

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

In the matter of:

UNITED ELECTRICAL, RADIO AND
MACHINE WORKERS OF AMERICA,

Petitioner

and

MASSACHUSETTS INSTITUTE
OF TECHNOLOGY,

Employer

Case No. 01-RC-304042

RESPONDENT EMPLOYER'S POST-HEARING BRIEF

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TABLE OF CONTENTS

	<u>Page(s)</u>
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	4
THE FACTS	5
A. Background of MIT and its Schools, Departments and Programs	5
B. Background of MIT Student Body	8
1. Total Enrollment and Degree Breakdown	8
2. Current Bargaining Unit of Graduate Students	8
C. Admissions Process	9
D. General Academic Requirements and Path Towards Degrees	10
E. Funding and Financial Aid For Graduate Students	15
1. Self-Funded Graduate Students	18
2. Funding Through Employment Appointments	19
3. Funding Through Fellowships	21
F. Further Details of MITs Appointments and Awards	25
1. Research Assistants (RAs).....	26
2. Teaching Assistants (TA)	33
3. Instructor G	36
4. Fellows	36
ARGUMENT	
I. GRADUATE STUDENTS ON FELLOWSHIP AWARDS AT THE INSTITUTE ARE NOT EMPLOYEES WITHIN THE MEANING OF SECTION 2(3) OF THE ACT	47
A. Introduction	47
B. Defining “Employee” under the Act Turns on Common Law Principles	47

TABLE OF CONTENTS
(Continued)

	<u>Page(s)</u>
C. <i>Columbia</i> and Application of the “Common Law Employee” Principle to Graduate Assistants	50
D. Application of the <i>Columbia</i> Ruling to the Instant Case.....	55
1. No indication that there is any required services to MIT as a condition of receiving fellowship awards.....	55
a. Written policies and guidelines, web site descriptions, admissions and appointment letters, and underlying funding documents all establish that a fellow does not have to provide services to the Institute as a condition of receiving their funding	55
b. Testimony corroborates the documentation establishing that Fellows do not have to provide services as a condition of keeping their funding	61
2. Because fellowship funding is not tied to service requirements, it is more portable than RA/TA funding and provides more flexibility for students to pursue their own academic objectives.....	63
3. Fellowships lack other indicia of employee status that the <i>Columbia</i> Board deemed relevant to its analysis.....	65
II. THE PETITIONER’S LEGAL ARGUMENTS ARE FLAWED AND ITS REBUTTAL EVIDENCE IS INSUFFICIENT TO ESTABLISH THAT FELLOWS ARE EMPLOYEES UNDER THE ACT	67
A. Fellows are not <i>de facto</i> RAs and TAs.....	68
B. The Union’s Argument on Teaching Grants is Legally and Factually Incorrect	79
III. THE PETITIONER’S CONTENTION THAT ALL RESEARCH DONE BY A FELLOW CONSTITUTES EMPLOYMENT WORK IS ERRONEOUS AND CAN LEAD TO ADVERSE AND UNINTENDED CONSEQUENCES FOR THE INSTITUTE, THE PETITIONER AND TO THE FELLOWS	81
A. Academic Research Done by a Student in Furtherance of their Degree is Not Employment Work within the Meaning of the Act	81
B. The Distinction Between RAs/TAs and Fellows is a Well-Established One; Disregarding it May Lead to Significant Negative Consequences, Especially for MIT’s International Students	85

TABLE OF CONTENTS
(Continued)

	<u>Page(s)</u>
1. Federal Immigration Rules Differentiate Between Academic Work and Employment Services	86
2. Federal Tax Rules Draw a Similar Distinction Between Academic Fellowships and Compensation for Services Rendered.....	88
3. Federal Regulations Governing Sponsored Research Administration Also Recognize the Distinction Between Fellows and RAs.....	89
C. A Finding that Fellows are Employees, and Potentially Including them in the Current Bargaining Unit of RAs and TAs, Will Create Confusing and Unmanageable Consequences for Both Parties	90
IV. SIMILAR PUBLIC SECTOR CASE LAW SUPPORTS MIT’S POSITION THAT FELLOWS WHO ARE NOT EXPECTED TO PROVIDE ANY SERVICES TO THEIR UNIVERSITIES ARE NOT EMPLOYEES.....	92
V. INDUSTRY PRACTICE SUPPORTS MIT’S POSITION BECAUSE OTHER COLLECTIVE BARGAINING AGREEMENTS HAVE EXCLUDED FELLOWS, OR THOSE WITH COMPARABLE TITLES, FROM UNITS OF GRADUATE RESEARCH AND TEACHING ASSISTANTS.....	95
CONCLUSION.....	98

TABLE OF CASES AND AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>AFL-CIO, CLC v. University of Pittsburgh</i> , 50 PPER ¶ 60, 50 Pennsylvania Pub. Employee Rep. ¶ 60, 2019 WL 1424342 (PLRB Case No. PERA-R-17-355-W (March 7, 2019)	93-94
<i>Bingler v. Johnson</i> , 394 U.S. 741 (1969).....	66
<i>Board of Higher Education of the City of New York</i> , 2 PERB Para. 3000, 1969 WL 1894424 (NY PERB, 1969).....	92
<i>Brown University</i> , 342 NLRB 482 (2004).....	49-50
<i>Columbia University</i> 364 NLRB 1080 (2016).....	1,2, 47, 49-55, 65, 68, 79-84, 93
<i>Matter of the Petition of: Graduate Student Employee Action Coalition, UAW involving certain employees of: University of Washington,</i> 2003 WL 23354434 (Wash. Pub. Emp. Rel. Com.) Case No. 16288-E-02-2699; Decision 8315 (December 16, 2003)	94
<i>Nationwide Mutual Insurance Company. v. Darden</i> , 503 U.S. 318 (1992)	48
<i>NLRB v. Town & Country Electric, Inc.</i> , 526 U.S. 85 (1995)	48, 49, 51
<i>New York University</i> , 332 NLRB 1205 (2000).....	54, 65
<i>Regents of the University of California and Student Researchers United, UAW,</i> Public Employment Labor Relations Board, Case No. SF-RR-1022-H (December 9, 2021)	97
<i>Trustees of Tufts College</i> , Case 01-RC-197023 (emphasis added).....	95
<u>Statutes and Regulations</u>	
8 C.F.R. § 214.2(f)(6)	86
8 C.F.R. § 214.2(f)(6)(i)(A).....	86
8 C.F.R. 214.2(f)(9)(i).....	86
22 C.F.R. § 62.2	86
22 C.F.R. § 62.4(a).....	86
22 C.F.R. §62.23(g)(2)(iii).....	86

TABLE OF CASES AND AUTHORITIES
Continued

	<u>Page(s)</u>
<u>Statutes and Regulations</u>	
26 C.F.R. § 1.1461-1(c)(2)(k).....	88
26 C.F.R § 1.45R-1	88
26 C.F.R. § 1.6041-3(n).....	88
26 U.S.C. § 117.....	88
26 U.S.C. § 3121(a)	88
26 U.S.C. § 61.....	88
29 U.S.C. Section 152(2)	48
29 U.S.C. Section 152(3)	47
Employee Retirement Income Security Act of 1974 (ERISA).....	48
Section 3(6).....	47
Immigration Reform and Control Act of 1986, Pub. L 99-603	65
<u>Other Authorities and Collective Bargaining Agreements</u>	
https://www.brown.edu/about/administration/human-resources/sites/human-resources/files/Brown%20SUGSE%20Final%20Agreement_061520.pdf	97
https://www.geouaw.org/geo-contract/	97
https://www.ice.gov/sevis/employment#onCE	<u>57</u>
https://grad.uiowa.edu/funding/graduate-student-employment-standards/introduction	96
IRS, TOPIC NO. 421 SCHOLARSHIPS, FELLOWSHIP GRANTS, AND OTHER GRANTS, <i>available at</i> https://www.irs.gov/taxtopics/tc421	89

PRELIMINARY STATEMENT

Graduate students at the Massachusetts Institute of Technology (“MIT,” the “Institute” or the “Employer”) come to MIT primarily to study under the academic direction of the Institute’s faculty. As such, *all* graduate students have an academic relationship with MIT, but only *some* of those students also have an employment relationship with the Institute. At issue in this case is whether graduate students who receive only fellowship awards from and through MIT (“Fellows”) are employees under Section 2(3) of the National Labor Relations Act (the “Act”). Consistent with National Labor Relations Board (the “Board”) precedent in *Columbia University*,¹ they are not. As stated in *Columbia*,² a graduate student is an employee under the Act only where (1) the student is required to provide services under the direction and control of the university and (2) the student’s funding is conditioned on the performance of those services. The petitioned-for Fellows at MIT do not meet this test.

Unlike the student-employees in the current bargaining unit of research assistants (“RAs”), teaching assistants (“TAs”), and Instructor Gs,³ Fellows have no service requirements tied to their fellowship awards. They are not required to work on a particular faculty member/principal investigator’s (“PI”) research project or course in order to maintain their funding. Instead, their fellowship funding is akin to a scholarship, and they receive such funding to pursue their own academic programs and objectives. A Fellow retains their fellowship award so long as they make satisfactory academic progress, which is a baseline requirement for all students to maintain active enrollment status at MIT.

¹ 364 NLRB 1080 (2016).

² *Id.* at 1094.

³ For ease of reference, MIT often refers to these three categories of appointments collectively as “assistantships.”

It is undisputed that, unlike assistantships, fellowships are held by the individual student and are portable—Fellows are able to switch advisors, labs, and/or research groups to pursue their academic research, all while maintaining their funding. As such, Fellows have no supervisors as contemplated by the Act—only academic supervisors and advisors. Furthermore, unlike RA and TA appointments, which come with numerous terms and conditions of employment—*e.g.* hours of work requirements, vacation and time off policies, rules on employment authorization and tax withholding, rules on termination for poor performance, etc.—fellowships lack any terms, conditions, or other indicia of employment.

The Petitioner in this case, the United Electrical, Radio, and Machine Workers of America (“Petitioner” or “Union”), does not dispute most of these essential points. Instead, Petitioner attempts to recast fellowships as employment because Fellows—like all graduate students in research-based degree programs—perform academic research towards a thesis. It is undisputed that all graduate students must meet rigorous academic expectations set by MIT. For students in certain research-based programs (in particular those in science and engineering disciplines), this thesis research takes place in the *learning environment* of the lab or research group. Graduate students conducting thesis research in these environments are graded and receive academic credit for that academic work. Petitioner nevertheless argues that conducting thesis research in these environments somehow transforms Fellows into employees—solely on the basis that Fellows also receive financial assistance from MIT.

Petitioner’s position is untenable, inconsistent with *Columbia*, and would result in a significant expansion of Board precedent with respect to graduate students. Taken to its logical conclusion, Petitioner’s reasoning would suggest that all graduate students who receive financial assistance from their universities and conduct thesis research are employees. This cannot be the

law. Petitioner has already excluded from its proposed unit over 300 graduate students who conduct thesis research but who are self-supported or otherwise receive no funding from MIT. Fellows are much more similar to these self-funded students than they are to RAs and TAs. Indeed, like Fellows, these self-funded students conduct thesis research in labs and research groups under the guidance and direction of faculty members, and are required only to make satisfactory academic progress.

As the undisputed evidence shows, the distinction between assistantships and fellowships extends beyond labor law to federal immigration law, federal tax rules, and federal regulations concerning the administration of sponsored research. If the Board were to ignore these well-established distinctions, and credit the Petitioner's argument that thesis research and employment are equivalent—there may be significant negative consequences to both MIT and its students, in particular MIT's international students. Indeed, MIT's international students rely on this distinction between academic work and employment in order to make satisfactory academic progress while complying with federal immigration law. If thesis research is deemed equivalent to employment services, as Petitioner argues, then the time an international student spends on thesis research would count toward the 20/hr-week employment cap set by federal immigration law for these students. This would result in an inequitable two-tiered system where MIT's international students would be unable to dedicate sufficient time to their theses to make satisfactory academic progress or, at a minimum, would require significantly more time to obtain their degrees as compared to their domestic-student peers. Such a ruling would also raise significant issues as to the proper scope of bargaining between MIT and its Fellows, and may result in a significant intrusion by the Board into academic matters over which it has no jurisdiction or expertise.

Unsurprisingly, public sector case law has repeatedly found that fellows who do not provide services to their institutions are not employees. In addition, industry practice in both the private and public sectors reveals that graduate student unions and universities across the country have excluded fellows, or similar students, from graduate student bargaining units. Although not binding on the Region, this case law and industry practice reveal further that this distinction between fellows and assistantships is common and not of MIT's making.

After a four-day hearing and over 100 exhibits, Petitioner's evidence rests mostly on the testimony of four students. The students testified, in essence, that their day-to-day lives remained more or less the same, regardless of whether they were on a fellowship or research assistantship. As explained below, this testimony is incomplete, beside the point, and does not sufficiently rebut the overwhelming documentary evidence and testimony provided by MIT. The students' testimony stops well short of demonstrating that these students, who were required to fulfill academic expectations and were graded and received academic credit for their research, received fellowship funding *conditioned on performing specific services for MIT*. Moreover, these students spoke only to their own personal experiences, and failed to generalize anything to the remaining 1,468 Fellows in the proposed unit.

MIT respectfully submits that Fellows are not employees under the Act and, therefore, the Petition must be dismissed.

PROCEDURAL HISTORY

On September 26, 2022, the Union filed a Petition for Representation with Region 1 of the Board seeking an election in which "all graduate fellows enrolled in Massachusetts Institute of Technology (MIT) degree programs who are employed to provide instructional or research services" could vote on whether they wished to be added to an existing certified unit represented

by the Petitioner of all graduate students enrolled in MIT degree programs who are employed to provide instructional or research services, including research assistants, teaching assistants, and instructor G's. (See Case No. 1-RC-289879). That unit was certified on April 19, 2022 following an election held on April 4-5, 2022. In the earlier case, the parties excluded all Fellows by stipulated agreement.

In a Statement of Position filed with the Region on October 11, 2022, MIT replied to the Petition as follows:

The Union's proposed unit is comprised of individuals none of whom are employees within the meaning of the Act. Since they are not employees, they do not have the right to form their own bargaining unit nor can they be added to the existing bargaining unit of Research Assistants, Teaching Assistants and Instructor Gs.

A virtual hearing was held on October 19, 20, 21 and 24, 2022. Essie F. Ablavsky served as the Hearing Officer for Region 1. Representing the Employer were Nicholas DiGiovanni and Damien DiGiovanni of Morgan, Brown & Joy, 200 State Street, Boston, MA 02109 and also Antonio Moriello, Counsel/Office of the General Counsel, Massachusetts Institute of Technology, 105 Broadway/NE36-6201, Cambridge, MA 02142. Representing the Petitioner was Thomas W. Meiklejohn, Livingston, Adler, Pulda, Meikeljohn & Kelly, 557 Prospect Ave., Hartford, CT 06105.

Post-hearing briefs were due to be filed with the Region on or before November 10, 2022.

THE FACTS

A. Background of MIT and its Schools, Departments, and Academic Programs

MIT is a private non-profit institution of higher education located in Cambridge, MA, and is widely considered one of the world's leading educational institutions and research universities. MIT's mission is "to advance knowledge and educate students in science,

technology, and other areas of scholarship that will best serve the nation and the world in the 21st century.” (Petitioner Exhibits 1, 2; Transcript at 42-43⁴). The Institute offers bachelor’s degrees for undergraduates and multiple graduate degrees at both the doctorate and master’s levels.

MIT’s academic organization includes five Schools and one College, all of which operate somewhat differently in various respects with regard to admissions and funding of students: the School of Architecture and Planning; the School of Engineering; the School of Humanities, Arts and Social Sciences; the Sloan School of Management; the School of Science; and the Schwarzman College of Computing. (Er. Ex. 5). The Institute’s academic departments are housed within the Schools and College, and MIT’s academic programs are operated by one or more academic departments.

MIT offers 55 doctoral degree programs. (Er. Ex. 5). While each program has its own set of academic requirements and obligations, generally speaking, obtaining a doctoral degree from MIT “*requires the satisfactory completion of an approved program of advanced study and original research of high quality.*” (Er. Ex. 3 (emphasis added); Tr. 50).

MIT also has 54 programs that offer master’s-level degrees (minimum of one year of study) and an engineer’s degree (minimum of two years of study) (Er. Exs. 4, 5; Tr. 51, 74). Of those programs, 48 of them *require* students to conduct thesis research in order to obtain their degree. (Tr. 57). For both the doctoral and master’s programs, these thesis requirements apply to all enrolled students—*independent of funding status*.

Given the Institute’s mission and the academic requirement of thesis research for students in research-intensive degree programs, MIT operates numerous labs and research groups across

⁴ Throughout the brief, Petitioner’s Exhibits will be cited as “(Pet. Ex. __).”; Employer’s Exhibits will be cited as “(Er. Ex. __).”; and, the Transcript will be cited as, (“Tr. __).”.

campus. These labs and research groups vary in size, scope, and research focus, and provide the learning environments for graduate students in certain disciplines (mostly science and engineering disciplines) to conduct their academic research. As explained by Dr. Ian Waitz, currently MIT's Vice Chancellor for Undergraduate and Graduate Education:⁵

The learning environment in research-intensive programs is the research group of the lab. You often think time at college, the learning environment is the classroom, and then your dorm room, and the library and things like that. *In research-intensive programs, the learning environment is the research lab or the research group.*

(Tr. 71)(emphasis added). The labs and research groups also provide the venues for RAs, research staff, and other employees to conduct their research work.

Smaller labs are primarily associated with, and sometimes named after, an individual faculty member. (Tr. 47). Mid-sized labs may consist of multiple faculty members, research scientists, and graduate students, and larger labs could consist of “100 people who are faculty members and principal investigators, and more than 1,000 participants in the lab. And it's composed of again multiple groups of faculty or multi-faculty groups that focus on different areas.” (Tr. 48). In most science and engineering departments, *in order for students to develop their thesis and obtain their degrees, they must perform research in one of these labs or research groups.*

Students in most humanities, arts and social science departments, as well as Sloan students, typically do *not* join research groups or labs. Based on the nature of their disciplines, they perform their thesis research at a more individualized level, but still under the academic direction of a MIT faculty member.

⁵ Vice Chancellor Waitz is also the Jerome C. Hunsaker Professor of Aeronautics and Astronautics. He previously served as Department Head for the Department of Aeronautics and Astronautics and, later, as the Dean of the School of Engineering, among other roles during his 31 years (and counting) at MIT.

B. Background of MIT Student Body

1. Total Enrollment and Degree Breakdown

Approximately 12,000 students are enrolled at MIT, including 4,600 undergraduates and 7,100 graduate students, (Tr. 51), which is broken down by school and degree type in the following manner:

- School of Engineering: 3,182 grad students (2,220 Doctoral; 962 Master's);
- Sloan School of Management: 1,690 grad students (162 Doctoral; 1,528 Master's);
-
- School of Science: 1,231 grad students (1,223 Doctoral; 8 Master's);
- School of Architecture and Planning: 570 grad students (182 Doctoral; 388 Master's);
- School of Humanities, Arts and Social Sciences: 293 grad students (281 Doctoral; 12 Master's);
- Schwarzman College of Computing: 120 grad students (37 Doctoral; 83 Master's).

(Er. Ex. 5).

At the graduate level, approximately 40% of MIT's students are international students, meaning they are here on either J-1 or F-1 *student* visas. (Tr. 52). As explained in further detail, *infra*, both types of visas have strict restrictions on the number of "employment" hours an international student can perform in a given workweek. *See* 8 C.F.R. 214.2(f)(9)(i); 22 C.F.R. §62.23(g)(2)(iii).

