UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK **and** **COLUMBIA POSTDOCTORAL WORKERS AND UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA**	**Case No. 02-RC-225405**

THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK'S REQUEST FOR REVIEW

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PRELIMINARY STATEMENT

The Trustees of Columbia University in the City of New York ("Columbia" or the "University") respectfully request review of the Regional Director's September 18, 2018 Decision and Direction of Election ("DDE") finding that: (1) the petitioned-for Postdoctoral Research Scientists, Postdoctoral Research Scholars, and Postdoctoral Research Fellows ("Postdoc Trainees") are "employees" under Section 2(3) of the National Labor Relations Act ("NLRA" or the "Act");[1] (2) Postdoctoral Research Fellows ("Fellows") are employees of Columbia; and (3) the petitioned-for Postdoc Trainees share a "community of interest" with the petitioned-for Associate Research Scientists and Associate Research Scholars ("ARSs").

As an initial matter, the Regional Director's finding that Postdoc Trainees are employees under Section 2(3) of the Act is based on the National Labor Relations Board's ("NLRB" or "Board") decision in *Columbia University*, 364 NLRB No. 90 (2016) ("*Columbia I*"). As discussed in detail below, there are compelling reasons for the Board to reconsider and reverse its decision in *Columbia I*. Namely, that *Columbia I* is a break from longstanding Board precedent holding that individuals who teach or conduct research in connection with their educational programs are not "employees" under the Act.

The Board has held for nearly its entire history that the Act was not intended to apply to relationships that are primarily educational rather than economic in nature.

This principle was most recently articulated in *Brown University*, 342 NLRB 483 (2004) ("*Brown*"), in which the Board held that individuals who perform research as part of their

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[1] The difference between titles such as Postdoctoral Research Scientist and Postdoctoral Research Scholar or Associate Research Scientist and Associate Research Scholar relates only to the discipline of individual researchers. "Scientists" typically perform research in the "hard" sciences (*e.g.*, biomedical sciences, engineering, etc.), whereas "Scholars" typically perform research in the social sciences and humanities. (Tr. 42, 87.)

academic program are not statutory employees. The same principle applies here where Postdoc Trainees perform research as part of their postdoctoral training program. The purpose of Columbia's postdoctoral training program is to provide Postdoc Trainees with continued education, albeit outside of a formal degree program, by providing mentorship and training from which Postdoc Trainees learn to become successful independent researchers. The relationship between Columbia and its Postdoc Trainees is therefore primarily educational.

Thus, for the Regional Director to find that Postdoc Trainees are employees under *Columbia I* is contrary to the longstanding policies and purposes of the Act, furthers no legitimate purpose of national labor policy, and threatens harm to postdoctoral training programs at private universities across the United States. The Board should reaffirm that relationships that are primarily educational are not covered by the Act, reconsider and reverse *Columbia I*, and return to its historical precedent as most recently articulated in *Brown*. Under *Brown*, Postdoc Trainees cannot be statutory employees.

Even if *Columbia I* is not reconsidered, the DDE should be reversed because the Regional Director either ignored or misapplied outcome determinative, precedential Board law, and based his factual findings on a misreading of the record.

The Regional Director erroneously concluded that the scope of the petitioned-for unit was appropriate by finding that Postdoc Trainees share the requisite community of interest with ARSs. As a preliminary matter, the Regional Director's finding was in clear error because his conclusions as to the community of interest factors he analyzed were not supported by the record. The record made clear that ARSs and Postdoc Trainees lack a community of interest because: (i) ARSs and Postdoc Trainees do not share common supervision; (ii) ARSs and Postdoc Trainees possess different skills and training; (iii) there is no evidence of temporary

interchange between ARSs and Postdoc Trainees; and (iv) ARSs and Postdoc Trainees have different terms and conditions of employment.

Moreover, the Regional Director engaged in an insufficient analysis of only a subset of the relevant factors and ignored factors and record evidence which contradicted his conclusion—namely, that ARSs and Postdoc Trainees have separate hiring processes, and that an ARS position is a permanent, career position whereas a Postdoc Trainee appointment is a temporary traineeship. A complete and sufficient analysis of the community of interest factors and Board precedent compels the conclusion that ARSs and Postdoc Trainees do not share the requisite community of interest and cannot be included in the same bargaining unit.

The Regional Director also erroneously concluded that Fellows are employees of Columbia. Assuming, *arguendo*, that the Board finds Postdoc Trainees to be employees under Section 2(3) of the Act, the Regional Director's finding that Fellows are not employees of Columbia cannot stand because, as was made clear by the record, Columbia does not control key terms by which Fellows conduct research. The Regional Director erred in this regard in three ways. First, the Regional Director failed to properly apply precedential Board law, under which Fellows cannot be found to be employees of Columbia because they are compensated by external funding agencies. Second, the Regional Director improperly distorted Columbia's admission that ARSs are University employees by failing to acknowledge critical differences between ARSs and Fellows. Namely, that any admission as to ARSs who hold permanent, career positions cannot be appropriately applied to Fellows who hold temporary traineeship appointments. Moreover, the Regional Director failed to acknowledge the distinct function external funding has as to each classification. The record established that Fellows are compensated by stipends funded by external funding agencies, and complete their training

pursuant to grants awarded directly to them for their research idea. Thus, any admission as to ARSs who are compensated by salaries paid by the University, and complete their work in labs funded by grants awarded to Principal Investigators ("PIs") for the PI's research ideas, has no applicability to Fellows.

Finally, the Regional Director failed to give due weight and consideration to Board law and record evidence which established that Fellows are independent contractors. The record makes clear that Fellows are independent contractors because they: (i) are minimally supervised; (ii) have entrepreneurial opportunities; (iii) possess distinct skills; (iv) hold temporary appointments; (v) are compensated by external sources; and (vi) are paid on IRS tax Form 1099. The Regional Director erred by analyzing a fraction of the factors comprising the independent contractor analysis. The Regional Director disregarded ample record evidence related to those factors, and ignored other factors and record evidence supporting the conclusion that Fellows are independent contractors. Had the Regional Director properly considered all applicable factors, the complete record, and applicable Board law, he would have concluded that Fellows are independent contractors, rather than employees of Columbia.

In light of the above, Columbia respectfully requests that the Board grant review of the DDE, pursuant to Section 102.67 of the Board's Rules and Regulations, because:

1. There are compelling reasons for the Board to reconsider its *Columbia I* decision which is unsupported by the Act and ignores significant policy considerations;
2. The Regional Director's decision that all of the petitioned-for classifications share the requisite community of interest ignores Board law and substantial factual differences between ARSs and Postdoc Trainees, resulting in prejudicial error; and
3. The Regional Director's decision that Fellows are employees of Columbia ignores substantial record evidence and is contrary to precedential Board law, resulting in prejudicial error.

PROCEDURAL HISTORY

On August 10, 2018, Petitioner filed a Petition seeking to represent "[a]ll postdoctoral researchers who have received a doctorate or its professional equivalent who provide services to the university, including Postdoctoral Research Scientists, Postdoctoral Research Scholars, Postdoctoral Research Fellows, Associate Research Scientists, and Associate Research Scholars," and excluding "Postdoctoral Clinical Fellows and Postdoctoral Residency Fellows." (DDE at 1.)[2]

On September 21, 2018, Columbia filed a Statement of Position, in which Columbia raised the following issues, *inter alia*, for resolution by Regional Director: (1) that Postdoc Trainees were not "employees" as defined in Section 2(3) of the Act; (2) assuming *arguendo* that Postdoc Trainees were "employees" under the Act, that Fellows are not employees of Columbia; and (3) that Postdoc Trainees and ARSs do not share the requisite community of interest to be included in the same bargaining unit. (Bd. Ex. 3.)

Thereafter, a two-day hearing was conducted on August 22 and 23, 2018. During the hearing, Columbia submitted an Offer of Proof seeking a hearing on the issue of the employee status of Postdoc Trainees. While the Regional Director accepted Columbia's Offer of Proof, he precluded Columbia from litigating that issue at the pre-election hearing. (Tr. 182-83.)

On September 18, 2018, the Regional Director John J. Walsh, Jr. issued the DDE, directing an election in the unit sought by Petitioner and rejecting every argument made by the University. The Regional Director found that all individuals in the petitioned-for classifications,

[2] On August 22, 2018, during the pre-election hearing, the Regional Director granted the Petitioner's motion to amend its petition to specifically exclude Postdoctoral Clinical Fellows and Postdoctoral Residency Fellows from the petitioned-for unit. (DDE at 1 n.1; Tr. 19.) On August 23, the Regional Director granted the Petitioner's motion to amend its petition to remove the language "or anyone with substantially equivalent qualifications who conducts similar work" from the petition. (DDE at 1 n.1; Tr. 208-09.)

including Fellows, were employees under Section 2(3) of the Act and *Columbia I*, that Fellows were the University's employees, and that Postdoc Trainees shared the requisite community of interest with ARSs to justify inclusion in the same bargaining unit.

Pursuant to the DDE, an election was held on October 2 and 3, 2018, and the ballots were counted on October 4. Of the 2,067 eligible voters, 729 voted for the Petitioner, 339 voted against the Petitioner, 4 ballots were void, and 91 ballots were challenged. The Regional Director issued the Certification of Representative on October 12, 2018.

