<sup>th</sup> Cir.), *cert. denied*, 350 U.S. 836 (1955).

As explained below, this duty flies in the face of federal law. Grinnell has an absolute obligation to maintain the confidentiality of student financial aid information and student academic performance. If the Board exercises jurisdiction Grinnell College would be forced to risk an unfair labor practice charge or violation of the Higher Education Act or the Family Education Rights Privacy Act.

A vast majority of Grinnell College students receive financial aid. Section 483 (A)(3)(E) of the Higher Education Act restricts the use of student financial aid information to the application, award in administration of aid awarded under federal student aid programs, state aid, or aid awarded by eligible institutions. The Department of Education interprets “administration of aid” to include audits and program evaluations necessary for the efficient and effective administration of the student aid programs. The department **DOES NOT** authorize sharing student financial aid information with a union bargaining on behalf of students.

Grinnell College would be faced with the Scylla and Charybdis: provide student financial information demanded by a union bargaining on behalf of students and violate the Higher Education Act or refuse to provide such information and be dragged in front of the National Labor Relations Board, accused of an unfair labor practice.

Student campus employment opportunities at Grinnell College are sometimes tailored to students who are suffering academic problems. For example, an employment opportunity that

carries with it lots of “down time” will be reserved for a student who needs the money derived from student employment but who also needs extra time to study. That student is expected to study while on the job. Any union representing a unit of undergraduate students would rightfully demand information concerning how the College determines who is eligible for such an assignment and whether individuals given such assignments meet specific academic thresholds. That is, are the students “doing bad enough” in class to warrant such special assignments. This bargaining demand flies in the face of federal law.

The Family Educational Rights Privacy Act of 1974, 20 U.S.C. § 1232g, popularly known as “FERPA” or “The Buckley Amendment” has a pervasive impact on the way colleges conduct themselves.

FERPA revolves around “education records” which are deemed absolutely confidential except in certain circumstances. Records related to academic performance are unquestionably education records covered by FERPA. *See 34 CFR § 99.3*. There are specific enumerated exceptions set forth in FERPA that allow educational institutions to share records under very limited circumstances. **NONE** of these exceptions relate to the collective bargaining obligation to furnish information. Thus, Grinnell College would be forced to choose between violating labor law or violating FERPA.

The responsibility for enforcing FERPA rests with the Family Policy Compliance Office of The Department of Education. This office is authorized to investigate and review potential violations. *See 34 CFR § 99.60*. The office has the authority to terminate all or any portion of Grinnell College’s federal funds or to take “any other legally available enforcement action” against Grinnell College. *See 34 CFR § 99.67*. Thus, the union, in fulfilling its duty to bargain in good faith, would arguably expose Grinnell College to a loss of federal financial aid-a vital

component of the student aid package and an essential element of the student aid and compensation mix that the union would theoretically be bargaining for. Simply put, this is a ridiculous outcome. Thus, there is no better evidence that Congress would never have intended the National Labor Relations Act to be foisted upon academia in such a way as to destroy fundamental privacy rights mandated by Congress itself!

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**CERTIFICATE OF SERVICE**

I hereby certify the foregoing document was filed in the NLRB's E-Filing system and served on the opposing party so that it was received on or before 11:59 a.m. on October 16, 2018, by E-mail to the following persons as disclosed in the RC Petition:

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