2. Current Bargaining Unit of Graduate Students

At present, approximately half of the graduate student population (*i.e.*, 3,500 students) at MIT are unionized pursuant to the certification issued by Region 1 in *Massachusetts Institute of Technology*, Case No. 01-RC-289879. The existing unit consists of students holding RA, TA and Instructor G appointments, who perform services for MIT in exchange for compensation as a

means to fund their education. MIT and the Petitioner commenced negotiations for an initial collective bargaining agreement for that unit in September and have met several times since then.

While the Petitioner's initial Petition sought to represent Fellows as well, the Petitioner ultimately removed them from its proposed unit, filed in February 2022, and it did not file the present Petition, which *now* seeks to represent the Fellows in that same unit, until seven months later. *See* NLRB's Certification in Case No. 01-RC-289879.

C. Admissions Process

MIT is among the most highly selective universities in the country. As Vice Chancellor Waitz explained, “[w]e admit about 10 percent of the students who apply to our graduate programs. And of those, about 60 percent accept our offer of admission. So of all the people who apply, about 6 percent end up at MIT.” (Tr. 62-63). To be offered acceptance, applicants must have distinguished themselves as undergraduate students or through work experience in a field that prepares them for the desired graduate program, and provide MIT confidence that the applicant will succeed, if accepted. (Tr. 62).

Prospective graduate students apply directly to the departments or programs in which they are interested, (Er. Ex. 3), and each department has its own set of application requirements. (Tr. 61). While the final decision concerning the admission of an applicant “is signed off at the department or program level, it is often made even lower down than that by individual faculty or research groups[.]” (Tr. 63; *see also e.g.*, Tr. 301 (Prof. Anne White, Department Head in Nuclear Science and Engineering (“NSE”), testified that applicants are admitted directly into her program).

Because of this local admissions process, and the fact that some graduate disciplines are highly specialized, many prospective students will first write to specific individual faculty

members and express interest in their research work and in studying under their academic direction. (Tr. 61). Applicants also provide a statement of objectives for their graduate school experience in which they declare what interests them. (Tr. 61). These are often very specific and may describe the specific lab or research being performed, along with the student's interest in advancing knowledge in that area. (Tr. 61-62). All of this assists both the prospective student and the faculty in evaluating whether there is a match of academic interests, and whether the student is likely to be successful at the Institute.

In addition to evaluating a prospective student's academic qualifications, departments and programs also consider the types and availability of funding that may be available to admitted students. Because MIT has "many more qualified applicants than ... resources to support their education at MIT[,]" (Tr. 106), and since funding and research space are constrained, as is the ability of faculty to supervise additional students, the programs look for the strongest applicants and must turn down many who may be successful, while also competing with other institutions for the best candidates.

D. General Academic Requirements And Path Toward Degree

Once admitted, *all* graduate students must meet the specific academic requirements of their degree programs, including any thesis requirement. These requirements are entirely independent of a student's funding source or status. In other words, regardless of whether a student is self-funded, a Fellow, or working as an RA or TA, they must satisfy the same academic requirements in order to receive their degree from MIT:

Q. ... when a particular program requires a thesis as a condition of obtaining a degree, is that an academic requirement for students in that program?

A. Absolutely, as just reflected in that prior exhibit [Er. Ex. 6].

Q. Does it depend on funding sources for that student?

A. No, no.

Q. What happens if a student does not satisfactorily complete their thesis?

A. They are not awarded a degree.

(Tr. 72).

As mentioned several times throughout the hearing, and as evidenced through MIT's exhibits, every individual admitted to MIT is a student first and foremost and, with regard to academic expectations, there is no distinction between Fellows, self-funded students, or students who have employment appointments to support themselves through their time at MIT. (Tr. 237; 327; *see also* Er. Ex. 8 ("students who are not making satisfactory progress towards a degree may be denied permission to continue or may be warned that without substantial improvement the following term, they may be refused further registration.")). (Er. Ex. 6). While there is not a uniform academic path to graduation for all graduate students across the 109 graduate programs at MIT, most students follow a common structure:

[E]arly on in a student's time at MIT, they'll take several classes ... In our research-intensive degree programs, you're typically only taking two classes at a time, compared to undergrad where you may do four or five classes at a time. And they are beginning to learn how to do research at that same time in varying ways. So they start with let's say more classes and less time learning how to do research and as they progress they take fewer and fewer classes and spend all of their time on doing research, and to advance their degree program as, as reflected in a thesis typically

(Tr. 65-66).

Many students come to MIT to obtain a master's degree with the intention of eventually moving onto doctoral studies, although admission into a master's degree program does not guarantee a commitment beyond that level of study. (Er. Ex. 4). It typically requires two years of study for students to complete their master's thesis, which are of "much more limited scope, and much more directed guidance." (Tr. 74).

For doctoral students, either those who transition from a master's program or those who start in a doctoral program, they require an average of 6 years to earn their degrees. (Tr. 75).

Vice Chancellor Waitz described the typical academic path and level of academic effort at the various stages of a student's doctoral program:

So the way I would estimate that is first students are doing their classwork particularly early on in their degree progression. And for that we account it with units. And we typically have graduate students in our thesis-based programs doing 24 units or 24 hours a week of classwork. In addition to that, they will sign up for 12 to 36 hours of thesis units, so that's reflecting time that they are devoting to the academic progression of their thesis. And then many of them are appointed as research assistants and teaching assistants, where in addition to that they have a 20-hour a week obligation. So you can add up all those hours, class hours, academic requirements for the thesis, and then additional work hours for which they get sort of financial assistance in exchange for that specific work. And it's a large number of hours. It's a lot of work to be a graduate student in any institution.

(Tr. 75-76).⁶

As noted, MIT measures the level of academic work and effort required for various classes and research by "academic units," which roughly equate to the number of weekly hours that a student needs to devote to the particular academic objective. (Tr. 69). For example, a typical class, for which a graduate student would receive a traditional letter grade (*i.e.*, A through F (Er. Ex. 7; Tr. 76)), would be 12 units, which might be broken down into three (3) hours dedicated to the lecture and nine (9) hours engaging in problem sets and studying. (Tr. 69). In addition to coursework units, students sign up for "thesis units" or other courses which track their academic research work and applies towards a student's "academic requirement of

⁶ As the Region is aware, the Petitioner concedes that Fellows who are solely taking classes are not in the unit. (Tr. 19-20). Notably, those Fellows are nevertheless funded in the exact same manner as when they are engaging in academic research that furthers their own individual theses. Moreover, the Petitioner does not offer any persuasive reason for distinguishing Fellows in classes and Fellows conducting thesis research, when both are simply doing what is required of all students to earn degrees.

achieving a thesis at MIT. That converts directly to the hours that we expect them to devote to the academic requirements of a thesis at MIT.” (Tr. 71). .

Typically, it takes a student about a year or two years to determine the specific thesis questions they seek to pursue. Ultimately, all students are provided or choose a thesis advisor, and for a doctoral degree are advised by a thesis committee, to assist them in developing, writing, and defending their theses. (Tr. 82-83). As students transition from a more coursework-focused academic load towards working primarily or entirely on their theses, they continue to sign up for thesis research units.

Notably, students are graded for their work on their theses, just as they are evaluated on their coursework, albeit on a different scale. A student’s thesis advisor monitors the student’s academic progress on the thesis and assigns either a J, which means satisfactory progress, or a U, which means unsatisfactory progress on the thesis. (Tr. 77; Er. Ex. 7 at 3). If a student receives two consecutive “U’s” they receive a warning or further academic discipline. (Tr. 83).

In the beginning of their graduate career, many students explore multiple research groups for a period of one or more years before deciding on a particular group and thesis project to pursue. For example, in the Brain and Cognitive Science Department, students rotate through several research groups or labs during their first year in the program before deciding on a particular lab in which to do their thesis work. (Tr. 365-366) Towards the end of some master’s degree programs, students will take a rigorous qualifying exam to be admitted to the doctoral program. (Tr. 66). At that time, they may switch research topics/labs or continue in the same general area of inquiry. As they move into the doctoral program, they begin working with a doctoral thesis committee. (Tr. 67). That committee will typically recommend a set of classes

(which could be another half dozen or more) that will support the student's research over a multi-year period. (Tr. 67).⁷

Vice Chancellor Waitz described in great detail the educational objective of the thesis requirement and its critical importance to the students' academic goals and future:

So the educational objective of the thesis requirement is to develop within a student the ability to independently perform original research that advances the state of, of knowledge in a particular field ... What does that mean to develop within them this capability? Research is a lot of hard work. Even defining the specific question that you're going to ask can take several years to develop that. And when the students come to us, they are not skilled in doing independent original research, so they work under the guidance and mentorship of faculty and senior research staff throughout the course of their thesis. And ultimately at the end they have, again under this guidance have developed an original contribution to a particular field of study which could be very significant. It may lead to a book in some fields. It may capture within it things which are communicated in multiple scholarly publications. But it's that work to educate a student on how to be an independent researcher. In fact, the transition that happens for some students when they complete their doctoral degree is that they go on to become a faculty member. So now they are the next day responsible for now mentoring and guiding the development of others in how to perform original research and help them get to the point where they are able to do independent original research, which our entire research enterprise in the U.S. and around the world is based on in terms of advancing knowledge. So that's the academic progression that happens for all students at MIT who are pursuing a thesis across all of our fields.

(Tr. 73-74).

MIT makes its students' theses available to the public (with few minor exceptions), and does not generate any revenue or receive specific benefits through their distribution. (Tr. 72-73).

Ten (10) of MIT's 109 graduate degree programs also have academic teaching requirements for all students enrolled in those programs. As with coursework and thesis

⁷ This is somewhat different in some departments where the masters degree is a less well defined transition point and the entire process is a more integrated doctoral degree program.

research, students in these programs often enroll in credit-bearing teaching courses, are evaluated and graded on their teaching performance, and then count those grades and credits toward their minimum degree requirements. These academic teaching requirements apply to *all* students in the relevant programs—*independent of funding source or funding status*. If a student does not satisfy this academic requirement, they do not graduate.

E. Funding and Financial Assistance For Graduate Students

MIT endeavors to provide as much financial assistance as possible to its admitted students, (Tr. 64), and the majority of graduate students come under the assumption that they will require some financial assistance from MIT to pursue their academic programs. As explained by Vice Chancellor Waitz, “[t]he financial support for our students directly impacts their ability to make academic progress.” (Tr. 284).

MIT provides financial assistance to its graduate students through a variety of different methods and from several different sources. As noted, MIT utilizes particular types of formal appointments or awards for students, some of which involve financial assistance (for tuition and/or to defray living expenses) with no service requirements tied to the funding (*i.e.*, fellowships), while others involve financial compensation in exchange for the student providing specific services to the Institute (*i.e.*, an appointment as an RA or TA). Depending on the type of support and the nature of the appointment or award, this funding could come from internal MIT funds held centrally or by a department (as is the case with most fellowships and TA appointments), from outside sponsored funding that is provided to MIT and managed by individual PIs (as is the case with most RA funding), or some other source. In other cases, students are self-supported or receive funding from outside sources that MIT has no contact with

or oversight over. Vice Chancellor Waitz explained the general funding categories during the hearing:

So there are a range of different ways that students finance their education. In some cases, as mentioned, they are fully self-supported. In other cases, we'll provide some financial assistance either as tuition support or as to offset living expenses. In other cases, we'll fully support them on financial assistance through a fellowship. And then many students have research assistantships where in exchange for working on a specific project and the objectives and deliverables associated with that, they will get tuition and a salary. And similar with students who in exchange for doing a teaching service as TAs. So a combination of those things are used across MIT.

(Tr. 89).

MIT does not generally guarantee full financial assistance for a graduate student's full degree program. However, in order to compete for talented students with its peers and to provide the optimal learning environment for its students, an offer of admission to one of MIT's graduate programs usually comes with some assurance of financial assistance in one form or another, at least for the first year (*see e.g.*, Er. Exs. 26-30). In most engineering and science programs – generally the largest programs at MIT – students are also usually informed that continued funding is anticipated as long as students are making appropriate academic progress towards their degrees. (Tr. 64-65). Vice Chancellor Waitz described this as a “soft guarantee” of continued funding (Tr.64-65).

Another example was provided by Professor Christopher Schuh, who served as head of the Department of Materials Science and Engineering (“DMSE”) for 10 years. He explained that in his department, all first-year students are guaranteed funding for their first semester. After

that, students find their way to “other arrangements” (Tr. 422).⁸ Those “other arrangements,” in large part, consist of RA/TA appointments or an award of a Fellowship.

Funding vehicles for graduate students often change during their tenure at MIT. For example, a student may start with a fellowship award with no service responsibilities, but later be given an RA or TA where specific work is required in order to maintain the money. Indeed, the most common funding path for a MIT graduate student involves an early-program fellowship followed by a number of assistantship appointments. (Tr. 203, 288).

In terms of desirability, Vice Chancellor Waitz described the “pecking order” of the various funding types, starting first with the fellowship:

Fellowships are considered to be prestigious awards of financial support that give you the freedom to choose among multiple faculty members that you may work with. They are awards to the individual, so that if you were to come in and get a fellowship from the Department of Aeronautics and Astronautics, and you initially were interested in working with me, but then got interested in working with someone else, it would give you an opportunity to move and work with that other person. And, importantly, it doesn't come with additional work requirements. So it gives you the most capacity to pursue your academics at MIT. (Tr. 106-107)

(Tr. 106-07). He then explained that, if sufficient overlap exists between an RA's assigned service work and his or her thesis topic – although there is no guarantee that this occurs – then such an RA appointment is the next best option as it would cut down on the total amount of effort (for academics and service) required of the student:

The next in that pecking order beyond fellowships is a research assistantship. That's because as we see in these exhibits that we've been through, a research assistantship often, while there are additional assigned tasks that may not contribute to your thesis, often the work that you're doing is contributing to your academic requirements. So it's sort of a win/win in that way.

⁸ (See also Tr. 304 – Professor White explained that in her department, they seek to fund the first year, mainly through Fellowships.)

(Tr. 107). Finally, except for those students who might seek a career in teaching, a TA is the least desirable funding option, given that there is usually no overlap between the assigned work and the student's academic program:

And the least attractive appointment from most students' perspectives is a teaching assistantship, because other than in the, the 10 programs we have that have a teaching requirement, it really does sit outside your academic requirements. But even with that we have some students who volunteer and want to do one or multiple teaching assistantships because they, one, love teaching and, two, may see themselves moving into an academic role where they want to be able to have that experience with teaching. But the clear pecking order is fellowships, followed by RA, followed by TA in terms of attracting students.

(Tr. 107-08).

The distinctions between the different funding sources (both from MIT and other outside sources) are outlined below.

1. Self-Funded Graduate Students

Many graduate students in research-intensive degree programs do not receive *any* financial assistance from MIT. These students generally fall into two categories. The first category includes students who either have personal or family means to pay for their entire graduate education. (Tr. 89, 313, 343, 435). The second group consists of students, referred to by the Petitioner as "pay direct" awardees, who receive external fellowships⁹ that go directly to the students with no involvement or administration of the funds by MIT. (Tr. 89). In total, there are about 330 students in these two categories across MIT's research-intensive programs, as testified to by Vice Chancellor Waitz. (Tr. 235-36; *see also* Tr. 302; 343; 423).¹⁰

⁹ Additional detail regarding "external fellowships" is provided below.

¹⁰ Vice Chancellor Waitz explained that there are an additional 140 students who receive fellowship funding directly (*i.e.*, from an external source that MIT does not administer), but to whom MIT will provide supplemental funding. (Tr. 236-37). If the supplemental MIT funding is via a fellowship, there is no distinction between those

The Petitioner concedes these individuals are *not* employees and they do not seek to include them in the petitioned-for unit.

2. Funding Through Employment Appointments

Most students are not fortunate enough to fund their own graduate school education or to receive full and direct financial support from external sources. Instead, many graduate students must provide employment services to MIT in exchange for compensation, which is then used to fund their degree program. Indeed, the majority of MIT's graduate students receive funding in the form of employment appointments as an RA or a TA, which carry with them specific service expectations and other terms and conditions of employment. (*See e.g.*, Er. Exs. 26-30).

RAs work on faculty- and PI-led research projects, which are largely funded by sponsored contracts and grants. MIT faculty and others with PI status apply for these grants and contracts by outlining a specific research question or problem that they wish to explore:

So faculty and other principal investigators will develop ideas for research. And that may come from reading other scholarly papers or it may come from interacting with people in industry or different government roles, colleagues at other universities. And they will develop an idea for research and then they will seek out different opportunities for that to be funded, and will write proposals to those organizations that include specific objectives and deliverables depending on the nature of the work. And when those are ultimately successful, then money is put into a specific account number at MIT that that person is -- the person who wrote the proposal is the account supervisor for. And they have the ability then to charge particular people, material, services, lab equipment, and things like that against that grant or contract.

(Tr. 81). Once a PI is successful in obtaining a grant or contract, the money from that award funds their research project. In addition to individual efforts of the PI, there may also be a number of employees who will work on the grant, including research scientists, post-doctoral

individuals and other Fellows with regard to the academic work they engage in. (Tr. 237). For those who are provided supplemental RA or TA appointments, they are in the current bargaining unit represented by the Petitioner.

associates, and some graduate students who are appointed as RAs. The compensation paid to these individuals by MIT can be charged (in whole or in part) to the sponsored award. The PI accounts for these compensation costs in the cost estimates when the PI applies for the grant or contract. For example, in applying for a grant, the faculty member or PI will have to indicate the number of individuals who will be staffed on the grant, including RAs, and what their compensation will be. This will be factored into the amount the PI seeks in their proposal. (Tr. 81). While the number of RAs are listed on a grant proposal as part of the cost estimates, Fellows are not listed because they have no duties for the work on the grant.

Because a student's RA appointment is tied to a particular faculty member/PI's research project, the student's funding depends (among other things) on continued funding of the underlying project. If the project funding is no longer available, the RAs will lose their appointment. Vice Chancellor Waitz explained:

Q. You testified there have been circumstances in which RAs were either terminated in the middle of an appointment or were facing non-reappointment for another term. What is the most common reason why that happens?

A. The most common reason would be a loss of funding or an ending of funding on a particular contract or a grant that they would then not be reappointed as an RA on that contract or grant.

(Tr. 281).

Professor Schuh also noted:

Q. Could a research assistant leave the lab that they've associated with or the principal investigator they've associated with if they lose interest in that work?

A. Of course, yeah. They are not bound in any way to MIT.

Q. Okay. And in that case would they retain the stipend associated with the research assistantship?

A. *No, no. So the RA is, you know, those grants are supplying funds to do specific work. And if that work were to stop then those funds would not flow to it.*

(Tr. 427) (emphasis added).

Students appointed as TAs support faculty and other instructors on both undergraduate and graduate classes. Their work may involve a range of responsibilities, including teaching recitation sections, conducting office hours, grading problem sets and exams, developing questions for problem sets and exams and generally supporting faculty and instructors in charge of the classes. (Tr. 116-17). These positions are not funded by outside sources but from MIT's and its departments' internal funds.

As explained in more detail below, graduate students appointed as either an RA or a TA are required to perform 20 hours of work per week in exchange for their stipend, tuition and health insurance. Indeed, the receipt of funds is contingent upon working those hours – either on a faculty member/PI's research project or performing teaching duties.

3. Funding Through Fellowships

Fellowship funding comes from several different sources and is by far the most sought after by students. Unlike an appointment as an RA or TA, fellowship awards are provided without service obligations or other terms and conditions of employment. The only condition is an academic one—*i.e.* that the Fellow maintain satisfactory academic progress—and is required of *all* students to maintain active enrollment status. As noted above, some students receive direct external fellowships from outside sources. The Fellows at issue in this case receive fellowship funding provided and/or administered by MIT.¹¹

¹¹ As an aside, it is important to note that while fellowships are occasionally referred to, colloquially, as an appointment instead of an “award”, there is a significant difference between the two. “And here it draws a distinction between an award, which refers to a fellowship, and an appointment, which refers to RAs and TAs. Colloquially, we will refer to those things interchangeably sometimes. But formally we consider these two things to be different in terms of the way that they work.” (Tr. 92).