ARGUMENT

I. THERE ARE COMPELLING REASONS FOR THE BOARD TO RECONSIDER AND REVERSE ITS DECISION IN *COLUMBIA I*.

As is clear from the record, Postdoc Trainees have an educational relationship with Columbia. The University and its faculty offer mentorship, academic resources and invaluable training that help Postdoc Trainees meet their academic goals. Nevertheless, the Regional Director found that Postdoc Trainees are employees under Section 2(3) of the National Labor Relations Act (the "Act") based on the Board's recent decision in *Columbia I*. *Columbia I*, however, represents a reversal of well-established Board precedent that the Act was not intended to apply to relationships that are primarily educational rather than economic.

In holding that individuals who provide teaching and research services at a university are statutory employees under Section 2(3) of the Act, the Board majority in *Columbia I* improperly rested its decision on the common law definition of "employee" and rejected the relevance and centrality of the fundamentally educational relationship between those providing teaching and research services and the university. The majority also ignored significant policy considerations that weigh heavily against the intrusion of collective bargaining into educational relationships. The *Columbia I* decision furthers no legitimate purpose of national labor policy, while

threatening harm to educational programs at private universities across the United States. The Board should reconsider and reverse *Columbia I*, and hold that individuals like Postdoc Trainees are not employees under Section 2(3) of the Act.

A. *Columbia I* Represents A Departure From Nearly Uninterrupted Board Precedent Interpreting The NLRA To Protect The Primarily Educational Relationship Between Those Providing Research Services And A University.

Prior to its *Columbia I* decision in 2016 and with the exception of a four-year period following its decision in *New York University*, 332 NLRB 1205 (2000) ("*NYU*"), the Board has consistently held that individuals who perform teaching and research services at private universities are not statutory employees. In *Adelphi University*, the Board excluded graduate students serving as teaching and research assistants from a unit of full-time faculty members because they were "primarily students" who were "working toward their own advanced academic degrees." 195 NLRB 639, 640 (1972). The Board observed that, unlike the largely autonomous nature of the work performed by regular faculty, the research assistants at issue were "guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members." *Id.*

Two years later, in *Leland Stanford Junior University*, the Board, relying on *Adelphi*, held that physics research assistants who performed various research tasks both independently and under faculty guidance, and who received financial aid in the form of a living allowance, were "not employees within the meaning" of the Act. 214 NLRB 621, 623 (1974). In reaching that conclusion, the Board examined the relationship between Stanford and the research assistants, with emphasis on the economic aspects of that relationship. The Board reasoned that the stipends Stanford provided were part of a package intended to make study at the university affordable to students from a wide variety of backgrounds. The amount of the stipend was "not

based on the skill or function of the particular individual or the nature of the research performed," and there was "no correlation between what [was] being done and the amount received by the student...." *Id.* at 621-22. Further, it was clear that all research performed furthered the individual's ability to reach his or her academic goals. *Id*. at 622.

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

The flawed *NYU* decision survived for only four years. In *Brown*, the NLRB overruled *NYU*, recognizing once again that the nature of the relationship between research and teaching assistants and the university is "primarily an educational one, rather than an economic one." 342 NLRB at 489. In support of that well-reasoned conclusion, the Board cited, among other things, the following undeniable facts: (i) research positions are directly related to the core elements of the individual's training and educational objectives; (ii) research and teaching assistants perform their service under the guidance of department faculty members; and (iii) faculty members serve as advisors and mentors to research and teaching assistants. *Brown*, 342 NLRB at 485, 488-89. The same analysis is true for Postdoc Trainees at Columbia: (i) research functions of Postdoc Trainees are directly related to the core elements of the individual's training objectives; (ii) Postdoc Trainees perform their service under the guidance and mentorship of department faculty members; and (iii) faculty members serve as advisors and mentors to Postdoc Trainees.

The *Brown* Board noted several aspects of the relationship between research and teaching assistants and the university—also true of the Postdoc Trainees at Columbia—that contributes to its basic incompatibility with collective bargaining. Specifically, collective bargaining is "fundamentally an economic process," which does not belong in a relationship "predicated upon a mutual interest in the advancement of the student's education, and thus academic in nature." *Id.* at 489 (citing *St. Clare's Hosp. & Health Ctr.*, 229 NLRB 1000, 1002 (1977)). The academic concerns that dominate the relationship are "largely irrelevant to wages, hours, and working conditions," making collective bargaining "not particularly well suited to educational decisionmaking." *Id.* Additionally, the training and education at issue is "intensely personal," both for the trainee and the faculty, while the collective treatment of individuals represents "the very antithesis of personalized individualized education." *Id.* at 489-90. The Board also recognized that the essential purpose of collective bargaining is "to promote equality of bargaining power, a[] concept that is largely foreign to higher education." *Id.* at 490.

The *Brown* Board thus concluded that treating research and teaching assistants as employees would be incompatible with the purposes of the Act. *Id.* at 488-90. Indeed, the Board opined that "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process." *Id.* at 493. This same analysis is applicable to Postdoc Trainees.

The Board in *Columbia I* overruled this well-reasoned precedent in *Brown* by holding that individuals who perform various teaching and research tasks for their university are "employees" within the meaning of the Act. Though the *Columbia I* Board asserted that changes in higher education over time justified a new look at the employment status of graduate students, *Columbia I*, 364 NLRB No. 90, slip op. at 8-9, the Board failed to appreciate that the

fundamental nature of the relationship between individuals performing services for their own benefit and the university remains unchanged. As discussed in detail below, the *Columbia I* Board erroneously gave controlling significance to the common law definition of employee without regard to the realities of the higher education environment or the policy considerations that had justified their exclusion forty years earlier in *Adelphi*, *Leland Stanford*, and *Brown*. This Board should correct this error and reconsider the *Columbia I* decision.

B. Relevant Policy Considerations Establish That Postdoc Trainees Who Perform Research Services For Columbia Are Not Employees.

1. The Board Must Consider The NLRA's Purpose In Determining Its Scope.

Section 2(3) of the NLRA tautologically defines the word "employee" to include "any employee." 29 U.S.C. § 152(3). Section 2(3) does not further define the term, nor is "employee" defined elsewhere in the Act.[3] It is a bedrock principle of statutory interpretation that "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132 (2000); *Brown*, 342 NLRB at 488. The Board and the courts have a duty "to construe statutes, not isolated provisions." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citation omitted). And in construing the NLRA, the Court has held that "[i]n doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) with meaning." *Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 168 (1971); *see id.* at 167 ("The term 'employee' must be understood with reference to the purpose of the Act and the facts involved in the economic relationship."); *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999) ("At the heart of each of the Court's decisions is the principle that employee status

[3] The definition includes a number of exceptions, none of which is relevant here.

must be determined against the background of the policies and purposes of the Act."). Because Section 2(3) "contains no detailed provisions for determining statutory employee status," that issue "must be examined in the context of the Act's overall purpose." *Brown*, 342 NLRB at 492.

The purpose of the Act remains as clear today as it was when enacted. Section 1 of the NLRA sets forth a policy to encourage "practices fundamental to the friendly adjustment of industrial disputes" to avoid "industrial strife or unrest." 29 U.S.C. § 151. The Supreme Court has recognized that the "Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry," and that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" *NLRB v. Yeshiva University*, 444 U.S. 672, 680-81 (1980) (citation omitted). The Board has similarly acknowledged that the NLRA envisions a statutory scheme applicable to the economic relationship between employer and employee. *WBAI Pacifica Foundation*, 328 NLRB at 1275 ("A central policy of the Act is that the protection of the right of employees to organize and bargain collectively restores equality of bargaining power between employers and employees and safeguards commerce from the harm caused by labor disputes. The vision of a fundamentally economic relationship between employers and employees is inescapable.").

The Board and reviewing courts have routinely applied these principles to the analysis of employee status, and have held that persons who might otherwise fall within the Act's definition of "employee" (or who might be considered common law employees) may fall outside of the statutory definition, based on relevant economic facts or policy concerns. In *NLRB v. Bell Aerospace Co*., the Court held that "managerial employees" who surely fall within the common law definition are not covered by the Act, even though they are not specifically excluded under Section 2(3). 416 U.S. 267, 289 (1974). *See also Yeshiva University*, 444 U.S. at 686

(recognizing the tension between the Act's inclusion of "professional employees" and its exclusion of "managerial employees" in the context of full-time university faculty); *Retail Clerks International Association v. NLRB*, 366 F.2d 642, 644-45 (D.C. Cir. 1966) (employees closely aligned with management excluded from coverage because of "potential conflict of interest between the employer and the workers"). Similarly, in *Pittsburgh Plate Glass Co*., the Court excluded retirees from the Act's coverage, reasoning that inclusion of retirees would not further the Act's policy of preventing disruption to commerce caused by interference with the organization of active "workers." 404 U.S. at 166. In *Brevard Achievement Center*, 342 NLRB 982, 989 (2004), the Board refused to include workers with disabilities at a rehabilitative facility within the definition of "employee" because the employer's relationship with the individuals at issue was not guided by economic business considerations, but rather was "primarily rehabilitative." *See also NLRB v. Hendricks Cnty. Rural Elec. Membership Corp*., 454 U.S. 170, 178-79 (1981) (upholding the Board's refusal to extend collective bargaining rights to "confidential employees"); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 495-96, 499 (1979) (declining to exercise jurisdiction over teachers at church-operated schools because doing so would necessarily entangle the Board in matters of religious education and run afoul of the First Amendment).

