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]

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[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

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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

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[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 Engineering[25] 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

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[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

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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. <u>The Union's Argument on Training Grants is Legally and Factually Incorrect.</u>

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).

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> 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:

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[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

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[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.

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[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

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[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]

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

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