The hearing record is replete with evidence concerning the source of the various fellowships and to whom they may be awarded. Employer's Exhibit 31 provides a breakdown of the current number of fellowship awards provided and/or administered by MIT. Regardless of the particular source, however, the one constant through all of these fellowships is the lack of any service requirements tied to the funding – some even affirmatively prohibiting it. (Er. Ex. 52, p. 19 regarding National Science Foundation (“NSF”) fellowships.).

In terms of number of awards, the largest number of fellowships (43%), come from MIT's General Institute Budget (“GIB”) or other unrestricted funds at the Institute, School, or department levels (*i.e.*, the money can be used for any purpose, including fellowships). (Tr. 174-75)).

Other fellowship funds come from charitable donations from donors. (*See e.g.*, Er. Ex. 36). Some of these are department controlled gifts (second most common source of fellowship awards) and some are centrally-controlled gifts (fourth most common source). In either case, the underlying gift agreements do not include service or work conditions but, rather, simply provide funding for various types of fellowships—often based on field of study, demographics, and other non-work-based selection criteria. (*See e.g.*, Er. Ex. 34). For example, the agreement included as Employer Exhibit 35 indicates that the fellowship “is to be awarded by the Dean of the Graduate School to a doctoral student in the life sciences or bioengineering who is devoting more than fifty percent time to thesis research.” (Er. Ex. 35). Employer's Exhibit 36 states the purpose of that particular gift “is to provide funds for Fellowship grants of financial assistance to MIT students who may be selected and in such amounts as may be determined by MIT from time to time ... We would like, until MIT decides otherwise, emphasis to be given to women students at the graduate level.” (Er. Ex. 36). Employer's Exhibit 34 describes 24 endowed fellowships

awarded to students by the Office of Graduate Education (“OGE”). These fellowships are set aside for a variety of student recipients, such as students pursuing research in environmental sustainability (Jack Tang Fellowship); students pursuing research with semi-conductors and nanotechnologies (Surpina and Panos Eurnekian Nanotechnology Fund); entrepreneurial activities by students from Texas (Louis B. Seigle Award); student research in the sugar industry (Luis Francisco Verges Fellowship); students in environmental studies (John S. Hennessey Fellowship); as well as others with preferences for students from Brazil, Macau, China, Argentina, and graduates of Boston College, to name but a few. None of these sets forth service expectations tied to the award. (Er. Ex. 34).

The third largest source of fellowships comes from federal agencies such as NSF, the Department of Energy, the Department of Defense or the National Institutes of Health (“NIH”), as well as other government agencies. These fellowships are tied to individual students who apply for, and are awarded, these fellowship grants by these federal agencies. The funds then pass through MIT and are provided to the individual student awardees. Approximately 350 of the 1,472 MIT Fellows are on active fellowships from the NSF’s Graduate Research Fellowships Program (Tr. 176). The NSF publishes an administrative guide book that serves to inform both the Fellow and the institute of higher education (“IHE”) that administers the fellowship program.

(Er. Ex. 52). That guide book, in describing relevant compliance matters, states:

NSF requires no formal service (time commitment) of Fellows, beyond the requirement that Fellows meet Fellowship reporting requirements and maintain satisfactory progress in their graduate programs throughout the five-year fellowship period at the IHE ... Fellow are not, in any sense, considered salaried employees of NSF.

(Er. Ex. 52 at 18 (emphasis added)).

In addition, if the NSF Fellow engages in any research or teaching activities, “it is expected that such activities should further the Fellow’s educational objectives and the gain of substantive teaching or other experience; *the activities should not constitute service to the IHE* or a method to make up the difference between the COE and the IHE’s regular tuition and fees.”

(Er. Ex. 52 at 19 (emphasis added)). As Vice Chancellor Waitz explained:

If you go back here to pages 18 [of Er. Ex. 52] in particular, it clearly lays out the fellowship service requirement and it says that NSF requires no formal service of fellows -- of fellows. And further down under income tax, it says fellows are not in any sense considered salaried employees of the NSF. It then goes on, on page 19, for example, where it’s discussing teaching and similar activities. It says that any activities that the fellows are involved in should not constitute service to the IHE. IHE stands for Institute of Higher Education, in this case MIT. And in particular that we can’t put students on partial RAs and partial TAs to make up the shortfall in tuition and fees that come with an NSF fellowship, which is guidance that they recently updated in March, in fact, to be very clear about the fact that we cannot do a partial RA or partial TA.

(T. 232).

Further, various sponsored and external fellowships administered by OGE (Er. Ex. 37) and MIT’s Research Administrative Services (“RAS”) (Er. Ex. 38) also describe preferences as to who is eligible to receive particular fellowships, but none of them require services to MIT.¹² As previously stated, OGE has no role in administering external fellowship funding that is provided directly to students. (Tr. 266).

¹² For example, the Department of Energy National Nuclear Security Administration offers a Fellowship to graduate students “planning full-time study for a PhD in areas of interest to stewardship science areas such as high-energy density physics. (Er. Ex. 37 at 2). The Ford Foundation offers “fellowships designed to increase the diversity of the nation’s colleges and university faculties by increasing their ethnic and racial diversity.” Dissertation fellowships are offered to support the final year of writing the PhD or ScD thesis. (Er. Ex. 37 at 4). The NASA Earth and Space Science Fellowship administered by MIT’s Research Administration Services Office is for students engaged in basic and applied research in Earth Science and Space Science. (Er. Ex. 38 at 2)

A few dozen students (40 at last count) are funded on federal training grants, which MIT receives from the NIH to operate training programs approved by the NIH. The largest training grant at MIT is in its Biology department. There are no service requirements imposed on training grant students. And, notably, unlike the case with many training grants at other universities, the Biology department does not require training grant students to engage in any training obligations *that go beyond the generally applicable academic requirements of all students in that department.*¹³

There are also various fellowships supported by private companies or non-profit foundations. (Er. Ex. 31).

In sum, regardless of the underlying funding source, fellowships simply provide students with financial support for their academic programs and objectives—much like an undergraduate scholarship. There are no stated service obligations and the funding is not tied to working on a faculty member/PI’s research project or an instructor’s course. Because of these key features, which do not exist with RA and TA appointments, most programs explicitly describe fellowships as offering the student more flexibility to pursue their academic interests. Many departments give fellowship awards to all first year students. Departments with insufficient funds to do so, give fellowship awards to those students they most want to attract. Some students whom a department most wants to attract get multi-year fellowship offers.

F. Further Details of MIT’s Appointments and Awards

The Petitioner contends that RA/TA appointments and fellowships are one-and-the-same, with the only difference being the “source of funding.” (Petitioner’s opening statement at Tr. 17-

¹³ For this and other reasons, as set forth in more detail in Argument II, B, the Biology department’s training grant appears markedly different from the training grants at issue in *Columbia*.

19). But there are numerous and significant differences between these appointment and award types that go beyond the source-of-funding differences outlined above. The specific contours of the RA/TA employment experience, on the one hand, and the purely academic experience of Fellows and self-supported students, on the other hand, are set out below.

1. Research Assistants (RAs)

The majority of graduate students at MIT are required to perform some services for MIT—in the form of an RA, TA, Instructor G appointment—in order to fund their education and living expenses. (*See e.g.*, Tr. 302 - NSE department, the most common source of funding is through a research assistantship).

At any given time, faculty members and other PIs at MIT are working on a range of research projects, most of which are supported by sponsored research funding, and are looking to hire graduate students to work on those projects. When that happens, and when a student is offered and accepts such a RA appointment, that student is tied to that lab and/or to that faculty member's research project in order to earn and keep their compensation. (*See e.g.*, Er. Ex. 24 – “when you have a Research Assistantship, you're on a project tied to a specific advisor and you'll jump right into that project from the start.”). The RA becomes part of the research staff for that PI, faculty member, or lab. They are under the direction of that particular faculty member or PI and complete assignments relating to their supervisor's research project. In many cases (but not others), an RA's research work will overlap with the student's thesis research, meaning the RA research can help advance the student's thesis as well. (Tr. 145)

RAs receive compensation in exchange for their work, in the form of a full tuition subsidy and a stipend. (*See Er. Exs. 26-30*). If they lose interest in their assigned lab or project, they are, of course, free to leave. But if they do, they lose their compensation and must search for

other forms of funding. (Tr. 427). Similarly, if the faculty member or PI's research project loses its funding support, the RA would lose their RA appointment and funding as well (Tr. 434).

RAs, like TAs and Instructor-Gs, must dedicate up to 20 hours per week toward their appointment duties. The same student may register for 12-36 hours of thesis credits (or more in some departments), and also 24 hours/week of classes. Thus, it is not unusual for a student to be spending 60 or 70 hours per week pursuing their degree and appointments. (Tr. 75).

The OGE--which provides central administrative support and guidance relating to *all* of MIT's graduate programs--formally describes the RA position as follows:

The research assistant is a member of a research group in a laboratory or on a project, whose principal duty is to contribute, under supervision, to a program of departmental or interdepartmental research. Through project work, the assistant gains increased facility in organizing work, applying new experimental techniques to real problems, and oral presentation. Most students welcome the opportunity a research assistantship gives them to participate as junior colleagues of the faculty in an ongoing research project; this experience frequently influences their choice of thesis topic.

Graduate students holding research assistant appointments must register as full time resident students and are charged full tuition during the period of appointment. The RA appointment comprises a monthly stipend as well as a tuition scholarship which is credited directly to the student's account. Research Assistants are compensated on the basis of the time devoted to research activities. A 100% graduate RA appointment typically includes payment of full tuition for the period of the appointment.....

A 100% research assistantship requires no more than 20 hours of effort per week. MIT recognizes that graduate students may spend additional time conducting research in support of their academic studies. International students considering an RA appointment should review information regarding on-campus work.

(Er. Ex. 11). Some programs or departments elaborate on this description¹⁴ but the OGE description is of general applicability throughout the Institute and is also reflected in MIT's policies and procedures (Er. Ex. 14).

MIT similarly lists the particular time commitments that these appointments involve, along with time off/vacation allowances:

TIME COMMITMENT

An appointment for the academic year is normally for the period September 1 through May 31; a summer appointment is normally for the period June 1 through August 31. However, appointments may be made for shorter periods. Only resident graduate students who are candidates for advanced MIT degrees may be appointed.

A 100% research assistantship (RA) or teaching assistantship (TA) requires no more than 20 hours of work per week. MIT recognizes that graduate students may spend additional time conducting research in support of their academic studies. International Students considering an RA or TA appointment should review information regarding on-campus work:
http://web.mit.edu/iso/immigration/emp_campus.shtml.

Instructor-G and assistantship appointees observe normal Institute holidays and are entitled to two weeks of vacation with pay if their appointments are for a consecutive 12-month period of time. Their vacation schedules must be approved by their supervisors.

The supervisor must approve a student's absence from the Institute during a working period. Some departments may require additional approvals.

(Er. Ex. 12).

The OGE descriptions further outline the compensation and benefits for all of these appointments, along with relevant tax and withholding information:

Research and teaching assistants receive a monthly stipend as well as a full tuition scholarship. The compensation for research and teaching assistants is adjusted to make the appointments equally

¹⁴ (See e.g., Er. Ex. 22, p. 25; Er. Ex 24).

attractive, taking into account the availability of tuition scholarships, the opportunities for thesis research, and other benefits connected with each. Stipend levels are established each year by individual departments within guidelines approved by the Academic Council in discussion with the Provost.

A department may not assign a stipend (exclusive of tuition and fees) above these guidelines without specific approval of the Office of Graduate Education. Graduate student staff members should recognize that their stipends are not intended necessarily to cover the full cost of living.

...

The Institute is obliged to withhold federal and Massachusetts income taxes from the stipends of teaching and research assistants. Assistants must file the necessary federal and Massachusetts tax withholding forms through the MITAtlas system. Failure to submit these forms will result in the required maximum tax being withheld.

(Er. Ex. 14).

There is some variation in what RAs receive for a stipend depending on the program, level of effort, and the individual. The 2022-23 stipends for work as a 12-month, full-time RA are between \$45,480 and \$52,302 for Ph.D students. (*See* Er. Ex. 19). Departments have some freedom to offer higher rates within Institute guidelines. In addition to these stipends, RAs receive tuition support and health insurance. Combining stipend, tuition and medical insurance, overall support for RAs amounts to about \$120,000 per year. (Tr. 129-130).

RAs are not found in all programs. Some programs in the arts or humanities departments, for example, which do not have much externally funded research, have fewer (if any) RAs. In those programs, the typical student would receive a fellowship award or a TA appointment. However, in most if not all of the science and engineering departments, there are hundreds of RAs performing services on faculty/PI's sponsored research projects.

Some RAs receive notice of their RA appointment as part of their admissions letter, while others receive a written appointment notification after they are admitted. (Er. Exs. 26-30; Tr.

153). The formal letters typically provide greater detail about expectations. Later in students' academic programs, they communicate directly with faculty, PIs and graduate administrators about their appointments to an RA position and receive a confirmation of that appointment from a central MIT system. In all cases, RA appointments are governed by applicable Institute rules and policies, including those of OGE. (Er. Ex. 14, Section 8.1, p.2) Work assignments and obligations for an RA are set by the individual faculty/PI and programs, but almost all involve a specific commitment of working 20 hours a week on average and accepting work assignments from the faculty member/PI to whom they are assigned. In addition to the particular research work of a given day, the RA may also be required to assist with various grant-reporting or grant-stewardship tasks, which may include reporting on the progress of the research to the funding sponsor or making presentations to research sponsors:

Q. And you said that there is a professional expectation that an RA in a particular lab assist in making presentations and making reports to research sponsors?

A. Yes.

(Tr. 445).

Therefore, while there are instances where a RA's research will contribute to the student's thesis, RAs are also required (by virtue of their appointment) to assist with certain research tasks that will not advance their own thesis research but will advance the faculty member/PI's research obligations. Furthermore, for some RAs (in particular those in certain humanities, social sciences, and business disciplines), *none* of the research work they do will advance their thesis research. As Vice Chancellor Waitz explained:

So students who are appointed to research assistantships in many cases have obligations that go beyond their academic thesis requirements. *In other words, they are doing things that won't ever contribute to or appear in their thesis.* In other cases, in particular students who don't have any additional obligations with their

financial assistance, their work will entirely be towards fulfillment of their thesis objectives and their overall academic progression to be an independent researcher.

(Tr. 82-83)(emphasis added). He later elaborated on this point:

Q. ... You testified that an RA will often be assigned tasks unrelated to their own research. Is that correct?

A. Many times -- we should probably be clear about what's meant by often.

Q. Okay. What do you -- so I -- all right, I will withdraw the word often and ask you what do you mean by many times?

A. In particular, in research groups with multiple students working collaboratively and being supported by multiple grants and contracts. It's -- such as the research laboratory that I work in. It's not uncommon to ask a student to perform a service on one particular contract or grant that's not related to their thesis. So that's one example.

A second example is that in some departments, in particular economics, also in some of our humanities, arts, and social sciences programs of which we have five, and also in pure mathematical disciplines, the, the -- how do I describe it? The, the way the fields work is that they want the student's thesis research to be independent to a large degree from the work that faculty members in that field are doing. So for example, in humanities, arts, and social sciences, it's not uncommon for the student's thesis to then if they go onto become a faculty member to be their first book. So they -- in cases like that, if they have RAs, the RA will be intentionally distinct from the student's thesis work, their academic thesis work. So there are situations like that where students are assigned to RA duties, which have little to do with contributing to their thesis. So there are maybe two different situations.

(Tr. 272-73). *See also* Testimony of Josh DeMaio from Sloan School of Management ("Sloan").

(Tr. 338) (work by an RA in Sloan is "separate and distinct" from the student's thesis work).

That School has 90 RA appointments and 103 Fellows in the petitioned-for unit. (Er. Ex. 15).

When there is no overlap in the RA work and thesis research, MIT tries to be especially mindful of the total time it might take a student to do both their academic work and their job.

Accordingly, MIT and many departments have policies that place caps on the total number of academic units that students can register for while holding certain appointment and award types:

[O]ur objective is to enable students to be successful in the pursuit of their academics at MIT, while recognizing that for many of them they have these employment responsibilities that come with the financial assistance of an RA or a TA. So this is really the reason departments would set maximum unit limits is to try and balance that load so that people don't do too much, because already people are doing too much. So just understand what, what this is. And we have in particular a range of situations at MIT where the RA may be completely distinct from a student's academic research, not in any way related. And then we have cases where they overlap one another. And what this is talking about is that if you're doing an RA which is completely separate from your academic research, from your thesis, it has no relationship whatsoever, you're really not allowed to register above the maximum allowed. But in cases where those two things overlap to some degree, you can go above the maximums. It's just recognizing that in many cases students on an RA, their RA work will contribute to their academic thesis, but in some cases they don't at all. In fact, we have whole departments where the RAs are distinct from the thesis, academic thesis requirements.

(Tr. 143-44).

Further, RA appointments come with several terms, conditions, and other typical indicia of employment, including:

- RAs are assigned work by their supervisor that they must complete. In some cases, this supervisor might be separate from the student's thesis advisor;
- RAs are evaluated by their supervisor on their job performance, which impacts continued and future appointments;
- RAs are provided paid vacation from their work time;
- RAs have state and federal taxes withheld from their paychecks, just like other MIT employees;
- RAs receive W-2 forms at the end of each year; and,
- RAs are required to complete I-9 Forms – Employment Eligibility Verification, to verify their identity and work authorization.

(Er. Exs. 9-12, 14, 16-18, 21).

In addition, the work performed by an international student RA is counted against 20-hr/week employment caps set by federal immigration law.

Lastly, an RA's appointment can *be terminated* on the sole basis that the RA did not perform the assigned services in a satisfactory manner. (*See* Er. Ex. 14 – “A student’s appointment to an assistantship may be cancelled at any time ... if the student is not carrying out the duties assigned in a satisfactory manner.”).

2. Teaching Assistants (TAs)

Typically, a student who wishes to serve as a TA must apply for or otherwise express interest in the appointment, and must be selected by a particular department or program. As Professor Schuh explained:

Q. What does a student -- how does a student obtain a teaching assistantship?

A. It's an application process. So each semester, the department has a certain number of courses that need a teaching assistant and they put out a call saying, hey, anyone interested in being a teaching assistant, here is an application process. So they have to submit application materials and signal which courses they think they are going to be a good teacher for. And then the department has a committee process to sort of select the best matches so that we put good teachers in each class.

(Tr. 428-29; *see also* Tr. 123). In some instances, a faculty member or other instructor may seek out a student and ask the student whether they are interested in becoming a TA for a course. If there is interest, the student would meet with the faculty member/instructor and determine if there is a match. (Tr. 310 – re: NSE department).

Once appointed, TAs carry a variety of duties and work obligations, as delineated in the OGE website:

The duties of a teaching assistant include assisting a faculty member in grading undergraduate homework and quizzes, instruction in the classroom and laboratory, preparing apparatus or

material for demonstrations, posting web-based materials, and conducting tutorials and discussion sections

...

Graduate students holding teaching assistant appointments must register as full time resident students and are charged full tuition during the period of appointment. The TA appointment comprises a monthly stipend as well as a tuition scholarship which is credited directly to the student's account. *Teaching Assistants are compensated on the basis of the time devoted to teaching activities.* A 100% graduate TA appointment typically includes payment of full tuition for the period of the appointment ... *A 100% teaching assistantship requires no more than 20 hours of work per week. MIT recognizes that graduate students may spend additional time conducting research in support of their academic studies.*

(Er. Ex. 10 (emphasis added)). Some programs and departments elaborate on this description, (see e.g., Tr. 116-17; 310; 337; 429; Er. Ex. 22, p. 25), but the OGE description is of general applicability throughout the Institute and is also reflected in the Institute's policies and procedures (Er. Exs. 9-14).