Most recently, in *Northwestern University*, 362 NLRB No. 167 (2015), the Board declined to exercise jurisdiction over a representation case involving student football players, explaining that "it would not promote stability in labor relations to assert jurisdiction" (*Id.*, slip op. at *3) even if scholarship players were found to be statutory employees.[4] The Board should

[4] The appropriateness of such policy considerations in construing the scope of the NLRA was not affected by the Supreme Court's decision in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995) (cited in *Columbia I*, 364 NLRB No. 90, slip op. at 4), which established that the Board could—but was not required to—apply the common

apply the same deference it applied in deciding not to interfere with college athletic programs to postdoctoral training/mentoring programs at Columbia and other leading colleges and universities across the nation.

Notably, well-established case law under analogous provisions of the Fair Labor Standards Act ("FLSA") provides strong support for the "primary relationship" test applied in *Brown* and throughout most of the Board's history. Like the NLRA, the FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e).[5] In deciding whether students in a variety of settings should be considered employees under that statute, courts have adopted a "primary beneficiary" test very similar to the "primary relationship" test of *Brown*. *See, e.g., Solis v. Laurelbrook Sanitarium & Sch., Inc*., 642 F.3d 518, 526 (6th Cir. 2011) (students at a vocational boarding school are not employees; "identifying the primary beneficiary of a relationship provides the appropriate framework for determining employee status in the educational context"); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (finding that students were not "employees" because the chores that they were required to do were "primarily for the students', not the [school's], benefit"); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) ("[T]he proper legal inquiry in this case is whether [the employer] or the [trainees] principally benefited from the weeklong [training] arrangement."); *Marshall v. Regis Educ. Corp*., 666 F.2d 1324, 1326-27 (10th Cir. 1981) (comparing respective benefits of the student resident assistants and the college to determine whether the resident assistants were "employees"

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law agency definition of employee as a means for determining whether paid union organizers were protected by the Act. Indeed, the Supreme Court in *Town & Country* examined the underlying purposes of the Act when determining employee status. 516 U.S. at 91.

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

of the college and noting that "[t]he mere fact that the College [employer] may have derived some economic value from the [resident assistant] program does not override the educational benefits of the program and is not dispositive of the 'employee' issue").

In *Glatt v. Fox Searchlight Pictures, Inc*., 811 F.3d 528 (2d Cir. 2015), in considering whether student interns working for a motion picture company were FLSA "employees," the U.S. Court of Appeals for the Second Circuit adopted a "primary beneficiary" standard, which "focuses on what the intern receives in exchange for his work" and "accords courts the flexibility to examine the economic reality as it exists between the intern and the employer." *Id*. at 536. The court also identified a list of non-exhaustive factors to determine the primary beneficiary, including "[t]he extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit" and "provides training that would be similar to that which would be given in an educational environment." *Id*. at 537; *see also Schumann v. Collier Anesthesia, P.A*., 803 F.3d 1199, 1212 (11th Cir. 2015) (adopting *Glatt's* "primary beneficiary" test); *Berger v. NCAA*, 843 F.3d 285, 291 (7th Cir. 2016) (determining that student-athletes are not employees under the FLSA because of the history of amateurism in college sports and because "factors [to determine employment status] used in the trainee and private-sector intern context fail to capture the nature of the relationship between" student athletes and the university).

These court decisions interpreting the definition of "employee" under the FLSA further support the consistent rulings under the NLRA that the Board should not look solely to the common law definition of employee, but must analyze "the underlying fundamental premise of the Act," *i.e.*, that the Act is designed to cover economic relationships, as the Board properly

recognized in *Brown*, 342 NLRB at 488. *Columbia I*, 364 NLRB No. 90, slip op. at 25 (then-Member Miscimarra, dissenting) ("I agree with the Board majority's reasoning in *Brown*.").

2. Considering Postdoc Trainees As Section 2(3) Employees Does Not Promote The Purposes Of The NLRA.

Just as the Board found in *Brown*, the essential elements of the relationship between Columbia and its Postdoc Trainees are decidedly educational—not economic. While it is true that Postdoc Trainees typically already have their PhD degree, these individuals still require additional mentoring and training on how to conduct research independently. Postdoctoral programs, like Columbia's, provide these individuals with the additional mentoring and training they need to meet their professional goals. Columbia is committed to its Postdoc Trainees' training and development. The academic and mentoring nature of this relationship is clear on the record in this case as established by the following undisputed facts:

1. Postdoc Trainee positions at Columbia are temporary. Postdoc Trainee appointments are not career positions, they are temporary appointments designed to educate, train, and mentor Postdoc Trainees so that they have the skills necessary to succeed in a future career conducting research independently. (Er. Exs. 1, 3; Tr. 35-36, 46, 51-52, 67 [Purdy], 87 [Peterson].)
2. PIs train and educate the Postdoc Trainees. They teach them, among other things, research skills, leadership and management skills, where to submit journal articles, and how to write proposals. (Tr. 35-36, 38-40, 43-44 [Purdy], 97 [Peterson].)
3. PIs mentor Postdoc Trainees on, among other things, how to operate in the culture of academic research, how to build collaborations, and what conferences and professional meetings to attend and how to improve their research methods. (Tr. 35-37 [Purdy], 81, 87, 91-92, 107 [Peterson]; Er. Ex. 3.)
4. Columbia offers workshops and courses to its Postdoc Trainees. These workshops include training on how to write a CV, how to build a LinkedIn profile, how to write and get an elevator pitch, how to communicate science to the non-scientist, and transitioning to research independence. (Er. Ex. 4; Tr. 81-82, 107 [Peterson].)

5. Columbia maintains an Office of Postdoctoral Affairs (the "OPA") that exists to support Postdoc Trainees on all levels. This office runs courses, provides one-on-one career counseling and guidance, helps Postdoc Trainees develop career plans, and offers a variety of other services focused on supporting Postdoc Trainees' career and professional development. (Er. Ex. 4; Tr. 81-82, 97, 107 [Peterson].)

The ultimate purpose of the Postdoc Trainee program at Columbia is educational. As such, the Postdoc Trainee program is generally limited to three years—the amount of time typically needed for a Postdoc Trainee to receive sufficient training and mentoring on how to conduct research independently.[6] The fact that Postdoc Trainee appointments are temporary and not designed to be permanent, career positions, is compelling evidence that these individuals are more like "students" than "employees." Indeed, the fact that the University has strict limits on the amount of time an individual can remain a Postdoc Trainee, regardless of the success or performance of his/her research project, supports its position that Postdoc Trainees are not employees as defined by Section 2(3) of the Act.

Moreover, the program serves the academic and future professional needs of Postdoc Trainees, who will often become faculty members and/or PIs. Witnesses called by both the Union and the University testified that Columbia is committed to helping its Postdoc Trainees develop the skills they need to succeed professionally. (Tr. 35-36, 38-39 [Purdy], 81-82 [Peterson], 174-175 [Patel].) The fundamental nature of the relationship between Postdoc Trainees and Columbia is academic, rather than economic, and it does not fit into a traditional employer-employee framework.[7]

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[6] Extensions for a fourth and fifth year may be granted, but only in limited circumstances. (Tr. 89 [Peterson]; Er. Ex. 1.) Thus, at three years, the typical duration of a Postdoc Trainee appointment is significantly less than the duration of the graduate students at issue in *Columbia I*, who typically spent "five to nine years" in their programs, and who similarly have a primarily educational relationship with the University. 364 NLRB No. 90 slip op. at 13.

[7] Postdoc Trainees also fit poorly within the common law definition of "employee." *Brown*, 342 NLRB at 490 n.27 (Member Schaumber, concurring). As the Board observed in *Brown*, "[u]nder the common law, an employee is a

Indeed, as noted in then-Member Miscimarra's dissent in *Columbia I*, substantial policy reasons counsel against treating educational relationships, such as the one between Postdoc Trainees and Columbia, as employment relationships. Collective bargaining rights under the NLRA could serve as an economic weapon that if fully utilized would thwart the Postdoc Trainees' primary goal: to develop the skills necessary to become an independent researcher. *See Columbia I*, 364 NLRB No. 90, slip op. at 29 (then-Member Miscimarra, dissenting) ("I believe collective bargaining and its attendant risks and uncertainties will tend to detract from the primary reason that students are enrolled at a university. . . .") Additionally, imposing collective bargaining on the academic relationship between universities and Postdoc Trainees would also have a "deleterious impact" on the educational decisions made by faculty and administrators. *Brown*, 342 NLRB at 490; *see id*. at 492 ("[T]he broad power to bargain over all Section 8(d) subjects would, in the case of graduate student assistants, carry with it the power to intrude into areas that are at the heart of the educational process.")