TAs are typically assigned work by the faculty member or instructor in charge of the course they are supporting. This work can include, *inter alia*, conducting discussion sessions with students enrolled in the course; preparing homework and test problems; teaching recitation sections; conducting office hours and review sessions; grading; and helping the instructor create materials for the class. (Tr. 116-17; 310; 337; 429). TAs may be observed by the course instructors as to how they perform. They are also typically included in the subject evaluation forms filled out by the students enrolled in the course. (Tr. 128-29).¹⁵

¹⁵ There are a few departments (like Biology, Brain and Cognitive Sciences, and EECS) that require teaching as an academic requirement for the doctoral degree, (Tr. 87-88), but those students are graded on and/or receive academic credit for their teaching performance – they are not compensated for the teaching. Indeed, as Vice Chancellor Waitz testified on rebuttal in response to two Union witnesses stating they worked as TAs while on a Fellowship, “[t]he transcript reflects that in the semesters where they taught, they enrolled in a class, depending on whether it was biology ...or brain in cognitive sciences, it would be two different classes they would enroll in, but titles like teaching in biology or, you know, teaching and brain cognitive science and *received credit for fulfilling that academic requirement that both brain and cognitive sciences and biology have.*” (Tr. 525-26 (emphasis added)).

In terms of the volume of work, as noted in the OGE description, and like RAs, TAs can be required to provide up to 20 hours a week of service for compensation, which includes a full tuition subsidy and a stipend. Twelve month stipends for full-time TAs range from \$41,976 to \$53,530 for certain TA work in academic year 2022-2023. (Er. Ex. 19). Departments have some freedom to offer higher rates within Institute guidelines. (See Er. Ex. 19; Tr. 131-32). In addition to these stipends, TAs receive tuition support and health insurance. Combining stipends, tuition and medical insurance, overall support for TAs amounts to about \$120,000 per year. (Tr. 129-130).

Typically, a TA's thesis advisor is different from the individual who supervises them while engaged in their TA work. (Tr. 137). Like RAs, TA appointments also come with numerous terms, conditions, and other indicia of employment, including:

- TAs are assigned work by their supervisor that they must complete;
- TAs are evaluated on their job performance by their supervisor, which impacts continued and future appointments;
- TAs are provided paid vacation from their work time;
- TAs have state and federal taxes withheld from their paychecks, just like other MIT employees;
- TAs receive W-2 forms at the end of each year; and,
- TAs are required to complete I-9 Forms to verify their identity and work authorization.

(Tr. 116-18; 136; 310; 337; 429; Er. Exs. 16 (TAs in the DMSE are provided two weeks)); 17; 18; 21 (“Research Assistant and Teaching Assistant payments are subject to federal and state income taxes.”).

The time spent by international students conducting their TA duties is counted against 20-hr/week employment caps set by federal immigration law.

TAs can be reappointed from semester to semester or year to year. Reappointment depends on academic progress *but also on prior work performance*. A student's appointment to a

teaching assistantship may be terminated at any time if the student is not satisfactorily performing the duties assigned. (Tr. 138-39).

3. Instructor G

An Instructor G is very comparable to a TA position, except it is usually reserved for graduate students with more teaching experience and allows the student more independent control of the class they are teaching. (Tr. 144). Instructor Gs can be compensated at a higher rate and generally work within MIT's largest department, Electrical Engineering and Computer Science (EECS). (Tr. 144). As described on the OGE's website:

Graduate students with considerable teaching experience may receive Instructor-G appointments. These appointments are given only to more advanced students of proven teaching ability. The rate of compensation for teaching assistants is determined by the Dean of the School within guidelines approved by the Academic Council.

(Er. Ex. 10).

Instructor G appointments otherwise have the same terms, conditions, and indicia of employment as TAs. At present, there are only three (3) students with an Instructor G appointments. (Tr. 144).

4. Fellows

Unlike RAs and TAs, students are not formally "appointed" to a fellowship. Instead, a Fellowship is considered and defined by OGE as an "award." Thus,

A fellowship or traineeship is an award to a graduate student that covers tuition partially, or fully, and also provides a stipend to help defray living expenses. A scholarship is an award that provides partial or full tuition. Most awards are made on the basis of merit, but in some circumstances can be based on financial need. Awards are made only to individuals enrolled in a graduate degree program.

A full fellowship covers the full cost of a student's education for a prescribed period of time, which includes tuition and a monthly

stipend; many fellowships also pay for student health insurance. *Unlike the teaching or research assistant, the fellowship recipient generally does not have formal teaching or research obligations to a sponsored research grant.* Nevertheless, students should cultivate collaborations that further their research interests. For example, it is important for the student to foster a strong relationship with his or her advisor in order to develop a research project and agree on degree milestones.

(Er. Ex. 13 (emphasis added)).¹⁶ In some instances, students receive a partial fellowship. (*See e.g., Er. Ex. 13 – “A partial fellowship covers some costs for the student. Often, the department supplements the fellowship with a research or teaching assistantship. In such cases, the student’s research or teaching obligations should be scaled proportionately by the department.”*). Notably, students who receive partial fellowships but who are *also working* as a partial RA or partial TA are included in the current bargaining unit represented by the Petitioner.

As explained above in Section E, 3, *supra*, there are a variety of sources for fellowship funding. At its core, however, a fellowship is a financial assistance award given to a graduate student that will cover their tuition in whole or in part and also a stipend to help defray living costs. A full fellowship can, for a prescribed amount of time, cover a student’s tuition, health insurance, as well as provide a stipend.¹⁷ Unlike RA, TA and Instructor-G appointments, fellowships come with **no service requirements whatsoever**.¹⁸ The funds from a fellowship

¹⁶ In addition to the significant academic benefits to receiving a fellowship – addressed in further detail herein – Professor White described the additional benefits of receiving an external fellowship. “It’s very prestigious to get an external fellowship. It’s a very good thing to have on your CV or your resume when you go to apply for, for a job like a post-doc or a professor position, or a job in industry perhaps if you’re a master’s student.” (Tr. 303).

¹⁷ While comparable to an undergraduate scholarship, MIT uses the term “scholarship” as an award that just covers tuition in whole or in part. For graduate students, such a scholarship is referred to as a “tuition only fellowship.”

¹⁸ While the Petitioner attempted to cobble together examples of certain research and “tasks” performed by four individual students during their fellowships, none of these examples rose to the level of service in exchange for compensation. For example, two witnesses explained how they were listed as contributors to articles based on research they performed; however, as explained by Vice Chancellor Waitz, “[t]his is a very regular occurrence for grad students and even undergraduate students at MIT. It happens almost every day we have papers being published with students contributing to those papers.” When asked whether it mattered “what the appointment or award status is for the students involved[,]” he confirmed that it did not. (Tr. 523-24).

remain in the hands of the student at all times. The funding is not held or controlled by an individual faculty member/PI, is not tied to any MIT sponsored research project, and is not tied to any course instructor. Indeed, a student with a fellowship is free to join a particular research group, in order to pursue their thesis research, without worrying about whether the faculty member/PI has RA funding for them or being required to take on employment duties. Professor Schuh explained:

Q. What happens when a fellow wants to affiliate with a principal investigator, would funding still be an issue for the principal investigator?

A. No. In fact, so this is one of the measures of that flexibility I referred to earlier. If a student is on a fellowship then it's they can join any group that will have them, because the PI doesn't need to raise research funds or have an active grant on, on which to put them. So it's definitely a much lower barrier to joining virtually any group.

(Tr. 434).

A Fellow is also free to leave their research group or project at any time and move on to something else *without losing their fellowship award* – the *only requirement* is that they continue making satisfactory academic progress towards their degree. An RA or TA does not have that freedom.

The Petitioner points out that a Fellow and a RA may conduct research alongside one another in a research group. But this fact is: (i) not true of all Fellows; and (ii) is of no consequence to the issues in this case. As noted above, and in more detail below, there are several entire departments and programs where Fellows conduct their academic research outside the lab/research group environment, and without any RA or other student even arguably working “alongside” them. Also, in the science and engineering disciplines, both RAs and Fellows– as well as TAs *and self-funded students* – are required to conduct academic research in the learning

environment that is the lab or research group. This is what brings them all together to conduct research. While in the research group, Fellows are required only to work on their academic research, while RAs might (or might not) be doing their thesis research *and* are assigned grant-related tasks that may be completely independent of their thesis work.

As explained by Vice Chancellor Waitz, “a typical research group will have within it faculty, senior research staff. It will have research assistants in it, who are working on different efforts. It will have students who are on fellowship in it, who are working on different efforts as well.” (Tr. 79-80). There is no evidence to suggest that merely because a Fellow is in the same research group as an RA, that they share the same *employment* status.¹⁹ To the contrary, as Professor White noted: “They’re all *students*. They’re all getting their degrees. So they’re all doing academic research.” (Tr. 327) (emphasis added).

Notably, *every single MIT witness*, all of whom have considerable experience and knowledge of MIT, spoke to the lack of service requirements for Fellows, as well as to the flexibility that fellowships afford. For example:

- Vice Chancellor Waitz:

Q. Does a student receiving any of these fellowships have any employment or service obligations to the institute in order to keep the fellowship?

A. No. (Tr. 218).

- Professor White, head of the NSE:

Q. Okay. If a fellow wishes to move from a particular research group to another, can they do so first of all?

A. Yes.

Q. And, and if they do, do they lose the fellowship?

¹⁹ Conversely, if a lab ever lost its funding or grant money no longer supported an RA appointment causing them to lose their job, Fellows would not meet the same fate. “In fact, so this is one of the measures of that flexibility I referred to earlier. If a student is on a fellowship then it’s they can join any group that will have them, because the PI doesn’t need to raise research funds or have an active grant on, on which to put them. So it’s definitely a much lower barrier to joining virtually any group.” (Tr. 434).

A. No. The fellowship is for the student, tied to the student. The fellowship is all about funding a person, rather than a project. And so they, they're flexible. They just take that money with them. (Tr. 313).

- Professor Schuh, former department head of DMSE:

Q. I'm assuming they don't have to stay [in a research group] if they lose interest in the work of that group.

A. That's true. They have -- they can -- they can leave. And because they have their own funding, they could -- they could likely find another group more easily because they don't need to find a matching RA to go with it.

Q. Has that ever happened in your experience, a fellow --

A. Absolutely, yes. (Tr. 433).

- Joshua DeMaio, Director of Student Funding for Sloan

-

Q. Does a fellowship award come with any service or work obligation?

A. No, it does not. (Tr. 335)

These undeniable facts are reiterated throughout the record exhibits. (*See e.g.*, Er. Ex. 23 – “These fellowships do not have a work obligation.”; (Er. Ex. 24) – “Internal fellowships (*i.e.*, those offered by MIT) are generally for one academic year and do not require a student to also work as an RA or TA.”; (Er. Ex. 52) – “NSF requires no formal service (time commitment) of Fellows, beyond the requirement that Fellows meet Fellowship reporting requirements and maintain satisfactory progress in their graduate programs throughout the five-year Fellowship Period at the IHE[.]”).

Notably, even the Union's witnesses extolled the academic benefits of having a fellowship, given their flexibilities and the absence of any **service requirements**. For example, one student acknowledged the ability to choose different labs within which to conduct their academic research, without any concern about funding:

Q. Talking about your obtaining being awarded the NSF Fellowship when you applied just before you came to MIT you considered that quite important ... One of the reasons you said was it allows me to choose different labs. What did you mean by that?

A. It wasn't a huge concern, but in theory, some labs might not have funding, so it could allow me to choose different labs.

(Tr. 515). The witness also explained that he did in fact change labs seamlessly due to his being funded through a fellowship.

Q. Okay. And then in Spring of 2020, you said you switched to [another faculty member's] lab?

A. That's correct.

Q. And was there any problem with that transition in terms of funding?

A. No, because I was funded via fellowship for my first two semesters.

(Tr. 516). Another student witness testified that she had won a National Defense Science and Engineering Graduate Fellowship, which is a three-year fellowship, when she was at her former university getting her masters. When she was admitted to MIT for her doctoral program, she was able to take her fellowship with her to MIT and thus without worrying about funding upon arriving at the Institute. (Tr. 363).

As another example, the DMSE Kavanaugh Fellowship, which is awarded to students, among others, is for those, "who are at the end of their MIT experience, so they've already been in a research group for a number of years. They've already done a lot of technical work. And this fellowship is intended to give them one year of sort of unencumbered time so that they can take what they've learned in the lab and think about how it will translate into the real world, for example, through patenting, and licensing, and founding of a start-up company, that kind of thing. (Tr. 436).²⁰ This fellowship provides relief from any work duties in the student's lab so the Fellow can focus on studying how to "translat[e] their technology to the real world." .

²⁰ The Union attempted to argue, without basis, that this award was only given to student employees. However, Vice Chancellor Waitz testified on rebuttal and provided at least two examples of students who received this fellowship near the end of their time as students. (Tr. 523).

In addition to the portability of fellowship funding, Fellows also have a great deal more flexibility in defining and pursuing new and exciting research objectives. As noted above, RAs must either conform their thesis research to their RA research, or must take on a RA that sits entirely on top of their thesis research and adds to their workload. Fellows, however, are not bound by the objectives or deliverables in any sponsored award, and need not conform their thesis research to that of their faculty advisors. This means they are able to pursue thesis research on topics that might be adjacent to, or orthogonal to, the grant research being done in a particular lab or research group.

Fellows, unlike RAs, are also not required to perform grant-related tasks as part of receiving or maintaining their fellowships:

Q. Okay. Now you mentioned some specific tasks that an RA may have to do in connection with the grant such as presentations, and meetings, and the like. Could a principal investigator require a fellow to perform those tasks?

A. No.

(Tr. 431). These differences between RAs and Fellows are reflected in the numerous rules governing sponsored research administration at MIT. For example, as Vice Chancellor Waitz explained with regard to charges to sponsored awards, “every month you are electronically certifying certain charges on federal and corporate awards that these are appropriate charges. That this person has done the work on that grant that you've committed to do for the money that you've received. And we have ... eight federal auditors who are on campus. This is their job. They audit us day in and day out. They will walk around and ask people what they're supported on and what they're doing ... So your relationship with an RA is very different from a fellowship student in terms of the specific things that are required in terms of receiving that compensation.”

(Tr. 225).

In an institution as large and complex as MIT, with over 7,000 graduate students and thousands of employees, mistakes are sometimes made at the margins by individual PIs, faculty, and staff members. However, if a Fellow is directed by a PI/faculty advisor to perform certain grant-related tasks, and MIT is made aware of this, the PI/faculty's direction is corrected:

Q. Well, the questions I asked you was what if you learned that a principal investigator had required a fellow who is not associated with the grant to do a particular task under that grant.

...

A. Okay. Well, I was the department head for almost 10 years and I frequently had to get in the middle between students and their advisors. And so without recalling a specific incidence, I can definitely speak to this. So the short answer is if a faculty member is doing something inappropriate in regard to their student, like if they were trying to compel them to do something that would be not allowable, that would be sort of in the category of, you know, disciplinary action. So I would be doing a little investigation, trying to understand what happened. I'd be talking to both parties. And I may be scolding a faculty member and telling them that they are not allowed to coerce their students in some way. It's a standard practice for every department head and every dean this is what we do. We keep an eye on our students and we take care of them.

(Tr. 432-33). Professor Schuh elaborated on his response on cross-examination:

Q. Is there professional expectations that fellows would similarly assist in making presentations and reports?

A. Not to sponsors, no, because they, they have no sponsor ... They're, they're fellows. They are funded separately.

Q. Well, you were asked some questions about what would happen if a faculty member or what happens when a faculty member pressures a student to do something inappropriate. Could you just, based upon your experience, what types of thing -- I'm not asking you ... to talk about a particular faculty member and a particular student, just the type of conduct or examples of the conduct that you've had experience with.

...

A. Yes. I'll give an example. The, the kind of thing that I was worried about frequently as a department head was making sure the students were, were never asked to do something off their academic trajectory. *So one example might be -- I'm trying to think of something now that's sort of general. If a student were asked to*

help, help organize a conference or something like that, or asked to be a moderator for a conference that the PI was organizing or something. Those activities can be professionally very rewarding, but they can't be compelled of the students, right? So the students would have to want to do those. That would be a good example of the kind of thing to keep an eye on.

Q. You would only know about it if the student didn't want to do it and complained to you about it.

A. You might see it. But there are many ways that you might see it. Now a good manager, a good department head has their ear to the ground and talks to all kinds of constituents all the time. And so I would say actually with some regularity you might hear about things through other venues, rather than some kind of formal complaint. And, of course, you would then follow-up on those. And most of the time those turn out to be inert. But one is always watching and making sure the students are taken care of.

(Tr. 444-47) (emphasis added).

Professor White testified about a similar experience when she supported a group of Fellows who had been asked to perform a specific task on a grant:

Q. ... Would a principal investigator ever assign a fellow a specific task on their grant?

A. No, not specifically tied to any grant. *And in fact, if they were asked to, to do some kind of tasks like a reporting task, we, we have to make sure that they know they don't need to do that. They can volunteer. And we had a situation like this recently, actually ... Yeah, without naming names, basically the assistant of a PI sent a message to a large group of students and said, hey, you need to put in your normal report on your annual activities for this cooperative agreement, which is a type of grant from the Department of Energy. And there were students on the list who weren't RAs. They were -- they were fellows, but fellows in my group on fellowship, but who were kind of lumped all in. And these students reached out to me and said, hey, do I need to do this. And I said, no, you don't, that's for -- that's for students who are part of the grant, because the PI has a responsibility to report activities to the sponsor and these students are being asked to provide a report of their activities.*

(Tr. 312-13) (emphasis added).

In contrasting RA duties with the academic expectations of Fellows, Professor Schuh further explained:

Q. What responsibilities does a student on a fellowship have in the department or with faculty?

A. Well, at a high level they have the same responsibilities as every other student in the program. They have to – they have to fulfill the academic requirements of their program. The difference is that because they are not paid on an RA, they don't have the sort of specific grant-based activities expected of an RA. So they -- what I tell them is that they have quite a bit more freedom. They are not -- they are not tied to a grant or the activities of a grant.

(Tr. 430-31).

Further, the indicia of an employment relationship that are present with the RAs, TAs and Instructor Gs, simply do not exist with Fellows:

- Fellows have only a thesis supervisor; not a work supervisor.
- Fellows are not evaluated by their supervisor on any job performance which might impact continued and future appointments;
- Fellows are not provided paid vacation from work, as they do not have work hours requirements;
- Fellows do not have state and federal taxes withheld from their awards;
- Fellows do not receive W-2 forms at the end of each year; and,
- Fellows are not required to complete I-9 Forms to verify their identity and work authorization.

Unlike RAs and TAs, the academic work done by an international student Fellow is *not* counted against the 20/hr-week employment caps set by federal immigration law.

Lastly, MIT and several of its departments and programs sometimes use fellowships as transitional funding for students in hardship situations, often *specifically* to eliminate any service requirements placed upon students appointed as RAs, TAs and Instructor Gs. For example, Professor White testified that her department (among others) has a bridge funding program that provides fellowship funding to students whose RA appointments are terminated due to a loss of grant funding. This program enables a student—who has essentially lost the job they depended

on to pay for school and living expenses—to maintain the necessary funding to complete their academic research toward their degree. Prof. White also testified about her experience on the working group that drafted MIT’s “Guaranteed Transitional Support” policy, (Tr. 314), which assists students who find themselves in an “unhealthy” relationship with their PI or supervisor. The program provides advisor-independent transitional funding support for students in these situations. The policy notes a preference for fellowships when possible, specifically to alleviate any service requirements while the student seeks a new supervisor. (Tr. 316-17; Er. Ex. 51). The MIT graduate students who helped design this policy advocated for the maximum use of fellowships specifically because of the unique flexibility they provide.

As evidenced above, while Fellows often perform academic research in the same laboratories and research groups as RAs, their experiences and responsibilities are markedly different. Indeed, the same is true of the self-funded students who pursue their graduate degrees. Both Fellows and self-funded students - whom the Petitioner does not seek to represent - must do their academic work in the labs and research groups where RAs work. However, their status is very different. RAs remain under the direction of principal investigators and carry out assignments under the grants and contracts procured by their PIs. Such is not the case with Fellows and self-funded students who have no such work requirements nor specific hours of work in the lab, and conduct only academic research in their labs and research groups.

ARGUMENT

I. **GRADUATE STUDENTS ON FELLOWSHIP AWARDS AT MIT ARE NOT EMPLOYEES WITHIN THE MEANING OF SECTION 2(3) OF THE ACT**

A. **Introduction**

The evidence in this case demonstrates that Fellows are not employees within the meaning of Section 2(3) of the Act and, in accordance with the principles delineated in *Columbia, supra*, they are not eligible to vote for inclusion into the current bargaining unit of RAs, TAs, and Instructor Gs. Unlike those student-employees in the existing bargaining unit represented by the Petitioner, Fellows have no employment responsibilities or service requirements in order to receive or maintain their fellowship awards. They are awarded fellowship funds free and clear of any service requirements tied to their funding. These fellowships are akin to scholarship funding, and are provided solely to support a student's pursuit of their academic program. Since the financial support they receive is not conditioned on any service expectations to MIT, they are not employees under the common law or under *Columbia*. The fact that they must maintain satisfactory academic progress towards their degree in order to keep their fellowships—which is a baseline requirement for all graduate students to maintain enrollment status—does not alter that conclusion in any way. Since the Petitioner's proposed unit consists entirely of Fellows, who are not "employees" under the Act, the Petition should be dismissed.

B. **Definition of "Employee" under the Act turns on Common Law Principles**

At the heart of this case is whether Fellows are employees under Section 2(3) of the Act.

That section states:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this subchapter explicitly states otherwise, and shall include any

individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor or any individual employed by an employer subject to the Railway Labor Act, 45 U.S.C.151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.²¹

Understandably, this tautological definition provides little guidance as to who might be considered an employee under the Act. However, the term “employee” has been interpreted by the courts in cases arising both under the Act as well as under other statutes. Such interpretations of the term “employee” have rested upon the common law or the common understanding of the term. For example, in *Nationwide Mutual Insurance Company. v. Darden*, 503 U.S. 318 (1992), the Supreme Court, in interpreting Section 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), explained,

[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. . . . In the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master servant relationship *as understood by common law agency doctrine*.

Darden, 503 U.S. at 322-23 (emphasis added).

A few years later, in *NLRB v. Town & Country Electric, Inc.*, 526 U.S. 85 (1995), the Supreme Court held that an individual may be a company’s “employee,” within the terms of the Act, even if, at the same time, a union is paying that individual to help the union organize the

²¹ 29 U.S.C. § 152(3). The term “employer” defined at 29 U.S.C. § 152(2)

employees of that company. In the course of affirming the Board’s decision that such a “union salt” was an employee, the Court first dealt with the statutory language of Section 2(3):

For one thing, the Board’s decision is consistent with the broad language of the Act itself-language that is broad enough to include those company workers whom a union also pays for organizing. The ordinary dictionary definition of ‘employee’ includes *any ‘person who works for another in return for financial or other compensation.’* American Heritage Dictionary 604 (3d ed. 1992). *See also* Black’s Law Dictionary 525 (6th ed. 1990) (an employee is a ‘person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed’).

Town & Country Electric, Inc., 526 U.S. at 90 (emphasis added). The Court further reiterated that the term “employee” must be read consistently with its common law meaning, citing *National Mutual Insurance Company, supra*.

In *Columbia*, the Board – basing its decision primarily upon an analysis of what constitutes a common law employee and citing with approval the Supreme Court’s analysis in *Town & Country Electric Inc.* – held that graduate and undergraduate student assistants at that institution were employees within the meaning of Section 2(3) of the Act. The Board overruled its previous decision in *Brown University*, 342 NLRB 482 (2004), which held that graduate and undergraduate teaching assistants were not statutory employees because they were “primarily students and have a primarily educational, not economic, relationship with their university.” *Id.* at 487. Since *Columbia*, the Board has not had occasion to consider any subsequent cases involving graduate teaching assistants, research assistants, or other graduate students who receive financial support from their universities.

While *Columbia* opened the door for graduate assistant unionization at private universities, the decision ***did not hold*** that all graduate students have the right to unionize or that

all graduate students are employees. Nor did the Board rule that all graduate students who receive any type of financial support from their universities are employees. The Board has no jurisdiction over students; it has jurisdiction only over statutory employees. In order to fall within the ambit of the Act, the employment status of a student must be established. Thus, the Board in *Columbia* found only that the “student assistants *who have a common-law employment relationship* with their university are statutory employees under the Act.” *Columbia*, 364 NLRB at 1081. This is at the core of the decision and serves as controlling precedent for the instant case.

C. *Columbia* and Application of the “Common Law Employee” Principle to Graduate Assistants

This case presents a study in contrast between Fellows on the one hand and graduate assistants on the other hand. Therefore, in order to reach a decision here, it is important to first review how the *Columbia* Board reached its conclusion that research and teaching assistants at that institution are common law employees.

The Board in *Columbia* began its analysis by explaining how, in its judgment, the earlier *Brown* decision was wrongly decided. It determined that the Board in *Brown* inappropriately focused on the overall relationship between the graduate students and their university when it held that such students “are primarily students and have a primarily educational, not economic, relationship with their university.” *Brown*, 364 NLRB at 487. Based on this principle, the *Brown* Board found that such students were excluded from an Act that centers on economic relationships between employer and employee.

The *Columbia* Board chose to pivot away from this “primary relationship” test, dismissing it as unnecessary to establish employee status. Instead, the Board focused on whether the disputed students were employees under the common law, regardless of what other

relationship the students might have to their institution. The Board concluded that there was no reason why such students could not be considered *both* students *and* employees, provided the students fell within Section 2(3) of the Act. *See Columbia*, 364 NLRB at 1081 (“Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.”).

The Board then turned to the question of whether or not the graduate student assistants at Columbia were employees under the Act. Initially, the Board reviewed the prior 2000 decision in *New York University*, 332 NLRB 1205 (2000), that had first established that graduate assistants could be considered employees under the Act – a decision overturned by *Brown* four years later. The *Columbia* Board cited with approval the earlier *New York University* decision, noting that “the Board examined the statutory language of Section 2(3) and the common law agency doctrine of the conventional master-servant relationship, which establishes that such a ‘relationship exists when a servant performs services for another, under the right of control, *and in return for payment.*’” *Columbia*, 364 NLRB at 1081, quoting 332 NLRB at 1206 (emphasis added). The *Columbia* Board chose to return to that analysis:

[I]t is well-established that when Congress uses the term ‘employee’ in a statute that does not define the term, courts interpreting the statute ‘must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning’ of the term with reference to common-law agency doctrine.

Id., at 1083, quoting *Town & Country Electric*, 516 U.S. at 94.

In applying these principles to the facts in that case, the *Columbia* Board first examined whether Columbia’s teaching assistants met the common-law employee test. The Board concluded they did, explaining:

[c]ommon-law employment... generally requires that the employer have the right to control the employee's work *and that the work be performed in exchange for compensation*. That is the case here. Here, the University directs and oversees student assistants' teaching activities... The record shows that teaching assistants who do not adequately perform their duties to the University's satisfaction are subject to corrective counseling or removal.

Instructional officers *receive compensation in exchange for providing services* to the University. Receipt of a full financial award *is conditioned upon* their performance of teaching duties. *When they do not perform their assigned instructional duties, the record indicates they will not be paid.*

Columbia, 364 NLRB at 1094 (emphasis added). The Board further explained:

...these payments are *not merely financial aid*. *Students are required to work as a condition of receiving this tuition assistance during semesters when they take on instructional duties*, and such duties confer a financial benefit on Columbia to offset its costs of financial aid... Indeed, in semesters where a student assistant would normally be required to work as a condition of funding, *he or she may opt not to work only if he or she finds a source of outside fellowship aid*.

Also, the stipend portion of the financial package given to assistants is generally treated as part of the university payroll and is subject to W-2 reporting and I-9 employment verification requirements.

Id. (emphasis added). Notably, when explaining that the compensation of teaching assistants was specifically conditioned on their performance of teaching services, the Board distinguished this compensation from “*fellowship or other non-work based aid*” that would not come with such restrictions. *Id.* at 1094 (emphasis added).

The Board then examined whether Columbia's research assistants should also be considered employees under the Act. The Board found that they, too, met the common-law definition of an employee, explaining:

The research assistants here work under the direction of their departments to ensure that particular grant specifications are met.

.... Further, a research assistant's aid package *requires fulfillment of the duties defined in the grant, notwithstanding that the duties may also advance the assistant's thesis, and thus the award is compensation.*

Id. at 1096 (emphasis added).

Then, foreshadowing exactly the situation in the instant case, the Board went on to say:

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

Id. at 1096-1097 (emphasis added). The Board further contrasted the status of a research assistant with those situations where there may be a general grant of financial assistance to a student without any service requirements:

It is theoretically possible that funders may wish to further a student's education by effectively giving the student unconditional scholarship aid and allowing the student to pursue educational goals without regard to achieving any of the funder's own particular research goals.

Id. at 1096.

In essence, that "possibility" is precisely the status that the MIT Fellows are in, as they receive unconditional aid to pursue their own educational goals unencumbered by the funder's own research goals. However, for the Columbia research assistants, that was not the case. Instead, the facts there demonstrated the requisite control by the institution and *the requirement* that the research assistants perform work on grants *as a condition of receiving their funding.* The Board wrote:

The funding here is thus *not* akin to scholarship aid merely passed through the University by a grantor without specific expectations of the recipients. Because Columbia directs the student research assistants' work and *the performance of defined tasks is a*

condition of the grant aid, we conclude that the research assistants in this case are employees under the Act.

Id. at 1097 (emphasis added).

Any fair reading of *Columbia* reveals that, in order to find employee status for a graduate student, *there must be a requirement that the student perform specific services for the university as a condition of receiving their funding*. The Board reiterates and refines this notion throughout its decision. What becomes clear is that in order for an employment relationship to be established, there must be an indispensable link that binds the compensation the student receives to services they are required to perform. The compensation will only be provided on the condition that the individual performs such services. Only then does one become a common law employee; only then does one become a statutory employee under the Act.

On the other hand, if there is no requirement to perform services in order to receive funding from a university, then an employment relationship will not be established. In the context of higher education, this principle forms the dividing line between compensation (*i.e.*, money provided to students on the condition of services performed) and pure financial assistance (*i.e.*, funding provided to a student to support their pursuit of an academic program). Similarly, this is also the dividing line between student and student-employee under the Act.²²

²² Indeed, in *New York University*, the Board, in first finding that graduate assistants are employees, used the same analysis in reaching their conclusion. The Board wrote:

In applying the common law agency definition of employee to the graduate assistants at issue here, it would appear that they clearly fall within that definition. *The graduate assistants perform services under the control and direction of the Employer, in exchange for compensation*. The Employer has specific expectations of graduate assistants that are often spelled out in departmental or program handbooks, by job descriptions, or by NYU representatives. NYU representatives supervise the work of the graduate assistants. The Employer provides the supplies and the place of work for the graduate assistants. In the case of TAs, NYU provides extensive training as to the nature of the services to be provided, including training on the application of NYU policies to the undergraduates. As for their compensation, graduate assistants' stipends are treated like any other personnel salary in that they are processed through the payroll department and distributed in biweekly checks. The IRS treats the stipends as taxable income or "salary for services rendered." Graduate assistants must complete certain forms, such as the INS I-9 form, which are required of employees, but which are not required of other graduate students. Finally, graduate assistants

D. Application of the *Columbia* Ruling to the Instant Case

When applying the *Columbia* decision to the facts of the instant case, the record evidence demonstrates that Fellows do not meet the common law employee test. Indeed, as explained in more detail below, both the documentary evidence and hearing testimony reveal that the financial assistance provided to Fellows is not conditioned on the performance of any services for MIT. As a result, and unlike the case with RA and TA funding, fellowships are held *by the graduate students themselves*. The funding is not tied to work on a specific PI or faculty member's project and, therefore, the funding is portable and allows the fellowship holder considerably more flexibility and discretion in pursuing their own academic and research objectives. Furthermore, fellowships lack several indicia of employment that the *Columbia* Board found relevant in determining that graduate assistants at that institution were employees under the Act.²³

1. No indication that there are any required services to MIT as a condition of receiving fellowship awards

a. Written policies and guidelines, web site descriptions, admissions and appointment letters, and underlying funding documents all establish that a Fellow does not have to provide services to the Institute as a condition of receiving their funding

As explained in the Facts section, *supra*, there are a variety of factors that demonstrate the material differences between graduate assistants and Fellows. First, MIT's written policies

are subject to removal or transfer. Based on the foregoing, it is clear that the graduate assistants sought by the Petitioner meet the statutory definition of employee under Section 2 (3) of the Act.

332 NLRB at 1217.

²³ MIT makes no distinction between the various types of fellowships delineated in Employer's Exhibit 31. Whether the original funding source of the fellowship is from the Institute, a particular department, the government, or a private foundation, all of fellowship funding on Employer Exhibit 31 is provided to graduate students by MIT. However, none of these fellowships requires service to the Institute.

and related documentation clearly establish that Fellows have no service obligations to the Institute as a condition of receiving their funding. This is in sharp contrast to the written policies, guidelines, terms of appointment, and other relevant documentation concerning RAs, TAs, and Instructor Gs.

For example, under the classification system provided on the OGE website, the Institute pointedly distinguishes Fellows from assistantships. Research assistantships, teaching assistantships, and instructor-G roles are all listed as “Appointments,” with various descriptions of work duties that pertain to each appointment and with statements of how many hours of work are expected from the recipients. Fellows, on the other hand, are separately listed and described under the “Awards” section of the website. The Institute’s description of the status of Fellows could not be clearer on the lack of service requirements:

A fellowship is an award to a grad student that covers tuition partially or fully and also provides a stipend to help defray living expenses. Most awards are made on the basis of merit but in some circumstances can be based on financial need.

Unlike the teaching and research assistant, the fellowship recipient *generally does not have formal teaching or research obligations to a sponsored research grant.*

(Er. Ex. 13 (emphasis added)).

Consistent with the OGE website, Fellows are not formally “appointed.” Instead, they are “awarded funds” with no service contingencies. In other words, rather than being appointed to what can be described as an employment classification, the student who receives a fellowship simply carries the honorific title of “Fellow” to indicate they are receiving award funds to help meet their living expense needs and tuition obligations. This distinction in the OGE’s website signals to the reader that there is indeed an important fundamental difference between the two: that money secured via a fellowship is an “award” that is bestowed on the fellow with no

concomitant work expectation other than successfully working towards one's degree. The research assistantship (or teaching assistantship) comes with compensation and job duties tied to receiving that compensation.

The OGE website also explains the “terms of appointment” for assistantships, underlining the appointment period; setting forth the 20 hours of work per week obligation; explaining holiday allowances; allowing vacation of two weeks for 12-month appointments, with supervisor approval; and, stating that reappointment to an assistantship depends on academic progress “as well as work performance.” A student’s appointment “to an assistantship may be terminated at any time if progress in the graduate program is unsatisfactory *or if the student is not carrying out the duties assigned.*” Under the “rules and requirements” section, students holding full-time assistantships need MIT approval for “additional employment.” Supervisors have to approve a student’s absence from the Institute during a *working* period. (Er. Ex. 12).

International students, tightly restricted as to the number of hours they can work while on visa status,²⁴ who might be considering an assistantship are urged to “review information regarding on-campus work,” so that they can consider the fact that taking on a full-time assistantship with its 20 hours a week work obligation will preclude further on-campus

²⁴ F-1 visas are by far the most common form of international student visa in the United States. F-1 students must maintain the minimum course load for full-time student status. F-1 status allows for part-time, on-campus employment. As reported on the U.S. Immigration and Customs Enforcement (ICE) website, an F-1 student has three main employment-related guidelines:

- May work at any qualifying on-campus job that does not displace a U.S. citizen or LPR.
- May work up to 20 hours per week while school is in session (full-time during those periods when school is not in session or during the annual vacation)
- Should report their work to you and receive a certification letter to present to the Social Security Administration in order to be able to receive a [Social Security number](#).

Not complying with these guidelines for on-campus employment may be a violation of status that could result in the F-1 student having to leave the United States. <https://www.ice.gov/sevis/employment#onCE>. Students on J-1 visas have similar restrictions. (*See* Argument, Section III.B, *infra*, for further discussion).

employment. (*See* Argument, Section III. B *infra*, for further discussion of work restrictions on international students).

No similar language appears anywhere on the OGE website or in Institute policies for Fellows. Nowhere in the description of a fellowship award does one find references to vacations, supervisors, work hours and obligations, observance of work holidays or any similar employment-related concepts.

In addition to the central OGE website, several departmental websites and written guidelines also describe graduate assistantships and fellowships in striking contrast. (*See generally*, Er. Exs. 22-25). For example, the Mechanical Engineering²⁵ department's (MechE) *Guide to Graduate Study in Mechanical Engineering* states: “[t]he majority of students in the MechE Department are supported by research assistantships, which are appointments *to work on particular research projects with particular faculty members*. The faculty members procure research grants for various projects and *hire* grad students to carry out the research. RAs *are required to do a certain amount of work for the grant that funds them*.” (Er. Ex. 22 (emphasis added)).

Similarly, “[t]eaching assistants are appointed to work on specific subjects of instruction,” and are required to “provide support to faculty instructors...” Due to the workload of a TA, “it does not leave much time for thesis research, and may extend the time [a] student will need to complete a degree.” *Id.*

By contrast, MechE's *Guide* states that “a fellowship provides students with a direct grant, and leaves them open to select their own research project and supervisor.” There is no stated requirement that Fellows must work on any PI/faculty member's research project or

²⁵ Mechanical Engineering is MIT's second-largest department in terms of number of graduate student appointments/awards.

course, or otherwise provide services to MIT. *Id.*

The Department of Aeronautics and Astronautics (AeroAstro) explains on its website that an RA works “on a project tied to a specific advisor,” and that most of the funding supporting RA appointments “comes from industry or government sponsors (such as NASA, Boeing, US Air Force, NSF and many more).” (Er. Ex. 24). In its *Guidelines for Research and Teaching Assistants*, AeroAstro further explains that an “RA is assigned to a research supervisor in charge of the research project in which the Assistant will participate” and a TA “is assigned to the faculty supervisor in charge of the specific course(s) in which the Assistant will participate.” Because these “[a]ssistants are responsible to their supervisors as are *other employees of the department and Institute*,” they are bound by certain terms of appointment (e.g. hours of work) and can be “terminated if the work performed is deemed unsatisfactory by the supervisor.” (Er. Ex. 24). Fellowships, on the other hand, “generally recognize superior academic achievement” and “do not require a student to also work as an RA or TA.” Again, there is no mention of any service requirements, or any terms or conditions of employment, for Fellows. (Er. Ex. 24).

The Department of Materials Science and Engineering’s (DMSE) website explains that a “a research assistant works closely with a faculty supervisor and with other graduate students on a sponsored research project.” The “research assistant is an employee of the Institute and is required to devote full time effort to the research project, at the very minimum during normal working hours, with the exception of the time spent in scheduled lecture or laboratory classes for which the student is registered.” (Er. Ex. 16). Similarly, a TA’s duties include various types of instructional support. A “teaching assistant is an employee of the Institute and is expected to devote full time to teaching and research with the exception of time spent in scheduled lecture or laboratory classes for which the student is registered.” (Er. Ex.16) The DMSE website also

details certain terms and conditions of employment for TAs and RAs, including time off, vacation, and employment authorization requirements. By contrast, fellowships are described as “an honor conferred by the Department.” (Er. Ex. 16) There are no stated terms of employment or service requirements for Fellows.