An employer's duty to bargain over terms and conditions of employment is expansive, *see Production Plated Plastics, Inc*., 254 NLRB 560, 563 (1981), and the duty would be no less so in higher education. *Kendall College*, 228 NLRB 1083, 1088 (1977) (rejecting Kendall's argument that the "law requiring bargaining on mandatory subjects requires a different interpretation in the halls of academia than it does in an industrial shop"), *enf'd*, 570 F.2d 216 (7th Cir. 1978); *see also Catholic Bishop of Chicago*, 440 U.S. at 503 (noting that "nearly

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person who performs services *for another* under a contract *of hire*, subject to the other's control or right of control, and *in return for payment*." *Id.* (emphasis in original) (quoting *Town & Country Elec.*, 516 U.S. at 94). Postdoc Trainees are not "hired" as assistants; they are appointed to positions to have a home for their research and professional development. And, research is not necessarily performed "for" the university, but rather for the Postdoc Trainees' educational and professional development. Furthermore, the financial assistance provided is "not a *quid pro quo* for services rendered." *Brown*, 342 NLRB at 490 n.27 (Member Schaumber, concurring).

everything that goes on in the schools affects teachers and is therefore arguably a 'condition of employment'") (citation omitted).

Other aspects of the NLRA demonstrate that it is ill-suited for application to Postdoc Trainees. As noted in then-Member Miscimarra's dissent, strikes and other economic tactics could lead to disruption of the educational process; suspension of stipends; potential replacement; and suspension. *Columbia I*, 364 NLRB No. 90, slip op. at 29-30 (Member Miscimarra, dissenting). Similarly, a lockout—lawful under the NLRA in appropriate circumstances—could deprive Postdoc Trainees of the ability to complete their program in an efficient manner and begin their independent careers. Accordingly, resort to accepted forms of economic leverage when bargaining breaks down could disrupt the Postdoc Trainee's training. These tools are a necessary component of the statutory scheme for resolving bargaining disputes, *see NLRB v Insurance Agents' International Union*, 361 U.S. 477, 489 (1960), but they would have a significant adverse impact upon the academic relationship, impeding the Postdoc Trainee's training. *See Columbia I*, 364 NLRB No. 90, slip op. at 29 (then-Member Miscimarra, dissenting).[8]

In like fashion, the Board's procedures in representation and unfair labor practice cases are cumbersome and time-consuming; they are a poor fit with postdoctoral research programs. *Columbia I*, 364 NLRB No. 90, slip op. at 31 (then-Member Miscimarra, dissenting). Litigation of unfair labor practice cases can extend for years before the Board issues a decision. In that time, "the academic world may experience developments that dramatically alter or even

[8] This has not been a problem in graduate student or postdoctoral trainee bargaining in public sector universities because most states prohibit strikes by public employees. *See, e.g*, New York Civil Service Law § 210 (prohibiting all public sector strikes); *see also* Milla Sanes & John Schmitt, Center for Economic and Policy Research, Regulation of Public Sector Collective Bargaining in the States (March 2014), http://www.cepr.net/documents/state-public-cb-2014-03.pdf (only twelve states allow teachers to strike).

eliminate entire fields of study." *Id*. Additionally, given the transitory and temporary nature of Postdoc Trainee appointments, Postdoc Trainees may have completed their training by the time a Board case affecting them is resolved. As then-Member Miscimarra observed in his *Columbia I* dissent, "[i]n these respects, treating student assistants as employees under the NLRA is especially poorly matched to the Board's representation and ULP procedures." *Id*. at 32.

II. THE REGIONAL DIRECTOR ERRED BY FINDING THAT POSTDOC TRAINEES AND ARSs SHARE A "COMMUNITY OF INTEREST" JUSTIFYING THEIR INCLUSION IN THE SAME BARGAINING UNIT.

The Regional Director erroneously determined that the petitioned-for unit was appropriate. A requisite community of interest does not exist between the petitioned-for unit classifications because the unit inappropriately groups a classification of Section 2(3) employees, ARSs, with Postdoc Trainees who, as set forth in Section I above, are not Section 2(3) employees. Moreover, the record does not support the Regional Director's conclusion. To the contrary, as is clear from the record, ARSs do not share the requisite community of interest with Postdoc Trainees and cannot be included in the same bargaining unit.

It is well-settled that in determining the scope of a bargaining unit, the Regional Director must find that a petitioned-for unit is an "appropriate" unit. *Home Depot U.S.A., Inc.*, 20-RC-067144, slip op. at 12 (Nov. 18, 2011). The Board has long held that it will not certify a grouping of employees that is "arbitrary" or "heterogeneous." *American Cyanamid Co.*, 110 NLRB 89, 95 (1954); *Moore Business Forms, Inc.*, 204 NLRB 552 (1973). When the interests of one group of employees are dissimilar from those of another group, a single unit is not appropriate. *Swift & Co.*, 129 NLRB 1391, 1394 (1961).

More specifically, the Regional Director was required to determine whether the employees in the petitioned-for unit share the requisite "community of interest."[9] *N.L.R.B. v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985). To determine whether a community of interest exists, the Board analyzes a number of factors including:

> [the] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

Overnite Transp. Co., 322 NLRB 723, 724 (1996).

Instead, the Regional Director engaged in a cursory analysis of only four factors: (1) common supervision; (2) different skills and training; (3) departmental organization and functional integration and interchange; and (4) terms and conditions of employment. (DDE at 9-11.) The Regional Director's analysis was deficient and incorrect. Among other things, the Regional Director misinterpreted and misapplied Board law, disposed of several of Columbia's meritorious arguments without discussion, and ignored credible witness testimony.

A proper application of the community of interest factors compels the conclusion that Postdoc Trainees and ARSs do not share a community of interest and should not be in the same bargaining unit.

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[9] On December 15, 2017, the Board in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) overturned *Specialty Healthcare*, 357 NLRB No. 83 (2011) and its "community of interest" analysis. Moreover, the Board in *PCC Structurals* reverted back to its traditional "community of interest" analysis that existed prior to *Specialty Healthcare*.

A. The Regional Director's Finding That A Community Of Interest Exists Between Postdoc Trainees And ARSs Is Not Supported By The Record.

1. Contrary To The Regional Director's Finding, ARSs And Postdoc Trainees Do Not Share Common Supervision.

The Regional Director erred by failing to recognize material differences in the way that ARSs and Postdoc Trainees are supervised. Instead, the Regional Director misconstrued the record and ignored credible testimony demonstrating that these groups of individuals do not share common supervision.

The Regional Director found that ARSs and Postdoc Trainees "clearly" shared common supervision because they "are supervised by the PI of the labs in which they work." (DDE at 9.) Sharing a supervisor at the lab's organizational apex, in this case a PI, is insufficient evidence of common supervision. *See The Neiman Marcus Group, Inc.*, 361 NLRB 50 (2014) (a common manager is not sufficient on its own to establish common supervision). Rather, the Regional Director should have analyzed the level at which common supervision occurs, as well as the nature of the supervision. *Id.* For example, in *Neiman Marcus*, the Board found that even though common supervision by general managers over sales associates in different departments occurred at the "highest level" of management, the two groups lacked a community of interest. *Id*.

Here, while the PI manages the lab generally, the level and type of supervision by the PI of the Postdoc Trainees and ARSs is very different. PIs mentor Postdoc Trainees, while ARSs mostly work independently with limited supervision. (Er. Ex. 1; Tr. 35-37, 41-42, 46 [Purdy], 81, 87, 91-92, 107 [Peterson].) To the extent that ARSs share supervision with Postdoc Trainees, they do so at a high level in that the PI supervises everyone in the lab, and is the highest level supervisor of that lab. To find "common supervision" under these circumstances is illogical

because it would mean that every individual working in the same lab—graduate research assistants, lab technicians, etc.—share a community of interest because, technically, they all work under the same PI.

The Regional Director determined that there was only "vague testimony" that Postdoc Trainees are "'mentored'" by their PIs to a greater degree than ARSs. (DDE at 9.) In so finding, the Regional Director ignored extensive and credible testimony of Drs. Purdy and Peterson regarding the mentorship by the PI of Postdoc Trainees. Dr. Purdy testified that Postdoc Trainees are "engaged in research under the mentorship of a more senior faculty member," a PI. (Tr. 35 [Purdy].) Dr. Purdy further testified that the "single most important word" to describe the relationship between a PI and a Postdoc Trainee "would be mentor." (Tr. 36 [Purdy].) He stated that:

> [t]he principal investigator is responsible for helping the postdoc build their career [. . .] Faculty members typically list the names of all their postdocs on their CVs as a badge of honor that they have successfully trained and mentored these individuals who have gone on – the proof of the quality of that mentorship is the fact that they've gone on to secure prestigious faculty positions at leading universities around the country. So it's very much a – it's a leadership, it's a mentorship relationship training the postdoc on how to succeed in the business of academic research in this country. (*Id*.)

The characterization of this testimony as "vague" is plain error.

Dr. Peterson similarly testified that Postdoc Trainees are "working in this relationship with their PI as a mentor/mentee relationship and that includes, you know, writing papers, attending conferences, presenting their work. It's all contained within the position itself." (Tr. 91-92 [Peterson].) As part of the mentorship relationship, Postdoc Trainees "are encouraged to complete their individual development plan, to address – excuse me, identify certain skills, traits and interests that they have, and have a career discussion with their PI." (Tr. 81 [Peterson].) The

testimony of Drs. Purdy and Peterson demonstrates that the supervisory role of PIs over Postdoc Trainees is more accurately described as a mentorship, rather than supervision.

The testimony of Drs. Purdy and Peterson was credible given their respective job titles and experience with ARSs and Postdoc Trainees. Dr. Purdy has served as the Executive Vice President for Research and a professor in the Department of Earth and Environmental Sciences for approximately eight years. (Tr. 31 [Purdy].) He is responsible for overseeing the OPA and the training of Postdoc Trainees at the University and, accordingly, is intimately familiar with the role of a PI in carrying out that training. (Tr. 33-34 [Purdy].) Dr. Purdy also oversees Professional Officers of Research, and ARSs specifically. (Tr. 41-42 [Purdy].) Moreover, prior to coming to Columbia, Dr. Purdy spent approximately twenty years as a professional researcher at Woods Hole Oceanographic Institution, during which time he served as a PI and directly supervised postdoctoral trainees in his lab. (Tr. 31-32 [Purdy].) Thus, Dr. Purdy is exceptionally qualified to speak to the differences in the level and type of supervision by PIs over ARSs and Postdoc Trainees.

Dr. Peterson is similarly qualified to testify about the mentorship relationship between PIs and Postdoc Trainees. Dr. Peterson has held a position with the OPA since January 2016, and has been the Director of the OPA for approximately a year and a half. (Tr. 80 [Peterson].) Her responsibilities as Director of the OPA include supporting Postdoc Trainees "on all levels during their time at Columbia whether that be through career or professional development activities, or through the postdoctoral affairs side of their time at Columbia." (Tr. 80-81 [Peterson].) Despite their qualifications and experience, the Regional Director erroneously discredited the testimony of Drs. Purdy and Peterson.

2. Contrary To The Regional Director's Finding, ARSs And Postdoc Trainees Have Different Skills And Training.

Just as the University considers and requires different qualifications for ARSs and Postdoc Trainees, researchers in those positions possess different skills. Although ARSs and Postdoc Trainees both generally conduct research, there is a broad spectrum of skills, experience, and independence required to run a successful research lab, and ARSs and Postdoc Trainees play distinct roles in performing that research. The Regional Director erroneously disregarded substantial portions of the record that demonstrated material differences in the qualifications, skills, and training of ARSs as compared to Postdoc Trainees.

i. ARSs And Postdoc Trainees Have Different Skills.

The Regional Director's finding that there was "no evidence showing that any of the classifications have specialized lab skills or demonstrated proficiency in techniques" is contradicted by the record. Dr. Purdy testified that when a PI hires an ARS, they are "absolutely" looking for candidates with specific skills who can carry out the specific research advertised. (Tr. 44-45 [Purdy].) PIs "are looking for someone with the skills and the background to achieve the objectives that have been laid out in the research project." (*Id.*)

For example, the PI may require an ARS to carry out a specific, specialized task in a lab because, as Dr. Purdy explained, there are:

> some activities in your lab that you know you will continue for 10 to 20 years because if you're in a certain kind of science, you know by definition you're going to be running this kind of instrument. So you're always going to need somebody to run that kind of instrument . . . That would be an influenced job description that you would put in an ad for an ARS because you want somebody in the long term to do that. (Tr. 50 [Purdy].)

ARSs have already developed tangible skills required to succeed independently in a lab, perform research at a higher skill level, and operate lab instruments. (Tr. 36, 43-44, 50 [Purdy], 82 [Peterson].) By contrast, Postdoc Trainees are still learning or improving those skills and are

expected to take advantage of the training and mentorship opportunities that the University provides to them and become proficient in that regard. (Tr. 44, 50 [Purdy], 81 [Peterson].)

Highlighting the disparity between the skills of an ARS and a Postdoc Trainee, certain external agencies (*e.g.*, the National Institute of Health ("NIH"), the National Science Foundation ("NSF")) require mentorship training for Postdoc Trainees, but not for ARSs. (Tr. 49-50 [Purdy], 81 [Peterson].) Moreover, the OPA not only provides Postdoc Trainees with additional training and mentorship through the programs mandated by the external agencies, but also from many of its own original programs. For example, the OPA offers Postdoc Trainees targeted career and professional development programming and counseling tailored to their specific needs, including résumé-writing programs, one-on-one counseling, and others. These offerings by the OPA are not offered to ARSs because they already possess those skills. (Tr. 81-83 [Peterson].)

ii. ARSs And Postdoc Trainees Have Different Levels Of Experience.

The Regional Director found that there was no consistent evidence of additional experience required of ARSs as compared to Postdoc Trainees. (DDE at 9.) Specifically, he found that "there is no evidence of the average number of years of experience Associates have prior to their appointments." (*Id*.) While there was no testimony as to the exact number of years of experience required of an ARS, it is clear from the record that to become an ARS, an individual typically must have a PhD and have completed a postdoctoral training program. (Tr. 44 [Purdy].) The Regional Director did not give appropriate weight to this testimony.

Further, the Regional Director found that ARSs and Postdoc Trainees may have similar levels of experience in part because "there is evidence that Postdocs are sometimes first appointed at Columbia after they have had postdoctoral experience in other institutions." (DDE

at 9.) The Regional Director erroneously based his finding on the atypical and individual experience of Dr. Manu Vanaerschot. Dr. Vanaerschot testified that he gained three years of postdoctoral experience in Belgium before becoming a Postdoc Trainee at the University. (Tr. 137-39 [Vanaerschot].) The record is devoid of evidence that this experience was typical of other Postdoc Trainees, and the Union presented no evidence of any Postdoc Trainees who were appointed at the University after first gaining several years of experience at other institutions in the United States. The Regional Director's extrapolation from Dr. Vanaerschot's testimony was erroneous.

Indeed, a typical Postdoc Trainee does not have the level of experience needed to pursue an independent research career (as an ARS or any other researcher), as the fundamental goal of the Postdoc Trainee position is to provide "training for the purpose of acquiring the professional skills needed to pursue a career path of his or her choosing." (Er. Ex. 3.) "Postdoctoral appointments provide additional training . . . that prepares individuals for independent careers as scientists and scholars." (Er. Ex. 1.) As Dr. Purdy testified, being an "[a]ssociate research scientists/scholar is a job. It's a job. You apply for it. It's got a job description. You're working for a PI. You're doing a job" as juxtaposed against a Postdoc Trainee appointment which "is a traineeship. You're learning." (Tr. 42 [Purdy].) The fact that ARSs are already trained by the time they undertake their position is affirmed by the Faculty Handbook, which states that "[p]rofessional officers of research . . . perform independent research in the area of their training." (Er. Ex. 1.)

The different levels of experience possessed by ARSs and Postdoc Trainees further demonstrate that ARSs and Postdoc Trainees do not share a sufficient community of interest.

iii. ARSs And Postdoc Trainees Have Different Levels Of Accomplishment.

With respect to other differences in qualifications, the Regional Director noted that ARSs "may be expected to have published more than" Postdoc Trainees, but found there was "no evidence" that an ARS must have published "a particular number or type of publications." (DDE at 9.) In so finding, the Regional Director oversimplified the heightened publication requirement to be hired as an ARS and ignored additional material differences in hiring or appointment qualifications beyond mere publication.

While the record may not have established an exact number of publications required for ARSs that is higher than Postdoc Trainees, a substantial difference is nevertheless discernible. Although a Postdoc Trainee may have their work published during the course of their appointment, there is no requirement that a prospective Postdoc Trainee be able to demonstrate an established record of publication in order to gain an appointment. By contrast, to be qualified to be hired as an ARS, a candidate must have already been published and have a demonstrable record of peer-reviewed publications. (Tr. 43-44 [Purdy].)

This record of peer-reviewed publications is required as part of an overall record of accomplishment and recognition by the candidate's peers. (Tr. 44 [Purdy].) As Dr. Purdy testified, the qualifications for an ARS include:

> a PhD. Typically, some years of postdoc experience. A record of accomplishment in research at a reasonable level as indicated by publications in the peer reviewed literature. But also, recognition by one's peers. We always solicit outside reference letters. So one would expect there would be an established record of accomplishment at a junior level. (*Id*.)

There are no such requirements for prospective Postdoc Trainees. (Tr. 43-44 [Purdy].)

3. Contrary To The Regional Director's Finding, There Is No Temporary Interchange Among ARSs And Postdoc Trainees.

The Regional Director found that the interchange factor weighed in favor of finding a community of interest between ARSs and Postdoc Trainees because Postdoc Trainees are sometimes promoted to ARSs and occasionally interact in the lab. Even assuming these assertions are true, there is no evidence of temporary interchange between ARSs and Postdoc Trainees.

For community of interest analysis purposes, the Board gives much greater weight to examples of temporary interchange (ad hoc substitution or short-term replacement of other employees) than it does to permanent interchange (employees moving from one position to another). *Bashas', Inc.*, 337 NLRB 710, 711 n.7 (2002). In *Bashas'*, the union demonstrated that there were approximately 50 instances of permanent transfers within the petitioned-for unit. *Id.* Yet, despite the union's evidence of permanent interchange, the Board held that the petitioned-for employees did not share the requisite community of interest in part because there was no evidence of any temporary interchange, leaving the Board to conclude that there was "[n]o significant interchange." *Id.* at 711.