In addition to these OGE and departmental policies and guidelines, there is a marked contrast in the admissions and award letters given to Fellows versus recipients of RA or TA appointment letters. (*See, generally*, Er. Exs. 26-30, *compare to* Er. Exs. 43-50). For example, the EECS department’s appointment letter to an RA outlines work expectations, vacations, and other indicia of employment in great detail. (Er. Ex. 29 at pp. 1-6). By contrast, a letter from that same department notifying a student that they have been selected as a Presidential Fellow simply refers to the amount of the fellowship, with no service requirements or stated terms of employment. (Er. Ex. 29 at p. 7).

The lack of service requirements for Fellows is also apparent in the documentation through which MIT obtains certain funding for its fellowship programs. The largest number of fellowships come from MIT’s General Institute Budget (GIB) or unrestricted funds at the department, School or Institute level. (*See* Er. Ex. 31). Others come from gift funding, which sometimes is given for central and broad fellowship programs and other times to departments or based on demographics or areas of study. The largest source of federally sponsored fellowships is the National Science Foundation Graduate Research Fellowships Program, with some 350 students on active NSF fellowships. None of these (or other sources of MIT fellowships) require service of any kind to the Institute as a condition of receiving and keeping the fellowship funding. Some explicitly forbid it.

Collectively, the pattern is clear that it is antithetical to the very concept of a fellowship

to require any type of work or service from the Fellow, except for maintaining their academic progress towards a degree.

b. Testimony corroborates the documentation establishing that Fellows do not have to provide services as a condition of keeping their funding

In addition to the substantial documentary evidence, testimony at the hearing provides further support regarding the lack of service requirements tied to fellowship funding. For example, Vice Chancellor Waitz explained:

Fellowships are considered to be prestigious awards of financial support that give you the freedom to choose among multiple faculty members that you may work with. They are awards to the individual, so that if you were to come in and get a fellowship from the Department of Aeronautics and Astronautics, and you initially were interested in working with me, but then got interested in working with someone else, it would give you an opportunity to move and work with that other person. And, importantly, it doesn't come with additional work requirements. So it gives you the most capacity to pursue your academics at MIT.

(Tr. 106-07).

Professor Anne White underlined the fact that no service is required for someone on a fellowship and recounted a situation in her department (Nuclear Science and Engineering) where a PI tried to assign grant-related tasks to a group of Fellows and, as noted in the Facts, Professor White stepped in to inform the Fellows that they did *not* need to complete the tasks. (Tr. 312).

Similarly, Professor Chris Schuh, former department head of DMSE, testified along similar lines, indicating that Fellows do not have the grant-based assignments expected of an RA, and further, that he would take action to correct a faculty member or PI who was requiring a Fellow to take on such grant-related tasks. (Tr. 430-32) Professor Schuh also testified about the Kavanaugh Translational Fellowship in his department for which he is program director. He explained that that fellowship (set aside for graduate students and postdocs) provides support for

technical scholars to broaden their skills in support of commercial translation and entrepreneurship. Kavanaugh Fellows are relieved of any lab work responsibilities. (Er. Ex. 54).

Professor Schuh explained:

Q. What responsibilities if any would a Kavanaugh fellow have?

A. Their responsibility would be to their technology and to the study of the translation of their technology to the real world. So they are intended to be liberated from all other concerns. In fact, this exhibit that we're looking at literally says that. They must be liberated from other concerns of the lab during the course of the fellowship so that they can focus on what they think they need to do to translate their technology out of MIT.

(Tr. 437).

Similarly, Director of Student Funding at Sloan, Joshua DeMaio, testified as to the lack of work obligations for their fellows.

Q. When a student is on fellowship support, what are they doing?

A. So at the beginning of the program there is required course work for the first 2, sometime 2 1/2 years of the program. Students are doing required course work, as well as research for their thesis. And after year 2, it's almost entirely original research for their thesis.

Q. Are there any requirements for a student to maintain fellowship support?

A. The only requirement is that they maintain satisfactory academic progress, which is required for all students to remain in the program.

Q. Does a fellowship award come with any service or work obligation?

A. No, it does not.

(Tr. 334-35).

Even Petitioner's first student witness admitted that she was aware of the 20 hour work requirement when she was appointed one term as an RA, but she testified that there was no such requirement when she was appointed as a Fellow. (Tr. 487-88).

2. Because fellowship funding is not tied to service requirements, it is more portable than RA/TA funding and provides more flexibility for students to pursue their own academic objectives

The absence of service requirements tied to fellowship awards is apparent in the portability of fellowship funding and the academic flexibilities that these awards provide to Fellows. As Fellows are not required to provide any service to the Institute, they enjoy significant freedom of movement and are not bound to any work supervisor to whom they must report for any work assignments.²⁶ With a fellowship, the funding follows the student; with an RA or TA, the funding is tied to working on a specific faculty member/PI's research project or on a particular instructor's course.

This flexibility allows a Fellow to select a lab, research group, or research project that aligns best with their academic research objectives, without worrying about whether any PI has available funds to support an RA position. As Professor Schuh testified, “[i]f a student is on a fellowship then ... they can join any group that will have them, because the PI doesn't need to raise research funds or have an active grant on, on which to put them. So it's definitely a much lower barrier to joining virtually any group.” (Tr. 434) Once they join a research group or lab, a Fellow, unlike an RA, is not required to pursue research projects unrelated to their own thesis (so that they can fund their education) or to conform their thesis research so that it aligns with the specific research objectives of a sponsored grant or contract. Fellows, unlike RAs, are not bound by the objectives or deliverables in any sponsored award. This means they are able to pursue

²⁶ Of course, all graduate students have a faculty advisor or thesis advisor to help them with their research direction and to their ultimate graduate degree. But that is not the equivalent of a Section 2(11) supervisor under the Act who supervises an employee's employment work. A thesis advisor assigns only academic work to a student that relates to that student's research.

thesis research on topics that might be adjacent to, or orthogonal to, any grant research being done in a particular lab or research group.

This flexibility also allows Fellows to move from one research group or project to another, without jeopardizing their funding (again, so long as satisfactory academic progress is made). Indeed, as Professor White explained, “[t]he fellowship is all about funding a person, rather than a project. And so they, they’re flexible. They just take that money with them.” (Tr. 313). Significantly, one of the *Petitioner’s own witnesses* confirmed the flexibility of having a fellowship and the fact that he was untethered in his academic pursuit, “[the NSF fellowship is] a source of funding, so it allows me to choose different labs[,]” (Tr. 481), and further confirmed there were no problems transitioning to different labs of his choosing, “because I was funded via fellowship for my first two semesters.” (Tr. 516).

Indeed, because of the flexibilities inherent to fellowships, MIT and its departments often use fellowship funding to assist students in certain hardship situations and to specifically *eliminate* any service obligations tied to prior RA or TA appointments. For example, Professor White testified that her department has a bridge funding program that provides fellowship funding to students whose RA appointments are terminated due to a loss of grant funding. This program enables a student—who has essentially lost the job they depended on to pay for school and living expenses—to maintain the necessary funding to complete their academic research toward their degree. Similarly, MIT’s Guaranteed Transitional Support program provides eligible students (*i.e.*, those in unhealthy advising situations) with guaranteed advisor-independent transitional funding, and specifically notes that “[w]hen possible, the department will try to give *the most flexible funding (i.e., a fellowship)*.” (Er. Ex.51, p. 3). As Prof. White testified, the MIT graduate students who participated in designing this program advocated for

maximum use of fellowships precisely because of the lack of service requirements, the portability of the funding, and the resulting flexibilities that come with fellowship awards. (Tr. 315-18; *see also* Tr. 205, 227, testimony of Vice Chancellor Waitz).

The bottom line is that RAs or TAs may lose their appointment and funding if they do not satisfactorily complete the work-related tasks assigned to them, if they decide to leave their research group or assignment, or if the work they were hired to perform no longer exists. None of this is true for Fellows. The funding is theirs, is portable and flexible, and is for them to use in support of their own individual academic objectives.

3. Fellowships lack other indicia of employee status that the *Columbia* Board deemed relevant to its analysis

In deciding that graduate assistants at Columbia were statutory employees, the Board pointed to several indicia of employment that existed for those student appointments. *See Columbia*, 364 NLRB at 1094; *see also, NYU*, 332 NLRB at 1218. While these and similar indicia of employment exist for MIT's RAs and TAs, they do not exist for Fellows.

For example, graduate assistants must fill out I-9 Employment Eligibility Verification forms mandated by the Immigration Reform and Control Act before they begin work as an RA or TA. Such forms are used to verify the identity and legal work authorization of all paid employees in the United States as required by law.²⁷ Since they are not considered employees, Fellows do not have to complete such forms.

Graduate assistants on 12-month appointments receive two weeks' vacation from work. Fellows do not need, nor do they receive, vacation from work because they are not working as

²⁷ Immigration Reform and Control Act of 1986, Pub. L. 99-603

employees in the first instance. Similarly, graduate assistants need supervisor approval to take time off from work; Fellows do not.

RAs and TAs can either be terminated mid-appointment or not reappointed to their position due to misconduct, poor work performance, or lack of continued funding for their appointment. When this happens, they lose their compensation. Fellows cannot lose their funding unless they leave the Institute or otherwise fail to make academic progress towards their degree.

The RAs and TAs are issued W-2 forms indicating their compensation and tax withholdings for the year; the Fellows are not issued W-2s. State and federal taxes are withheld from the paychecks of research and teaching assistants; no such withholdings are made from fellowship funds. Indeed, the tax code recognizes that scholarships and fellowships involve receipt of funds where no “quid pro quo” exists in order to obtain the funds. In interpreting the tax code, the Supreme Court in *Bingler v. Johnson*, 394 U.S. 741 (1969) noted that fellowships and scholarships are “relatively disinterested, no-strings educational grants, with no requirement of any substantial clear quid pro quo from the recipients.” 394 U.S. at 751 The MIT fellowships fit perfectly into this definition of “no-strings educational grants.”

The work performed by international student RAs and TAs is subject to, and counted against, the on-campus employment caps set by federal immigration law. This is not the case for the academic work and research performed by Fellows.

Such indicia of employment status were cited throughout the *Columbia* decision as evidence supporting the finding that RAs and TAs were employees. The absence of such indicia in this case, then, is telling.

II. THE PETITIONER’S LEGAL ARGUMENTS ARE FLAWED AND ITS REBUTTAL EVIDENCE IS INSUFFICIENT TO ESTABLISH THAT FELLOWS ARE EMPLOYEES UNDER THE ACT

In the sections above, MIT details the numerous and material differences between Fellows, on the one hand, and RAs, TAs, and Instructor Gs, on the other. The Petitioner did not offer evidence at the hearing rebutting much of the evidence presented by MIT. Instead, the Petitioner presented evidence from just four students out of a total of 1,472 Fellows.²⁸ None of this testimony, however, contradicts the general proposition that Fellows are not required to provide services to MIT as a condition of receiving their fellowship funding. Not a single student witness testified that there were services tied to their fellowship funding, or that their fellowships could be in jeopardy if they were not carrying out such services. Not a single witness testified that they were required to work on any particular faculty member/PI’s research project or course in order to keep their fellowship. To the contrary, several students acknowledged the portability of their fellowship funding, and their ability to take their fellowship awards to pursue academic research in separate labs or research groups. No student testified that there were any terms or conditions of employment associated with their fellowships, or that they were required to work any hours beyond what was required for them to make satisfactory academic progress on their own theses. Indeed, one witness verified that she had no required work duties or hours of work during the times when she has been on a fellowship award. (Tr. 487-88).²⁹ As set forth in more detail below, the additional testimony that the Petitioner

²⁸ Notably, and addressed further below, *none* of the Petitioner’s witnesses are international students, effectively ignoring the catastrophic ramifications to thousands of graduate students at MIT (and other institutions) if Fellows are determined to be employees and their thesis research is deemed to be employment services.

²⁹ In one case where she was awarded a “Friends of McGovern fellowship,” she was actually appointed as an RA, not as a Fellow, so that any work she did was appropriately considered employment work. In other words, despite the name of the particular financial award, she was properly appointed and compensated as an RA. If anything, this is evidence that MIT looks past the labels associated with certain funding sources and administers the funding based on the actual terms and rules imposed on the student recipient.

provided was irrelevant to the issues in the case, incomplete, or limited only to the personal experiences of the four individual student witnesses out of 1472 Fellows.

Despite all of this, the Petitioner advances several baseless arguments in support of its position that Fellows are employees under the Act. First, it argues that Fellows are *de facto* RAs and TAs and that the only difference between them is “the source of funding.”³⁰ (Tr. 17). Second, the Union contends that MIT’s fellowships are the functional equivalent of the training grants in *Columbia* and, therefore, the Board should classify all Fellows as employees. (Tr. 24). Third, the Petitioner appears to argue that all academic research towards a thesis is, by definition, service to MIT because part of the Institute’s mission is to discover and disseminate “new knowledge.” (Tr. 23). (See Argument, III). As explained below, none of these arguments is supported by *Columbia* or the record of evidence in this case.

A. Fellows are not *de facto* RAs and TAs

The Petitioner’s argument that Fellows are *de facto* RAs and TAs rests on several inaccurate or incomplete assertions. First, Petitioner argues they are *de facto* RAs because the student-witnesses testified that they conduct certain research in labs and research groups alongside RAs. This is unpersuasive for several reasons. For the graduate students in most research-intensive programs, such as Science and Engineering departments, as explained by Vice Chancellor Waitz, who has been at MIT for more than 30 years, “**the learning environment is the research lab or the research group.**” (Tr. 71). Just as the classroom is where they pursue their coursework, the lab or research group is where they learn how to conduct the academic

³⁰ The Petitioner never fully explained the relevance of the different sources of funding for fellowships. Indeed, *both* assistantship funding and fellowship funding come from various sources—from both within and outside of MIT. MIT assumes the Petitioner’s point is that RA funding comes largely from external sponsors (*e.g.*, the federal government and other research sponsors), while fellowship funding comes mostly (but not entirely) from internal MIT funding. Of course, TA support also comes from internal MIT funds.

research necessary to develop, write, and defend their theses. As noted above, Fellows elect to join these labs and research groups based on their own *academic interests and objectives*. As one student witness explained:

Q. And what is the -- can you explain how the selection process works?

A. Yeah. So when you select a lab there has to be mutual interest between the Principle Investigator and the student. And you also have to make sure -- that mutual interest is based on your research activity. The kind of projects that you want to do. And so that was matched for both of those -- for both labs that I was considering. Which was Dr. Jazayeri's lab and also Dr. He's lab. But I -- so I had kind of had to consider which of those was the better fit for me. (Tr. 368)

Once there, they may indeed conduct academic research alongside RAs who are also working in the research group. The same is true for students who are self-funded or funded directly on external fellowships – none of whom are included in the petitioned-for unit. All of these graduate students conduct research side by side *not because they are all employees*, but because they share something else in common—they are all enrolled graduate students who are required to conduct thesis research to earn their degrees, who are graded and receive academic credit for this research.

The RAs in these groups, however, are on different footing with respect to their employment obligations to MIT. They are under the direct control and supervision of the particular PI/faculty member who controls their funding and supervises the sponsored or other research project on which the RA works. While the RAs might also be conducting their own academic research in their research group, their RA work must align with any objectives or deliverables in the award or contract on which they are supported. Unlike the Fellows and self-funded students, the RAs may be required—as part of holding their RA appointments—to perform specific tasks that either advance the objectives/deliverables of the award, or involve grant-stewardship or reporting obligations.

The deliverables or objectives of an award can take many forms, from meeting certain contractual milestones to interim research products or results that emerge prior to the completion of the award. The RAs are frequently involved in presenting those deliverables to the sponsor, preparing presentations to the sponsor, and otherwise working on those unique expectations set by a given sponsor. (*See, e.g.*, Tr. 308 – testimony of Professor White).

Professor Schuh also explained:

Q. Are there what we've heard in past testimony deliverables on a grant?

A. Yes, absolutely.

Q. Can you describe what those are?

A. It depends on the sponsor. But, in general, you can think of it as sort of being a set of milestones that the research is aiming toward and which are expected to be completed in a timely fashion. And so some grants or contracts would actually have explicit lists of tasks that need to be completed in each year of the program. Those tasks might include such things as completing a screening of materials, analyzing data from a particular type of test, achieving a certain design goal, things like that.

Q. Do those things have to be reported to the sponsor periodically on some grants?

A. They do, yes.

(Tr. 425).

An RA may also be required to perform certain grant-stewardship and other contract administration tasks. For example, they might be required to assist with grant renewal processes, make certain periodic reports to the sponsor, or assist with other requirements and expectations of the sponsor or contract monitor. An RA may be asked by a PI to perform tasks that go beyond academic requirements. Vice Chancellor Waitz explained, for example:

So if a student is an RA and they are working on a specific research contract or grant, there will be very specific things delineated in that research contract or grant that need to be accomplished by a particular date typically. And the faculty member would be in that case with an RA, would be telling them we need to finish these things by a certain period of time. And it would be a very specific task.

(Tr. 257-258)

Some of the grant-specific work would also involve periodic meetings with sponsors, as

Professor Schuh explained:

I would say almost all sponsored grants would involve interaction of the PI and, and the students with the, the contract monitor or the sponsor. In the case of funding from the government such as the Department of Energy or the Department of Defense, this would frequently come in the form of a meeting. So once every year or two, one goes to a meeting of all the contractors in a certain division of the Department of Energy and reports on their research results and so on. Students are often participants in such things and would show posters or give talks. For other sponsors, in particular industry and some of the -- some of the other government agencies, it would be common for those sponsors to show up on campus in order to participate in a meeting, and see the lab and see the results.

(Tr. 426). RAs are also evaluated on their work performance. (Tr. 161).

As a result of these significant differences, Fellows and RAs are also treated very differently when it comes to pre- and post-award sponsored research administration. When a faculty member/PI applies for a grant, for example, they do not list any Fellows or self-funded students as anticipated members of the research staff for the grant. The compensation of an RA is an expected expense of a proposed grant and the number of RAs to work on the grant is so listed. Fellows and self-funded students, on the other hand, are not listed as research staff on grant applications even though they may be doing their own academic research in the same research group.

With regard to post-award administration, Vice Chancellor Waitz explained that research assistants' compensation is a direct charge to research awards; the same is not true for Fellows.

They are not regarded as being necessary for completing the work on the contract or grant. And there is very rigorous, detailed rules that we follow called Uniform Guidance, which I believe come

down from the Office of Management and Budget, as to who we list on grants, who we don't list on grants, who we're allowed to charge to grants, and who we're not allowed to charge to grants. So RAs are listed on grants and we can charge their salary and a fraction of the tuition to the grants. Fellowship students are not. Again, they're not considered necessary to the specific objectives and deliverables of that grant or contract respectively.

(Tr. 166; *see also* Tr. 89, 145, 161-62).

In summary, unlike with Fellows, RAs have a contractual obligation to provide specific services associated with their PI's research project as a condition of receiving those funds.