Even where there is evidence of temporary interchange, the Board will not necessarily find that two groups share a community of interest. For example, in *Univ. of Miami*, 213 NLRB 634, 635 (1974), the Board found that medical school faculty did not share a community of interest with other university faculty, even where the evidence of temporary interchange showed that 20 to 25 out of 577 medical school professionals—approximately 4%—taught courses at the main university campus as opposed to their home medical school campus. Notwithstanding this, the Board found that this level of temporary interchange was limited and insufficient to establish a community of interest between medical school faculty and other university faculty. *Id.*

Here, the record is devoid of any examples of temporary interchange between ARSs and Postdoc Trainees. ARSs and Postdoc Trainees neither perform each other's work on a daily basis nor on a sporadic basis like in instances of absences. (Tr. 75 [Purdy].) Rather, ARSs and Postdoc Trainees conduct separate research experiments and perform different tasks and generally do not perform each other's work on a temporary basis. Additionally, any examples of permanent interchange only occur in one direction—from Postdoc Trainee to ARS, not the other way around. Thus, this movement is better characterized as promotion instead of interchange.

The Regional Director agreed, finding that the ARS "position is a promotion for a Postdoc." (DDE at 10.) However, the Regional Director inappropriately relied on this fact in his analysis. This fact is irrelevant under Board law. Just because an employee can eventually be promoted to a higher-level position—requiring more skill, responsibility, and different job duties—does not mean that the two classifications share a community of interest. *See, e.g.*, *Sonoco Prod. Co.*, *Downingtown Paper Co.*, 192 NLRB 310, 312 (1971). In *Downingtown*, production and maintenance workers were eligible for promotion to, and were in fact promoted to, the over-the-road truck driver position. *Id.* Indeed, former production employees occupied four out of five, or 80%, of the over-the-road truck driver positions. *Id.* Nevertheless, the Board found there was no community of interest between over-the-road truck drivers and production and maintenance employees because over-the-road truckers constituted a homogeneous, functionally distinct group. *Id.* Thus, even if a Postdoc Trainee applies for and later fills an open ARS position, such permanent interchange is insufficient to show a community of interest between Postdoc Trainees and ARSs.

The Regional Director further erred by granting undue weight to the testimony of Dr. Vanaerschot to conclude that ARSs and Postdoc Trainees perform "virtually indistinguishable"

work. (DDE at 10.) The Regional Director noted that Dr. Vanaerschot testified that his "working conditions stayed the same" between when he was promoted from Postdoc Trainee to ARS. (DDE at 4.) As discussed in Sections (C) and (D) above, this was the experience of only one ARS among hundreds at the University. Thus, it is inappropriate to extrapolate Dr. Vanaerschot's individual experience to reach a conclusion as to the work performed by all Postdoc Trainees and ARSs. Dr. Vanaerschot's testimony aside, the work of ARSs and Postdoc Trainees is not "virtually indistinguishable" because, as the record established, the work of an ARS is performed with greater skill, expertise, and independence due to the heightened qualifications and skills an ARS must have as compared to a Postdoc Trainee. (Tr. 44, 50, 68 [Purdy].) *See also* Section (A), *supra*; Section (D), *infra*.

Further, although the Regional Director recognized that the research of ARSs and Postdoc Trainees "involves a great deal of independence," the Regional Director found that interactions in the lab nevertheless constituted evidence of functional integration and interchange. (DDE at 10.) He appeared to reach this conclusion by ascribing unwarranted significance to the fact that there is at times collaboration between ARSs and Postdoc Trainees at lab meetings. (*Id*.) As a preliminary matter, sporadic collaboration regarding independent research projects which, pursuant to Dr. Vanaerschot and Dr. Tulsi Patel's testimony, consists of updates on research progress and troubleshooting, is insufficient to support a finding that the positions are functionally integrated or that there is interchange. (Tr. 136 [Vanaerschot], 166 [Patel].) During the "collaboration," which may only amount to interactions once per week at the weekly lab meeting, ARSs and Postdoc Trainees are not performing one another's work—they are at most listening to someone else's independent research and perhaps making

suggestions about how to address a difficulty the individual is experiencing. (*Id.*) This limited interaction is insufficient to find that there is substantial integration or interchange.

The fact that individuals in the same workspace perform collaborative work advancing a common project is also insufficient to establish interchange. To find otherwise would lead to the illogical conclusion that graduate research assistants, lab technicians, other lab personnel, or even the PI working with ARSs and Postdoc Trainees on projects which advance the common goals of the lab would be interchangeable with one another and that all of these classifications share a community of interest.

4. The Regional Director Erroneously Analyzed The Record And Board Law As To The Terms And Conditions Of Employment Factor.

The Regional Director unduly dismissed evidence that established material differences between Postdoc Trainees' and ARSs' compensation and benefits packages. (DDE at 10). The Regional Director's two-sentence analysis of the compensation factor both departed from Board law and rested on factual error.

Under *New York University*, *Grace Industries*, and *Overnite Transportation*, the Board, when analyzing whether a community of interest exists, considers differences in compensation between the petitioned-for classifications. 205 NLRB 4, 7 (1973); 358 NLRB 502, 505 (2012); 322 NLRB at 724. The Board has found that there is a lack of a community of interest where there is a "marked difference" in compensation between two classifications, and where there is a difference in pay amounting to as little as 5%. *New York Univ.*, 205 NLRB at 7; *Grace Industries*, 358 NLRB at 505. As is clear from the record, there is a considerable disparity in pay between Postdoc Trainees and ARSs. (Pet. Ex. 1.) Specifically, for the 2018-19 academic year, an ARS's salary is $6,177, or approximately 12.3%, higher than the stipend of Postdoctoral

Research Scientist/Scholar and $7,868, or approximately 16.2%, higher than the stipend of a Fellow. (*Id*.)

This difference of 12.3% or 16.2% is significantly greater than the 5% difference that was sufficient to demonstrate a lack of a community of interest in *Grace Industries*. 358 NLRB at 505. Nevertheless, the Regional Director summarily disposed of the issue in a single sentence finding, stating that, "in [his] view," the differences were insufficient. (DDE at 10). This finding was in error and departed from the Board's holding in *Grace Industries*.

The Regional Director's analysis of benefits was also incomplete. As discussed in Section (D) above, there are additional tangible benefits that Postdoc Trainees receive that ARSs are ineligible for. These benefits offered by the OPA include, but are not limited to, career development programs, one-on-one counseling, workshops, individual development programs, courses, and mental health and wellness programs. (Tr. 81-82 [Peterson]; Er. Ex. 4.) None of these benefits are made available to ARSs, either by the OPA or any other office at the University. (Tr. 83 [Peterson].)

In light of Board law, which was ignored, and the substantial record evidence, which was disregarded, the Regional Director's conclusion that the benefits and compensation of Postdoc Trainees and ARSs are insufficiently dissimilar to warrant exclusion of either classification from the unit was erroneous. The benefits and compensation of ARSs and Postdoc Trainees are substantially different such that inclusion of Postdoc Trainees and ARSs in the same unit would be inappropriate. Thus, this factor weighs against a finding that a community of interest exists between ARSs and Postdoc Trainees.

B. The Regional Director Erred By Failing To Consider Other "Community Of Interest Factors," Which Indicate That ARSs Do Not Share The Requisite Community Of Interest With Postdoc Trainees.

1. The University Has A Separate Process For Hiring ARSs As Compared To The Process For Appointing Postdoc Trainees.

Under *McLean Hospital* and *University of San Francisco*, a single unit may not be appropriate if two classifications are subject to different hiring practices. *McLean Hospital*, 311 NLRB 1100 (1993) (finding appropriate two separate units of employees where the two groups had different application and hiring processes); *Univ. of San Francisco*, 265 NLRB 1221 (1982) (finding that faculty from the university's school of professional studies lacked the requisite community of interest with other faculty at the university due in part to their distinct hiring process). The Regional Director failed to properly consider and analyze this factor.

Record evidence established that the University has distinct hiring and appointment processes for ARSs and Postdoc Trainees. Specifically, due to the permanent nature of the position, and in compliance with equal employment opportunity and affirmative action ("EOAA") regulations, the ARS hiring process mirrors that of other full-time University employees. The University conducts a comprehensive search for ARS candidates and publishes job postings for the open ARS position. The University goes through a rigorous and competitive process to fill that spot even if the ARS candidate is a Postdoc Trainee in the very lab that has an opening for an ARS position. (Tr. 42, 44, 46 48-49 [Purdy], 143 [Vanaerschot]; Er. Ex. 1.) By contrast, due to the temporary nature of the appointments, the Postdoc Trainee appointment process does not mirror that of other full-time University employees. The process is more informal because appointments do not need to comply with the EOAA regulations. (Tr. 46 [Purdy].) For example, there are no formal job posting requirements for Postdoc Trainee appointments. Instead, prospective Postdoc Trainees will at times contact a PI directly seeking

an appointment in the PI's lab, regardless of whether or not an opening in the lab has been posted. (Tr. 72 [Purdy].)

Because the University utilizes very different application and hiring or appointment processes for ARSs and Postdoc Trainees, this factor weighs in favor of finding that a sufficient community of interest does not exist between ARSs and Postdoc Trainees.