Second, some student-witnesses testified that they dedicated what they considered to be the same hours of work on their research projects regardless of their classification status (*i.e.*, Fellow v. RA). However, as Vice Chancellor Waitz explained, the amount of time a typical student spends conducting their academic research usually exceeds any time commitment they might have as a RA or TA. As noted above, graduate students can register for up to 36 thesis units (equivalent to 36 weekly hours of academic effort). In some cases (but not others), the research that a student performs in their capacity as an RA can be used toward their thesis research. When that happens, MIT and the graduate student experience what Vice Chancellor Waitz described as a "win win" – *i.e.* the student is able to conduct approximately 36 hours of academic research without having to dedicate an *additional* 20 hours a week toward a separate project. (Tr. 107). In these scenarios, the RAs are still subject to the same terms and conditions of employment as other RAs, but they are essentially able to repurpose the research they did for their jobs and use it for their academic program as well. And even where there is such overlap between RA research and the student's academic research, the RA must stay tethered to the PI's project as a condition of receiving their funding. While they are free to leave, the consequence for doing so is the need to find new funding or to otherwise finance their education and living

expenses. If and when such an RA later receives a fellowship, but *elects* to stay in the same research group for academic reasons (which is up to them), it is indeed likely that the total level of effort will not change. But that is because the large majority of the student's prior RA research was able to be repurposed toward their thesis in the first place. It says nothing about whether the fellowship has any service requirements or other terms and conditions of appointment.

Furthermore, it is telling that the Petitioner did not present any student witness who is unable to take advantage of this "win win." In those cases, there is no overlap between the research a student must do for their RA appointment and the separate research they are pursuing for their thesis. The RA role sits entirely on top of the student's academic effort. (*See*, Tr. 338 – Testimony of Mr. DeMaio). OGE and departmental rules place unit-enrollment caps on these students specifically to account for the extra effort involved in the student's RA appointment. (Er. Ex. 53). If a student in this scenario later received a fellowship award, their total level of effort *would in fact drop* by an amount commensurate with the effort on the RA appointment (*e.g.*, would drop 20 hours/week for a full-time RA appointment). Again, any change in work hours when a student moves from RA to Fellow is entirely driven by whether a student's RA work can be used toward their thesis. The Petitioner provided no evidence disputing this point.

MIT has a system for estimating the number of hours a student spends on research towards their thesis. Time spent by graduate students on their academic research is recorded into the MIT system. A student signs up for and has to achieve a number of thesis units as a requirement for graduation. The recorded thesis units, in turn, come from students enrolling in particular research courses each year (different course titles depending on the department), all of

which focus on their academic research. They are graded on this work and receive academic credit for it. (With regard to this system, see Vice Chancellor Waitz's testimony at Tr. 75-76)

This was also confirmed later in the hearing. For example, one student testified to taking the course "Introduction to Research" and acknowledged receiving academic credit for such course work.

Q. And did you also take the again, the intro to research course that you had in the first semester?

A. That's correct.

Q. Okay. And just in subsequent semesters, you were also taking and signed up for the graduate thesis course correct?

A. That's correct.

Q. And you received you had credit for those courses as well, correct?

A. Correct.

Q. Okay. All right. You were asked at one point, I think a couple of points by Mr. Meiklejohn that when you moved from a fellowship to being an RA and maybe back to a fellow, at some point, you were asked whether there was any change in the research that you did? I believe you answered there really wasn't, right?

A. That's correct.

Q. And also he asked you whether there was a change in hours. Can I assume that your academic hours of doing research that you were talking about?

A. Those are research hours. So the amount of hours I would take to perform research every week, which relatively stay the same across those boundaries.

(Tr. 516).

On rebuttal, Vice Chancellor Waitz, between days of the hearing, had checked with the MIT Registrar as to whether all of the four student witnesses who had testified had similarly been signed up for thesis units at the time they were performing the research and/or contributions to articles to which they testified.

Q. And what did you find in examining their academic research units, then?

A. That the entire time they were engaged in research activities, they were also enrolled in a number of different subjects. Depending on the department for which they get academic credit for research, and then they're ultimately graded on their performance on those subjects.

(Tr. 520; *see also*, Tr. 525).

In other words, while the Petitioner tried to establish that the various work the students were performing as Fellows was actually no different from the work of a typical RA, , such work was in fact purely *academic research work required for their degree* and resulted in a grade and academic credit following completion of the various research courses to which Vice Chancellor Waitz and others testified. The student witnesses did not testify to the contrary.

Two Union witnesses testified to teaching while on fellowship awards. However, both students are in programs (Biology and Brain and Cognitive Science) that require teaching for all students as part of their academic requirements—including self-funded students. This is an academic requirement in approximately 10 of MIT's 109 graduate degree programs, and is a requirement that exists for all students in those programs *independent of funding status*. (Tr. 87-88). Therefore, any student who is fulfilling this academic requirement while on a fellowship award is not doing so *as a condition of receiving their fellowship*. To the contrary, it is their *degree* (not their funding) that is conditioned on their participating in their department's academic teaching requirements. As Vice Chancellor Waitz confirmed, if that academic requirement was not fulfilled, the student would not graduate:

Q. Are these -- is teaching an academic requirement for all students in those departments independent of funding status?

A. Yes, it is.

Q. What would happen if a student didn't fulfill the academic requirement to each?

A. They would not graduate. I'm dealing with a couple of cases like that right now.

(Tr. 88). This same requirement would exist whether a student was on a fellowship, was independently wealthy and self-funded, or was on any other type of financial support from MIT or elsewhere. Accordingly, both student witnesses were enrolled in credit-bearing courses and received grades toward their degrees for their teaching performance. (Tr. 525-26).

The Petitioner introduced evidence of two students being co-authors on papers published in *Nature*, a leading scientific journal. The invitation to one of the student witnesses to be a co-author on a resulting *Nature* paper was not the result of required service, but a recognition that some of her own academic research was useful and relevant to the paper being revised by a faculty member. (Pet. Ex. 24). The same is true of the last student's contribution to and co-authorship on another *Nature* paper. (Pet. Ex. 27). In both cases, the students were invited to be co-authors in recognition that their academic research was relevant to the papers, not as a result of any required services relating to their fellowship.

To the contrary, as Vice Chancellor Waitz clarified, all students (including graduate students and undergraduate students) who make scholarly contributions to academic papers could be listed as co-authors on those papers. Being listed on an academic paper is simply a reflection of one's scholarly contribution to that paper. It is not indicative of employment status.

Q. Okay we heard testimony from a couple of students who contributed to published papers based on some of the academic research that they had done while a student at MIT this happened regularly at MIT?

A. Yes. *This is a very regular occurrence for grad students and even undergraduate students at MIT it. It happens almost every day we have papers being published with students contributing to those papers.*

Q. Does it matter what the appointment or award status is for the students involved.

A. No.

(Tr. 523-24 (emphasis added)).

Some of the students testified that they perform certain administrative or lab-stewardship functions. Again, this is not indicative of employee status. There are a number of basic duties that all members of a research group must perform in order to ensure a suitable research and learning environment for all lab members. For example, just as students in an undergraduate lab course must ensure that their lab equipment is cleaned and stored after use, graduate students in research groups must contribute to the stewardship of research specimens (*e.g.* animals) and other basic lab-stewardship responsibilities. No student testified that they were assigned specific or additional tasks as a condition to receiving their fellowship funding. Importantly, no student testified that if they were self-funded (as opposed to being on fellowship support from MIT) they would not have been asked to perform these same basic duties. Such student responsibilities go hand in hand with learning how to conduct research in a safe and professional research environment.

Two of the four student witnesses testified they performed some work relating to their faculty advisor's sponsored research project. The first case involved a student who testified that, while on a fellowship, he wrote a quarterly report on a sponsored research project, has participated in sponsor meetings, and updates the research group's web site from time to time. (*See generally* Tr. 400-17). In one other instance, another student, also on a fellowship, was asked to arrange a conference room for a potential speaker for the members of his faculty advisor's lab, (Pet. Ex. 28), and on another occasion was asked to contribute "two or three sentences" of suggested work that might be done in subsequent months on a pre-existing NIH grant. He was also asked to help edit a grant proposal from a researcher at an external organization who had asked the student's faculty advisor for his thoughts on a part of a grant proposal that the researcher was developing. It is not clear whether any of this was truly

“working on a grant.” The closest he may have come to working on a grant might be found in Petitioner’s Exhibit 30 where he was involved in working on a grant planning spreadsheet update. Neither student testified as to whether they had expressed interest in working on grant-related assignments for their own academic advancement, and neither stated that their fellowship funding was tied to performing this work.

Furthermore, even if these students were required to perform these tasks as a service to their faculty advisors, MIT considers these two cases to be, at worst, rare errors and exceptions to the general rule that Fellows are *not* required to work on a faculty member’s/PI’s research projects and, frankly, should not be. Indeed, MIT presented testimony from one current and one former department head, both of whom testified that, if/when they learn of faculty and PIs assigning RA-type work to Fellows, they intercede and take appropriate corrective action. Professor White explained how she informed a group of Fellows that they were not required to perform grant-related tasks that had been requested of them, and Professor Schuh also testified that if he found out about a Fellow being required to perform such tasks, he would take corrective steps to stop it. (Tr. 312; 432).

The Petitioner did not provide any evidence rebutting the testimony of Profs. White and Schuh, or any evidence suggesting that the tasks described by some of the Union’s witnesses is in any way common or representative of the typical fellowship student experience. Without more, the Petitioner’s evidence amounts (at best) to a pair of isolated examples among a group of nearly 1,500 Fellows.

Finally, in addition to the explanations above for students in research-intensive programs, it is also worth emphasizing that several hundred Fellows—including those in Sloan, Economics, and several humanities departments—do not conduct *any* academic research in labs or research

groups. (Er. Ex. 15). Due to the nature of these disciplines, graduate students conducting thesis research are instead advised at a more individual level and their academic work does not require the use of lab equipment and other research facilities. Therefore, when these students serve as RAs, there are simply no other Fellows or self-funded students who are working alongside them. Notably, the Union did not present any student witnesses who are enrolled in these departments.

B. The Union's Argument on Training Grants is Legally and Factually Incorrect.

The Union contends that MIT's fellowships are the functional equivalent of the training grants described in *Columbia* and, therefore, should be treated the same. This position is legally and factually incorrect.

Unlike the rest of MIT's fellowships, training grants are block grants that come to MIT to support a training program approved by a federal sponsor: the NIH. The NIH provides these block grants to a particular MIT department or PI, which is unlike the case for the NIH's separate fellowship program for individual awardees. (*See e.g.*, Er. Ex. 39). MIT is permitted to charge the training grant for the fellowships it awards under the program, which is not generally the case for Fellows working in research groups holding federal research funding. Training grant awards are also not a significant portion of MIT's total fellowships – and there were only 40 training grant fellowships (either full or partial) out of a total of 2,057 total fellowship awards at last count. (Er. Ex. 31).

Second, training grants are not administered the same way across all institutions of higher education. Some training grants require students to engage in training requirements separate and distinct from their academic programs—as appears to be the case in *Columbia*—and some may not. Vice Chancellor Waitz, who has deep knowledge of how graduate education works around the country through his associations with peers from other institutions, explained:

The training grants in most cases at most institutions will be something which has requirements above and beyond the academic requirements. They often come from multiple departments coming together and providing this unique training requirement for the NIH trainees. At MIT, our largest one of these is in the Department of Biology. And the Department of Biology, through our grant relationship with the NIH, has defined our training grant to be one in the same, identical to our academic requirements at MIT. So the students, Department of Biology training grant, have no requirements above and beyond academic requirements. And we, therefore, appoint them as fellows consistent with the way that we define fellows as are there [no] additional work requirements or duties above and beyond their academic requirements.

(Tr. 234-35).

MIT submits that, where a training grant student is not required to engage in specific training activities over and above the student's core academic requirements (which apply to *all students* in the relevant academic program), the student does not meet the common law employee test articulated in the *Columbia* decision. Indeed, where a training-grant-funded student's obligations are *exactly the same* as those of self-funded students, there is simply *nothing conditioned on the student's receipt of that funding* (apart from the general obligation of all students to make satisfactory academic progress).

Training grants at MIT involve academic work, not service to the Institute. Therefore, they should be treated no differently than any other type of fellowship award. To the extent the Board rules otherwise, there is no basis to extend that decision beyond the few-dozen students who are specifically funded on training grants.

III. THE PETITIONER’S CONTENTION THAT ALL RESEARCH DONE BY A FELLOW CONSTITUTES EMPLOYMENT WORK IS ERRONEOUS AND CAN LEAD TO ADVERSE AND UNINTENDED CONSEQUENCES FOR THE INSTITUTE, THE PETITIONER, AND THE FELLOWS

A. Academic Research Done by a Student in Furtherance of their Degree is Not Employment Work within the Meaning of the Act

The Petitioner next argues that the “fellows are conducting research and they are receiving compensation for conducting the research” and because of that, *without more*, “they are statutory employees under the common law test applied in *Columbia*.” (Tr. 17 – Petitioner’s opening statement). As argued by Petitioner’s counsel in his opening:

So our position is that once one of the students starts his or her rotation [in labs], they are starting to do work for the university. ...They are new employees, but they do immediately begin to contribute to the research of the laboratory.... And by doing research, a fellow, if the person is classified as a fellow, is furthering the mission of the university. And the mission of MIT is to educate and also to conduct to perform original research. And PhD students including fellows make a substantial contribution to the fulfilling that mission of MIT of performing original research. So after the first year -- so to be clear, our contention is once they go into the lab, a fellow is -- or once he or she starts conducting research, or participating, or helping with research, he or she is an employee.

(Tr. 20-21).

The key is they [fellows] are conducting research to fulfill the mission of the university. And that, that is almost by definition what a PhD student does is they conduct original research. That’s the whole point of being a PhD student is to come up with a final dissertation, a document showing that the individual has contributed something new to the knowledge of the world.

(Tr. 23).

Given the reality that *all* graduate students in research-intensive degree programs must perform academic research in order to write their theses and obtain their degree, the logical

extension of the Petitioner's position is that *any graduate student in these programs who receives any money from MIT, or any money administered by MIT on behalf of other organizations, is an employee*. This argument is not at all supported by the Board's decision in *Columbia* or any other case law. Indeed, this position stops just short of contending that all graduate students are employees, which even the Petitioner would agree is not supportable.³¹

Petitioner's argument incorrectly conflates two distinct concepts: academic work and employment work or services. Every graduate student in a research-based degree program must conduct academic work to achieve their degree: their original research leading to a thesis. In most Science and Engineering disciplines, this research has to be done in laboratories and collaborative research groups. This is beyond dispute. The collaborative nature of research demands it. But contrary to Petitioner's position, the academic research cannot *by itself* be considered employment work or service to MIT within the meaning of the Act, and cannot by itself be sufficient to establish a common law employee relationship. This is true even if the ultimate success of a graduate student enhances the reputation of MIT or fulfills its charitable mission of advancing knowledge and educating students. This is true even though a student – in this case, the Fellow – might be doing such academic work in a lab or research group setting.

While Petitioner cites *Columbia* for support, *Columbia* does not stand for the proposition that all research done by a graduate student is employment work. Instead, *Columbia* focused on whether the students in question – research and teaching assistants at that institution – were required to perform specific *employment* work or service *as a condition* of receiving compensation. The test in *Columbia* asks:

³¹ Even the Petitioner would admit that self-funded students who receive no money whatsoever from MIT, either because they have the means to pay for their education, or because they received fellowship aid that went directly to them and not the Institute, would not be employees.

In addition to the research one would expect of every graduate student in a research program, does the student *also* take on real employment work, for pay, that would put them under the Act and the jurisdiction of the NLRB?

The “work” at issue in *Columbia* was much more narrowly confined to the graduate assistants’ work on faculty members’ grants and courses, where there were required hours, assignments, directions, the possibilities of being terminated if the work was not performed well, and where the RA or TA was required to perform the work as a condition of receiving compensation. Indeed, the Columbia research assistants’ “work” came in the form of *specific* grant-related research and tasks that they were *required* to perform under the terms of their research assistant appointments:

The research assistants here work under the direction of their departments to ensure that particular grant specifications are met. Indeed, another feature of such funding is that the University typically receives a benefit from the research assistant’s work, as it receives a share of the grant as revenue, and it is relieved of any need to find other sources of funding for graduate students under a research grant; thus it has an incentive to ensure proper completion of the work in accordance with the grant. Further, a research assistant’s aid package requires fulfillment of the duties defined in the grant, notwithstanding that the duties may also advance the assistant’s thesis, and thus the award is compensation.

Columbia, 364 NLRB at 1096-97 (emphasis added).

This grant-based “work” is then placed in contrast by the Board to a student who is simply working on their own academic research towards a degree:

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

Id. at 1097.³² MIT's Fellows fall squarely into this passage of the Board's opinion.

Contrary to Petitioner's position, *Columbia* cannot possibly stand for the proposition that all research work a student undertakes to obtain their degree is employment work that transforms them into employees. Under that theory, every student who receives any money whatsoever from a university – whether it be in the form of a fellowship, scholarship, direct grant, loan or any type of financial aid – instantly becomes an employee if they happen to be doing research towards their degree. *Columbia* does not hold that *all* financial aid should be considered compensation, only that financial aid that is packaged with a requirement of performing services for a university can be viewed as compensation.

The Petitioner would also ignore all of the distinguishing elements of employment that only apply to RAs and TAs, and not to Fellows. These include the 20 hour workweek requirement; the fact that an RA or TA can be terminated for poor performance or other reasons; the entitlement to vacation and observance of holidays; the requirement to fill out I-9s; the issuance of W-2s; and the fact that supervisory approval is necessary for time off from work. The Petitioner sees these as irrelevant and trivial distinctions, but the *Columbia* Board – and, frankly, state and federal employment laws – found many of these indicia of employment relevant to its analysis.

The Institute acknowledges that, under *Columbia*, if an individual is performing work for a university as an RA, they are still a statutory employee even if their RA research also

³² See also *Columbia*, at 1099, n. 124, where the Board, in discussing the inclusion of undergraduate students with graduate student employees, separates out the educational component of a student's life from any employment that they may have. The Board noted:

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

contributes to the student's thesis and degree requirements. This is the "win win" scenario described by Vice Chancellor Waitz. But the reverse is simply not true. The fact that a student is conducting their own academic research towards their degree does *not* mean that they automatically become employees within the meaning of the Act because they happen to receive financial aid from the Institute or, from an independent source that is administered by the Institute. Again, such a holding would be far beyond what *Columbia* stands for and would be well beyond the jurisdictional authority of the Board, since at that point the Board would effectively be asserting jurisdiction over students, not employees.³³

B. The Distinction Between RAs/TAs and Fellows is a Well-Established One; Disregarding it May Lead to Significant Negative Consequences, Especially for MIT's International Students

The distinction between the employment services provided by RAs and TAs, on the one hand, and the purely academic work of Fellows, on the other hand, is not a distinction of MIT's own making. Rather, it is a well-established distinction that exists across several other legal contexts, including federal immigration law, federal tax rules, and federal regulations concerning the administration of sponsored research at universities. Disregarding this distinction, as Petitioner argues, could lead to significant negative consequences, especially for the thousands of international MIT graduate students who rely on this distinction to make timely academic progress and earn additional income at MIT.

³³ The Petitioner contends that both RA/TA stipends and fellowship stipends are processed through payroll and come from the same MIT bank account. This point is irrelevant and does not support the Petitioner's argument that Fellows are employees. For example, even though fellowship stipends may be processed through payroll for convenience, the differences in tax withholding between RAs and Fellows, as well as the absence of W-2s for Fellows, serve to distinguish the two.

Further, the Petitioner's point that Fellows are subject to the Institute's Intellectual Property policy just like RAs also proves nothing as to employment status. The IP policy applies to all "MIT faculty, students, staff, and others participating in MIT programs, including visitors" who make significant use of MIT funds or facilities. The policy is broad-based, not limited to employees (or even to MIT community members), and designed to address important rights and responsibilities that are not dependent on one's employee status at the Institute.

1. Federal Immigration Rules Differentiate Between Academic Work and Employment Services

MIT's graduate student population consists of several thousand international students, nearly all of whom are on either F-1 or J-1 visa status. (Tr. 51-52). Students on F-1 and J-1 visas must pursue a "full course of study" throughout their academic programs in order to maintain active immigration status. 8 C.F.R. § 214.2(f)(6); 22 C.F.R. § 62.4(a). A full course of study includes postgraduate study at a college or university (including programs requiring thesis research) as certified by the appropriate university official. 8 C.F.R. § 214.2(f)(6)(i)(A); 22 C.F.R. § 62.2. At MIT, a full course of study for a graduate student in a research-intensive program includes, among other things, original research culminating in a thesis. (*See* Er. Ex. 6; Tr. 69-70).