2. Being An ARS Is A Permanent Career Position Whereas Postdoc Trainees Are Temporary Appointments.

As part of the community of interest analysis, the Regional Director should have considered the temporary versus permanent nature of Postdoc Trainee appointments as compared to ARS positions. *See New York Univ.*, 205 NLRB at 7. In *New York University*, the Board held that part-time faculty did not share a community of interest with full-time faculty due to the part-time faculty's "transient" relationship with the university. 205 NLRB at 7. In finding an insufficient community of interest, the Board found it to be critical that part-time faculty were appointed on a single-semester basis and could never receive tenure, whereas full-time faculty were tenure-eligible. *Id.*

Rather than engage in an independent analysis of the nature of the positions, the Regional Director inappropriately conflated his limited analysis with the "Terms and Conditions" factor. (DDE at 10.) The Regional Director's limited analysis rested on incorrect factual findings. Regarding the amount of time that an ARS holds a position, the Regional Director found that "there [wa]s no evidence of the average time a researcher spends at Columbia in an Associate appointment." (DDE at 10.) In fact, the record makes clear that the ARS position is a permanent "career" position equivalent to Assistant Professor. (Tr. 41 [Purdy]; Er. Ex. 1.) ARSs may advance to Research Scientist and Senior Research Scientist positions, which are the equivalents of Associate Professor and Full Professor, respectively. (*Id.*) Although ARSs may be promoted

to Research Scientist or Senior Research Scientist—just as an Assistant Professor may be promoted to Associate Professor or Full Professor—ARSs typically hold their position for five to ten years or more, and may stay in that role for their entire career. (Tr. 45 [Purdy].) As Dr. Purdy testified regarding the ARS positions, "[t]hey're permanent positions within the university." (Tr. 41 [Purdy].) Dr. Purdy also testified that "[t]he associate research scientist is building a career within the lab [. . .] the associate research scientist is doing a job." (Tr. 45-46 [Purdy].) Further, EOAA regulations apply to hiring ARSs because of their permanent nature. (Tr. 46 [Purdy].)

By contrast, Postdoc Trainees hold their appointments for only two to three years. (Tr. 35-36, 51-52 [Purdy]; Er. Ex. 1.) In fact, the University with limited exception generally prohibits individuals from remaining a Postdoc Trainee for more than three years. (Tr. 51 [Purdy]; Er. Ex. 1.) While a postdoctoral appointment can be extended for a potential fourth or fifth year, such exceptions are rare and require the Provost's approval. (*Id.*) As Dr. Peterson testified, "[t]he purpose of a postdoc is a temporary period of mentored research or scholarly training." (Tr. 87 [Peterson].) A Postdoc Traineeship is not a career position, and unlike ARSs, Postdoc Trainee positions are not equivalent to Assistant, Associate, or Full Professor positions. (Er. Ex. 1; 153 [Vanaerschot].) A Postdoc Trainee "is an individual holding a doctoral degree who is engaged in a temporary period of mentored research and/or scholarly training for the purpose of acquiring the professional skills needed to pursue a career path of his or her choosing." (Er. Ex. 3.) Moreover, as Dr. Purdy testified, the EOAA regulations do not apply to Postdoc Trainee appointments "[b]ecause they're not permanent positions." (Tr. 46 [Purdy].)

In sum, the Regional Director erred by failing to fully analyze the nature of ARS positions and Postdoc Trainee appointments. The fact that ARS positions are permanent "career"

positions and Postdoc Trainee appointments are temporary demonstrates that the ARS positions and Postdoc Trainee appointments in the petitioned-for unit do not share a sufficient community of interest.

Based on the above, the Regional Director erred by misapplying certain community of interest factors and ignoring others. Moreover, the Regional Director also failed to consider the potential policy and practical implications that could result from combining, in the same bargaining unit, two disparate groups of individuals—namely ARSs and Postdoc Trainees. The public policy underpinning the requirement for establishing that different classifications of workers share a community of interest before being included in the same bargaining unit is to avoid potential conflicts of interest that may arise between those workers. Here, the Regional Director failed to account for the potential conflicts of interest that could arise from combining a group of temporary workers with a group of professional researchers in career positions. The bargaining objectives of Postdoc Trainees, based on the temporary nature of their appointments, may likely be focused on short-term goals designed to reward individuals who may only be in the bargaining unit for three years or less. Their objectives will likely be oriented towards terms and conditions which would allow them to complete their postdoctoral program as efficiently as possible in order to move on to their independent careers. Conversely, ARSs may be more focused on long-term objectives and have little interest in—and potentially even be adversely impacted by—Postdoc Trainees' focus on proposals aimed at accomplishing short-term objectives.

Thus, for legal and practical reasons, bargaining on behalf of a unit with inherently different objectives would be impractical, and could create the exact conflicts of interest within the bargaining unit that the Act seeks to avoid.

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Upon analysis of all of the community of interest factors and practical implications that flow therefrom, it is clear that ARSs and Postdoc Trainees do not share a community of interest, and that the Regional Director's finding undermines the Board's longstanding holding that a single unit is not appropriate where one group of employees is dissimilar from those in another group. *See Swift & Co.*, 129 NLRB 1391, 1394 (1961).

III. THE REGIONAL DIRECTOR'S HOLDING THAT FELLOWS ARE EMPLOYEES OF COLUMBIA IS ERRONEOUS BECAUSE COLUMBIA DOES NOT CONTROL THE TERMS BY WHICH FELLOWS CONDUCT RESEARCH.

For the reasons laid out in Section I, Postdoc Trainees are not employees under Section 2(3) of the Act. Assuming, *arguendo*, the Board concludes that they are, a finding must be made that the Fellows are not Section 2(3) employees of the University.

In concluding otherwise, the Regional Director misapplied the Board's decision in *Fordham University*, 193 NLRB 134, 137 (1971), improperly distorted an alleged admission by Columbia, disregarded record evidence establishing that Fellows are akin to independent contractors and improperly generalized the anomalous experience of a single Fellow as applicable to all Fellows. These errors prejudiced Columbia. Consistent with Board law and as demonstrated by clear record evidence, Fellows are not employees under the Act and, if they are, they are not employees of the University.

A. The Regional Director's Decision Misapplied The Board's Decision In *Fordham.*

As the Regional Director acknowledged, in *Fordham*, the Board held that individuals hired by faculty members to work on externally funded research grants were not employees of the university. 193 NLRB at 135-36. There, the individuals working on the research grants were compensated by an external funding source and were hired by the faculty member charged with

administering the grant. *Id.* The Regional Director failed to recognize, however, that Columbia's Fellows are virtually indistinguishable from the researchers in *Fordham* because they conduct research pursuant to grants provided by various external agencies to fund their research and, thus, are compensated by those agencies.

Fellows are paid in one of three ways: (1) by their "home" institution from which the Fellow is visiting[10] (*e.g.*, a university other than Columbia); (2) directly from the granting agency (*e.g.*, NSF); or (3) from the granting agency after the funds have passed through the University for disbursement to Fellows. (Tr. 100-04 [Peterson].) In none of the three circumstances does the University compensate Fellows for conducting research. (*Id.*)

Where Fellows are paid by their "home" institution or directly from the granting agency, the University is completely removed from the process. (Tr. 93-94, 101-02 [Peterson].) The University cannot be considered the employer of these Fellows. Even where payments to Fellows are facilitated by Columbia, the University is performing merely a clerical function on behalf of the funding agency and does not control the amount of payment or other terms related to the payment from the external agency to the Fellow. (Tr. 100-04 [Peterson].) Moreover, Fellows compensated by their "home" institutions typically receive benefits from that "home" institution. (Tr. 93-94 [Peterson].) Thus, these Fellows generally do not receive any benefits from Columbia. (*Id.*)

[10] A visiting Fellow is a Postdoc Trainee who already holds a postdoctoral appointment at another university. (Tr. 93-94, 103 [Peterson].) That visiting Fellow may seek a visiting postdoctoral appointment at Columbia for a specific purpose related to her area of research, but wants to retain her position at her home institution. For example, a postdoc from a University other than Columbia may want to use a particular research instrument available at Columbia. (Tr. 93-94 [Peterson].) The visiting Fellow will thus keep their postdoctoral appointment at their home institution, but be appointed as a visiting Fellow at Columbia for the time period in which they are carrying out their research on the University's campus or in the University's labs.

Under these circumstances, the Regional Director should have determined that, like the *Fordham* researchers who were not employees of Fordham, Columbia's Fellows are not employees of the University.

Instead, the Regional Director attempted to distinguish *Fordham* based on the fact that, unlike Columbia's Fellows, the hiring of researchers at Fordham was generally not subject to university approval. *Fordham*, 193 NLRB at 135 ("[Faculty members] may hire and fire [persons to work the grants] without the approval of the University, and salary questions are worked out in negotiations with the funding agency, although the school of education requires that appointments and salaries be approved by the dean.") The Regional Director read too much into this factual tidbit. There is no indication that the Board's conclusion that researchers were not university employees was predicated on the approval factor. To the contrary, the Board determined that none of the researchers were employees, including those in the school of education, whose appointments had to be approved by the dean. The Regional Director ascribed unwarranted significance to the approval process and misapplied *Fordham* to the facts of this case.