As these are *student* visas, not employment visas, federal immigration regulations set strict rules regarding the limited availability of employment opportunities for international students. Specifically, both F-1 and J-1 students are limited to 20 hours per week of on-campus employment during academic terms. 8 C.F.R. 214.2(f)(9)(i); 22 C.F.R. §62.23(g)(2)(iii). Because RA and TA appointments come with service requirements, the hours that students dedicate to those appointments are counted against this 20-hour/week cap. (Er. Exs. 10-11; Tr. 95-96, 136, 169-70). By contrast, the time spent by self-funded students, TAs, and Fellows pursuing their *academic research*, for which they receive academic credit towards their degrees, is *not* counted against this 20-hour/week cap. (Tr. 219-20). The same is true for the time spent by RAs conducting *academic research* over and above any research required by their RA appointments.

This differential accounting system is important because, as noted above, graduate students conducting thesis research often enroll for up to 36 units (equivalent to 36 weekly

hours) of thesis research during their time at MIT. (Tr. 75). If the Petitioner's position is accepted, and the Board deems that all thesis research performed by graduate students constitutes service to MIT, then MIT will no longer be permitted to exclude these 36 hours from counting against the 20-hour employment caps set by federal immigration regulations. In such a scenario, MIT would be required by federal law to ensure that international students on F-1 and J-1 visas spend no more than 20 *total* hours per week conducting any research or teaching at MIT (including any research on their theses).

This outcome would have substantial negative impacts on MIT's international students, who represent 40% of its graduate student population. Graduate students on full-time TA appointments would not be able to conduct any research during the terms in which they hold TA appointments. Graduate students on full-time RA appointments would not be able to conduct any research beyond the 20 hours/week spent performing their RA duties, even if their RA research is entirely distinct from, and does not advance, their thesis research – as is the case in several of MIT's departments. For students on full fellowship awards, MIT would be required to cap their total research time at 20 hours per week. Any international students who exceed 20 hours of weekly research work would be in violation of the terms of their visas and subject to deportation. In all of these cases, students would experience substantial delays in their ability to advance their academic work and, accordingly, would require additional semesters (if not years) to graduate. And, ironically, a student's receipt of a full-time RA or TA appointment—which is a mechanism for providing financial assistance to a student so they can pursue their academic program—would actually *prohibit* an international student from separately pursuing the very academic program that the RA/TA appointment was meant to support in the first place.

In addition, once an international student hits the 20-hour/week cap (inclusive of academic research, in the Petitioner’s view), the student would be prohibited from pursuing any additional on-campus employment opportunities. For example, a student on a full fellowship award would no longer be able to pursue a part-time on-campus job to help support themselves or their family. (Tr. 219-20). In other words, if the existing distinction between academic research and employment is not preserved, MIT’s international students (including those on fellowship awards, *and also those on RA appointments and TA appointments*) would need more time to graduate, and would have even fewer opportunities to earn income, as compared to domestic students at MIT. The position advanced by Petitioner would result in an inequitable two-tiered system that systemically disadvantages MIT’s international students. Against this backdrop, it is quite telling that, even though international students constitute approximately 40 percent of graduate students at MIT, (Tr. 51-52), none of the four student witnesses for the Petitioner was an international student.

2. Federal Tax Rules Draw a Similar Distinction Between Academic Fellowships and Compensation for Services Rendered

The United States Internal Revenue Service (“IRS”) defines a fellowship as “an amount paid or allowed to an individual for the purpose of study or research.” IRS, TOPIC NO. 421 SCHOLARSHIPS, FELLOWSHIP GRANTS, AND OTHER GRANTS, *available at* <https://www.irs.gov/taxtopics/tc421>. The portion of a fellowship that is attributable to “qualifying expenses” (which include tuition, fees, books, and other school-related costs required for attendance) is tax free, so long as the funding is *not* conditioned on the student providing any services to the academic institution. 26 U.S.C. § 117; (*see also* Er. Ex. 21). The portion of the fellowship that goes beyond qualifying expenses (which includes funding for living expenses) is subject to federal income tax. 26 U.S.C. § 117; (*see also* Er. Ex. 21). However, even though

these “non-qualified” amounts are taxable, only “wages” (*i.e.* employment income) are subject to federal withholding rules. 26 C.F.R § 1.45R-1; 26 U.S.C. § 3121(a). In addition, fellowship awards (both the qualified and non-qualified portions) are not required to be reported on a form W-2 by the institution that provides the award — again, provided they are not conditioned on employment service. 26 C.F.R. § 1.6041-3(n).³⁴

Consistent with the guidelines above, Fellows are not required to pay taxes on any portion of the fellowship award that is used for qualifying expenses. Because their fellowship stipends are not “wages” provided in exchange for services rendered, those payments are not subject to withholdings and are not reportable on Form W-2.³⁵ (Tr. 219). By contrast, the compensation of RAs and TAs is subject to tax withholding and is reportable on the Form W-2. (Er. Ex. 20; Tr. 133). If the Board were to accept the Petitioner’s position that there is no distinction between academic research and services to MIT, and therefore no difference between fellows and RAs/TAs, then MIT would be required to start withholding and reporting income taxes for Fellows as it does for RAs and TAs – which directly contravenes the U.S. Tax Code.

3. Federal Regulations Governing Sponsored Research Administration Also Recognize the Distinction Between Fellows and RAs

Finally, the distinction between Fellows and RAs is recognized in the regulations governing the administration of federally-sponsored research awards. The regulations state that fellowships are akin to “student aid” and are generally not chargeable to federal awards. 2

³⁴ There is a narrow exception for non-qualified amounts provided to “non-resident aliens.” *Id.*; *see also* § 1.1461-1(c)(2)(k).

³⁵ The Petitioner appears to argue that, even if Fellows’ stipends are not subject to tax withholding and W-2 reporting, they are nevertheless subject to federal income tax. That fact is a red herring and irrelevant to the issue before the Board. Indeed, the definition of “gross income” in the Internal Revenue Code is broad, and includes numerous items that are not tied whatsoever to employment status. 26 U.S.C. § 61. In other words, the fact that a particular type of payment (in this case, a stipend) is taxable says nothing about whether that payment is conditioned on employment services.

C.F.R. § 200.466. The exceptions to this general rule are narrow. First, fellowships can be charged to federal awards where the specific purpose of the award is to provide training to selected participants (as opposed to funding a specified research *project*), as is the case with training grants. Second, tuition remission and other forms of compensation can be charged to grants if, among other things, the student is conducting work that is “necessary” to the federal award and the payments to the student “are conditioned explicitly upon the performance of [this] necessary work.” *Id.*

Consistent with this framework, MIT charges a portion of an RA’s tuition, as well as the RA’s full stipend, to the federal grant on which the RA works. (Tr.165-66). With the exception of a few dozen students on training grants, Fellows are not charged to federal awards. (*See* Tr. 165-66.; Er. Ex. 15). The Petitioner’s argument that Fellows and RAs are one-and-the-same would disregard the clear separation that exists in the above regulations. Indeed, if there is no difference between RAs and Fellows—as the Petitioner would suggest—then MIT should be permitted to charge NIH, NSF, and other federal research sponsors for each Fellow’s stipend and a part of their tuition subsidy. This would potentially lead to millions of dollars of unbudgeted charges to federal sponsors – a clearly unintended and unreasonable result – and, at the very least, would result in a conflict with federal sponsored research administration regulations.

C. A Finding that Fellows are Employees, and Potentially Including them in the Current Bargaining Unit of RAs and TAs, Will Create Confusing and Unmanageable Consequences for Both Parties

In addition to the adverse consequences of adopting the Petitioner’s arguments summarized in Section B, *supra*, it is equally true that if the Fellows are found to be employees under the Petitioner’s legal theory, the practical result would be confusing to all parties and

adverse to the very Fellows the Petitioner seeks to represent. Among the myriad questions that would arise in the wake of such a finding include the following:

1. Given that Fellows currently have no service requirements, no hourly work requirements and no other “terms and conditions of employment,” what exactly would the parties negotiate over?
2. Would MIT be able to require specific services from the Fellows who had assumed they would have no work responsibilities? If they did so, would MIT be placed in a position of violating National Science Foundation guidelines that an NSF fellowship must not be conditioned on *any* service to the Institute?
3. If the Union prevailed and a student’s research work constituted employment work under the Act, would MIT violate the dictates of the many gifts and endowed fellowships that currently provide the funds to students for academic study *without* any expectation of work? Would such action actually violate the endowments, trusts or other legal instruments establishing the flow of fellowship money to certain MIT students? And if MIT chose not to assign any work to these new unit members, what does a bargaining unit look like where a third of the unit has no assigned job duties?
4. If a student’s academic research is equivalent to employment work, does that make the very research they do and how they do it a bargainable topic? Would the Union, on behalf of a fellow, be able to argue that the amount of academic research work (for which students receive academic credit) is excessive? Would the Board treat this as a mandatory subject of negotiations?
5. Would the parties have to negotiate over how many hours it takes to obtain a PhD? Or how well the graduate student Fellow is doing on their academic progress? Or whether the graduate student Fellow has met the requirements for graduation and conferral of a degree?

These constitute only a small portion of the significant and negative consequences that will arise if Fellows are deemed to be employees under the Act. If graduate students’ academic research is considered employment work sufficient to establish employee status, then the parties will likely be negotiating over academic issues that go far beyond the dictates of the Act. This would be an unlawful intrusion into the academic judgments of the Institute, including the Institute’s judgments as to the nature and amount of academic research necessary for conferral of a graduate degree. These are decidedly *not* the types of “terms and conditions of employment”

over which the Act contemplates bargaining. While cases certainly arise from time to time on the proper scope of negotiations over traditional employment issues, a decision here in favor of the Petitioner would not only be unprecedented but would improperly expand the scope of the Board's jurisdiction into academic matters over which it has no expertise.

The Petitioner's legal theory will not further federal labor policy of reducing "industrial strife and unrest," as the preamble to the Act aspires. If anything, it opens up an array of confusing issues as to the scope of collective bargaining in the student-university context and sets up the potential for numerous charges and counter charges between students and their universities on non-labor issues.

IV. SIMILAR PUBLIC SECTOR CASE LAW SUPPORTS MIT'S POSITION THAT FELLOWS WHO ARE NOT EXPECTED TO PROVIDE ANY SERVICES TO THEIR UNIVERSITIES ARE NOT EMPLOYEES.

While graduate assistant unionization is a relatively recent phenomenon in the private sector, it has a long history among public universities under public sector labor laws. Collective bargaining for graduate student workers made its first appearance in public sector universities over fifty years ago at the City University of New York ("CUNY") system, when the New York Public Employment Relations Board certified a union to represent a bargaining unit of teaching assistants, research assistants, and research associates. *Board of Higher Education of the City of New York*, 2 PERB Para. 3000, 1969 WL 1894424 (NY PERB, 1969). Since then, graduate student workers have organized at many public universities around the country.

In some cases, there were challenges brought by universities as to whether students in those jurisdictions had the right to unionize under those state labor laws and, if so, whether some of those students failed to meet the standards for employee status. While not binding on the

Region, case law from the public sector on similar issues supports the Institute's position in this case.³⁶

For example, in a recent case involving an organizing effort among graduate students at the University of Pittsburgh, the Hearing Examiner for the Pennsylvania Labor Relations Board found that certain graduate students were employees under Pennsylvania's public sector labor law. *AFL-CIO, CLC v. University of Pittsburgh*, 50 PPER ¶ 60, 50 Pennsylvania Pub. Employee Rep. ¶ 60, 2019 WL 1424342 (PLRB Case No. PERA-R-17-355-W (March 7, 2019)). *However, graduate students on fellowship funding were not considered employees.* The Hearing Examiner carefully distinguished the two groups.

Turning to this matter, dealing with the University of Pittsburgh, the record supports the conclusion that graduate students on an academic appointment who perform work as teaching assistants, teaching fellows, graduate student assistants, and graduate student researchers are public employees. TAs, TFs, GSAs and GSRs receive compensation from the University in the form of a stipend, tuition remission, health care benefits, and other fringe benefits.

In exchange for the compensation, TAs, TFs, GSAs and GSRs are required to perform teaching, research, and administrative support services. The terms and conditions of the relationship between the graduate students on academic appointment and the University are memorialized in a letter that every TA, TF, GSA and GSR receives. The University deducts income taxes from the graduate students' paychecks when they serve on academic appointments. The University may terminate academic appointments in cases of inadequate performance of assigned duties. These facts from the record are clear evidence of an employer-employee relationship. Additionally, TAs, TFs, GSAs and GSRs at the University have or expect to have an established relationship with the University for a period of at least one to five years or more as TAs, TFs, GSAs and GSRs are usually guaranteed for four to five years. Finally, there is no University requirement that graduate students accept academic

³⁶ It is proper for the Board to take note of such decisions. Indeed, the Board in *Columbia* paid special note to the collective bargaining experience of public sector institutions and considered it relevant to its assessment of whether the Act should apply to graduate assistants. Case law from the public sector on comparable issues can also be of some relevance to the Board in dealing with emerging issues in the area of graduate student worker unionization.

appointments and work as TAs, TFs, GSAs, or GSRs in order to obtain a graduate degree. Thus, graduate students on academic appointment serving as TAs, TFs, GSAs and GSRs are public employees pursuant to PERA.

Turning now to graduate students on fellowship and traineeship, the record in this matter shows that they are not public employees under PERA. Graduate students on fellowship are not required to perform services such as teaching or research in return for funding. There is no work requirement. Since there is no requirement to perform services in exchange for a stipend and other benefits, graduate students on fellowship are not employees of the University and therefore also not public employees under PERA.³⁷

Similarly, in the *Matter of the Petition of: Graduate Student Employee Action Coalition, UAW involving certain employees of: University of Washington*, 2003 WL 23354434 (Wash. Pub. Emp. Rel. Com.) Case No. 16288-E-02-2699; Decision 8315 (December 16, 2003), the Public Employee Relations Commission for the State of Washington considered a union petition to represent certain graduate student workers at the University of Washington. In considering the case and ultimately approving a proposed unit of certain graduate student workers, the Commission made the following relevant findings of fact, and, like the Pennsylvania labor board would later do in the University of Pittsburgh case, specifically separated certain research assistants and teaching assistants who were deemed employees from those students who receive financial assistance in the form of fellowship. The Commission held that

Graduate students who are awarded financial assistance by or through the employer without being subjected to any service expectancy imposed by this employer lack an employment relationship with this employer and are excluded from consideration in this case.³⁸

³⁷ *Univ. of Pittsburgh, supra*, p. 13. (emphasis added)

³⁸ *University of Washington, supra*, p. 18 (emphasis added).

The Commission explicitly excluded from the certified bargaining unit: “students who have no service expectancy imposed upon them by the employer, casual employees, and all other employees of the employer.”³⁹

Given the nearly-identical circumstances presented here, these cases from the public sector are beyond instructive and should be given their due weight by the Region.

V. INDUSTRY PRACTICE SUPPORTS MIT’S POSITION BECAUSE OTHER COLLECTIVE BARGAINING AGREEMENTS HAVE EXCLUDED FELLOWS, OR COMPARABLE STUDENTS, FROM UNITS OF GRADUATE RESEARCH AND TEACHING ASSISTANTS

Finally, it is also noteworthy that within the limited universe of graduate student worker contracts in both the private and public sector, parties have often made the distinction between fellows, or comparable types of student appointments/awards, and teaching and research assistantships. While not binding on the parties or necessarily conclusive with the Region, the recognition of what other schools and unions have done on this issue, even by agreement, is informative.

At Tufts University, Region 1 certified a unit of graduate student workers represented by Local 509 of the Service Employees International Union that has the following exclusions from the bargaining unit:

Excluded: All undergraduate students; all post-baccalaureate students who work or provide services outside of the Graduate School of Arts and Sciences; **students** who are compensated on an hourly basis, *who have no current work or service obligations*, or who work only in the Experimental College or Summer School; all other faculty; all other employees, managers, confidential employees, guards and supervisors as defined in the Act.

Trustees of Tufts College, Case 01-RC-197023 (emphasis added).

³⁹ *Id.* at p.21 (emphasis added)

In another example, the parent union of the Petitioner in the instant case – the United Electrical, Radio, and Machine Workers – also represents a bargaining unit of graduate student workers at the University of Iowa. The bargaining unit is specifically drafted to exclude students who have no service obligations to the institution, including students who are appointed as fellows and/or on training grants:

Excluding:

- 1. Research Assistants (FR19 or FL19) whose appointments are (a) primarily a means of financial aid which do not require the individuals to provide services to the University, or (b) which are primarily intended as learning experiences which contribute to the students' progress toward their graduate or professional program of study or (c) for which the students receive academic credit.***
- 2. Graduate students appointed on federal training grants or federal fellowships.***
- 3. Graduate students appointed as Fellows, (FT52), if they are not providing services as Teaching Assistants (FT19), Research Assistants (FR19 or FL19) except as provided in paragraph 1 above....⁴⁰***

Brown University's collective bargaining agreement with its graduate student worker union defines the unit *as excluding those individuals on fellowship* unless they are appointed to a TA, TF, RA or Proctor position. It specifically *excludes*:

...graduate students receiving fellowship stipend support where additional work performing research or instructional services are not a condition of receiving a stipend, unless such work entails a semester-length appointment as a TA, TF, RA, or Proctor with an average workload of twenty (20) hours per week as part of their assigned position;

Ph.D. students receiving an institutional training grant from external funding agencies where the purpose of the grant is to support student academic training and the external funding agency

⁴⁰ <https://grad.uiowa.edu/funding/graduate-student-employment-standards/introduction>

determines the terms and conditions of the grant; all undergraduate students; students who are compensated on an hourly basis; all other faculty; and all other employees.

https://www.brown.edu/about/administration/human-resources/sites/human-resources/files/Brown%20SUGSE%20Final%20Agreement_061520.pdf

In the massive University of California system, the state labor relations board's recent certification of a Graduate Student Researcher bargaining unit defines a "Graduate Student Researcher" as:

Graduate student who performs research as a condition of receiving financial remuneration from funding generated by the University in an academic department or research unit, provided that the graduate student is performing this funded research under the control of the University and under the specific direction of a faculty member or authorized Principal Investigator.

Importantly, and in contrast, the same certification specifically *excludes*:

*Students who receive funding, including financial aid awards, to pursue a course of study with no or de minimis service expectation imposed by the University, and whose receipt of these funds does not require the performance of service at the direction and control of the University.*⁴¹

Finally, the collective bargaining agreement between the University of Massachusetts and Graduate Employee Organization Local 2322/UAW excludes, "fellows and trainees who are not required to perform duties for remuneration." <https://www.geouaw.org/geo-contract/>

These agreements and certifications illustrate a common theme recognized by graduate student unions and universities across the country: where no work is required as a condition of receiving university funding, then employee status is not established.

⁴¹ *Regents of the University of California and Student Researchers United, UAW, Public Employment Labor Relations Board, Case No. SF-RR-1022-H (December 9, 2021) (emphasis added).*

CONCLUSION

The Region must exercise great care not to extend the ruling of *Columbia* beyond its legitimate confines. Allowing the MIT Fellows who have no required job duties or other service responsibilities and who receive unencumbered fellowship money that is not contingent in any way on the performance of work to be considered employees would be an unprecedented ruling with negative consequences not only for MIT and its graduate students, but also for all institutions of higher education. Based on all the facts and arguments presented, it is respectfully submitted that the Region should find that the petitioned-for Fellows are not employees within the meaning of the Act and consequently should dismiss the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Respondent Employer's Post-Hearing Brief was served on the following parties this day by email:

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