B. The Regional Director Distorted An Alleged Admission By Columbia.

The Regional Director erroneously relied on Columbia's acknowledgment that "other classifications of officers, many of whom work on externally funded research grants, are employees." (DDE at 8.) While the University conceded that ARSs are employees, the concession is of no significance to the employee status of Fellows. As an initial matter, ARSs are distinguishable in that they hold permanent, career positions whereas Fellows are appointed for a temporary traineeship. *See* Part (C)(2), *infra*. Moreover, these employee research officers, unlike Fellows, are not working on externally funded grants awarded to them for their research

idea. (Tr. 44-45, 48, 52 [Purdy], 119 [Peterson].) While an externally funded grant may be funding the overall lab in which a research officer works, the external award in that case has been awarded to the PI for the PI's research idea (*e.g.*, from NIH). (Tr. 48, 52 [Purdy], 119 [Peterson].) Fellows working pursuant to an externally funded grant, conversely, are working under grants that have been awarded to them based on their own research ideas. (Tr. 77-78 [Purdy], 94-97, 118-19 [Peterson].) The Regional Director completely disregarded this critical distinction.

C. The Regional Director Erroneously Failed To Credit Significant Evidence That Fellows Are Akin To Independent Contractors.

The Regional Director dismissed Columbia's argument that Fellows are independent contractors on two grounds. First, he found that "specific examples of significant independence, control, and entrepreneurial opportunity . . . were not adduced in the record." (DDE at 8.) This statement is contradicted by the record evidence demonstrating that Fellows exercise significant independence, have control over their research projects, and possess entrepreneurial opportunity. (Tr. 77-78 [Purdy], 94-97, 118-19 [Peterson], 169-70, 176-77 [Patel].) Second, the Regional Director improperly applied the limited testimony of one witness (Dr. Patel) about her personal and anomalous experience to the entire unit. He found that because Dr. Patel was supervised in a similar manner to that of a Postdoctoral Research Scientist/Scholar and performed the same work as a Fellow and Postdoctoral Research Scientist/Scholar, that those details must universally be the case for all eligible voters. (DDE at 8.) This factual conclusion is refuted by the record evidence, more fully discussed below, that Fellows are independent, minimally supervised, and have entrepreneurial opportunities. Additionally, the Regional Director engaged in only a cursory analysis of independent contractor status overall, and ignored multiple relevant factors,

all of which establish that Fellows are properly considered independent contractors, not employees under the Act.

1. Fellows Are Independent, Minimally Supervised, And Have Entrepreneurial Opportunities.

In determining independent contractor status, the Board considers the common-law principles of agency including, but not limited to, the extent of control over the details of the work, the level of supervision, the method of payment, the skill required and the duration of services provided. *See Pa. Interscholastic Athletic Assn.*, 365 NLRB No. 107 (2017) (adopting the common-law analysis as set forth in *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254 (1968)); Restatement (Second) of Agency § 220 (1958). This list of factors is non-exhaustive, and "all incidents of the relationship must be assessed and weighed." *Porter Drywall, Inc.*, 362 NLRB 6 (2015) (quoting *Fedex Home Delivery*, 2014 NLRB LEXIS 753 (N.L.R.B. Sept. 30, 2014)). No single factor in the analysis is determinative. *Id.*

In evaluating the "independence" or "control" factor, the Board considers whether the individual controls the details of their work. *City Cab Co. of Orlando*, 285 NLRB 1191 (1987). The record contains numerous examples of Fellows controlling the details of their work. (Tr. 77-78 [Purdy], 94-97, 118-19 [Peterson], 169-70, 176-77 [Patel].) Most importantly, prior to arriving at Columbia, Fellows independently develop original research projects and draft their own research proposals, which include detailed project goals, for submission to granting agencies for funding. (Tr. 95-96 [Peterson], 169-170 [Patel].) When Fellows receive funding, their grants, which are based on the individual's own plan, dictate the nature, scope and course of their research, and Columbia may not direct or otherwise intervene in the Fellow's research. (Tr. 96-97, 118-19 [Peterson].) Fellows, therefore, complete the grant application and research process independently of Columbia. (Tr. 176-77 [Patel].) As Fellows independently obtain their

awards for their own original research ideas, they have increased control over the budgeting of that funding, as the individual who is awarded the grant is responsible for how the funding is spent. (Tr. 97 [Peterson].) Moreover, Fellows are independent from Columbia as they can move to another university and perform the same research they were conducting at Columbia, while taking their independently awarded grant funding with them. (*Id.*) These are all clear examples of independence that were disregarded by the Regional Director.

Despite the Regional Director's assertion to the contrary, the record also contains ample examples of Fellows functioning with minimal supervision. Fellows develop their own research projects, and therefore, Fellows, not PIs, are principally responsible for ensuring that the research mission of their particular grant is satisfied. (Tr. 119 [Peterson].) Dr. Peterson testified that although Fellows are mentored and receive some training from their PIs, Fellows have significant autonomy and are not subject to strict supervision of their research, the methods utilized to carry out that research, and the overall budgeting of their funds. (Tr. 94-97, 118-19 [Peterson].) Dr. Peterson further testified that a PI is limited in what they can direct a Fellow to do. (Tr. 118-19 [Peterson].) Dr. Patel, the Union's own witness who is currently a Fellow, testified that she only meets with her PI approximately once per month. (Tr. 166-67 [Patel].) Her testimony indicates that she performs her work largely on her own. Accordingly, the Regional Director's statement that there were no examples of Fellows functioning with minimal supervision is factually false.

The record also contains evidence of entrepreneurial opportunity. Fellows are not tethered to Columbia. After a Fellow applicant's grant is awarded, their funding is generally portable and they are free to take their research to another university if doing so would prove to be more advantageous. (Tr. 176-77 [Patel].) As Dr. Peterson testified, Fellow applicants "really

are in essence picking Columbia versus Columbia choosing them." (Tr. 96 [Peterson].) Board law is clear that this freedom to take one's services elsewhere is an example of entrepreneurial opportunity. *See Pa. Interscholastic Athletic Assn.,* 365 NLRB No. 107.

2. The Regional Director Erroneously Ignored Several Of The Relevant Factors And Facts That Compel A Conclusion That Fellows Are Independent Contractors.

The Regional Director engaged in a cursory analysis of some of the relevant factors for determining independent contractor status while entirely ignoring others. While the Regional Director referred to supervision, independence, and entrepreneurial opportunity, he failed to consider compelling evidence regarding the Fellows' unique skill set, the duration of their service and the method of payment. A proper application of these relevant factors demonstrates that Fellows are independent contractors.

As established by the record, Fellows have a sophisticated skillset. In addition to being highly educated, Fellows have demonstrated the ability to draft research proposals at a high level which permits the Fellow to secure grants from external agencies, a skill that distinguishes them as compared to other Postdoc Trainees. (Tr. 94-97 [Peterson].) Fellows must go through considerable effort and intellectual rigor to draft research proposals that are ultimately funded by external agencies. (*Id*.) Their unique skill is coming up with new and interesting research topics that have the potential to benefit humankind. Because Fellows possess this valuable and distinct skill that allows them to obtain grant funding, they are independent contractors, not employees.

The record evidence further established that the Fellows' duration of service to the University is temporary and limited. Being a Fellow is not a "career" position. Indeed, the University will not allow Fellows to remain as a Fellow for more than three years, with very limited exceptions. (Er. Ex. 1; Tr. 35, 46, 51, 67 [Purdy].) Because the Fellows perform

research only on a temporary basis and for a limited duration, the duration of service factor supports the conclusion that Fellows are independent contractors, rather than employees.

In analyzing the method of payment factor, the Board considers the method by which a worker is paid and the entity that compensates that person. *See City Cab Co. of Orlando*, 285 NLRB 1191 (determining that cab drivers were independent contractors because, among other things, they were compensated through their customers' fares, and not by a cab company). The Board also considers the IRS tax form pursuant to which an individual is paid. *See Pennsylvania Acad. of the Fine Arts*, 343 NLRB 846 (2004) (artist-models were independent contractors, in part because they were paid pursuant to a Form 1099, not W-2); *Amerihealth Inc./Amerihealth HMO*, 329 NLRB 870 (1999) (physicians working for HMO were independent contractors, not employees, where they were paid a flat fee and their payments were reported on an IRS Form 1099, not a W-2).

Here, the Fellows are paid stipends from external funding sources, not from the University's endowment and not even from a PI's funding source(s). (72-73 [Purdy], 93-96, 99, 119 [Peterson].) Notably, they are paid on a Form 1099, with no tax withholdings made by the University. (101-03 [Peterson].) Because Fellows are not compensated by the University and they are paid like contractors by external entities, they are not employees of the University.

In sum, each of the factors the Regional Director ignored indicate that Fellows are independent contractors.

CONCLUSION

The Board should grant Columbia's Request for Review and the Certification of Representative should be rescinded and the petition dismissed in its entirety.

Dated: October 26, 2018
New York, New York

Respectfully Submitted,

By: _____

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK **and** **COLUMBIA POSTDOCTORAL WORKERS AND UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA**	CASE NO. 02-RC-225405

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 26, 2018, a copy of Trustees of Columbia University in the City of New York's Request for Review was filed with the National Labor Relations Board on its E-Filing Program and was also served in the manner set forth below:

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