NATIONAL LABOR RELATIONS BOARD

In the Matter of: **Case No.: 05-RC-188871**

THE GEORGE WASHINGTON UNIVERSITY
Employer

And

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 500, a/w SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC (SEIU Local 500)

Petitioner

BRIEF OF *AMICI* ASSOCIATION OF COLLEGE & UNIVERSITY HOUSING OFFICERS – INTERNATIONAL, AMERICAN COLLEGE PERSONNEL ASSOCIATION, THE STUDENT AFFAIRS ADMINISTRATORS IN HIGHER EDUCATION, THE AMERICAN COUNCIL ON EDUCATION AND NINE OTHER HIGHER EDUCATION ASSOCIATIONS IN SUPPORT OF THE GEORGE WASHINGTON UNIVERSITY

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American College Personnel Association
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American Association of State Colleges and Universities
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Association of American Universities
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Association of Governing Boards of Universities and Colleges
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Association of Independent Colleges of Art and Design
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I. Introduction and Statement of Interest

This *amicus* brief to NLRB Region 5 is submitted on behalf of The Association of College and University Housing Officers – International (ACUHO-I), the American College Personnel Association (ACPA), the Student Affairs Administrators in Higher Education (NASPA), the American Council of Education (ACE) and nine other higher education organizations.

The ACUHIO-I represents almost 1,000 member institutions whose 16,000 individual professional staff work in college and university housing. Each year, over 3.1 million college students live in on-campus residence halls in the United States alone. ACUHO-I is the voice of professional staff who work strategically for and directly on the front lines with those on-campus college and university students. ACUHO-I members believe in developing exceptional residential experiences at colleges, universities, and other post-secondary institutions around the world. ACPA and NASPA likewise represent thousands of professional staff who work in college and university residence life and housing.

ACE represents all higher education sectors. Its approximately 1,700 members reflect the extraordinary breadth and contributions of degree-granting colleges and universities in the United States. Together, the thirteen *amici* organizations represent the overwhelming majority of institutions in the United States which provide residential programs to their undergraduate students.

The institutions represented by *amici* all seek to create learning environments in which education occurs both within the classroom and through myriad other student interactions—including, and importantly, in residence halls. On most campuses the residence halls are far more than simply structures containing housing. They are designed and programmed to encourage student engagement ranging from student-conceived and initiated artistic and

performance activities to religious services to, significantly, unplanned but impactful personal interactions - with the student Resident Advisor (also known as Resident Assistants, and collectively referred to herein as "RAs") often being as much a fellow student participant as an environment-enhancer- orchestrator. In that regard, RAs are encouraged to foster an environment in which students learn from each other outside the classroom by, among other things, being both a student learner/teacher and helping to model how that's done. The RA role – unlike even the graduate student assistants at issue in the *Columbia* case, 364 NLRB No. 90 (2016) – cannot be filled by non-student employees.

Amici submit this brief because they believe that converting the Resident Advisor experience, as it is universally conceived, to the status of "employee" within the meaning of the National Labor Relations Act would do enormous damage to the educationally-enhancing nature that this position occupies in university life across the country. The residence life component of *amici* institutions is an extension of the learning that occurs in the classroom. Indeed, many institutions refer to their residential areas as "living/learning environments" (*see, e.g.* http://www.nyit.edu/administrative_offices/residence_life. And RAs perform a critical educational function within residential life. They serve as role models, multi-cultural liaisons, problem-solving resources, emotional supporters, informal crisis counselors, substance-abuse educators, conflict managers, financial counselors, activity organizers, teachers, information technologists and community builders. All of this is rooted in their primary role as *student peers*, who are selected because of their individual accomplishments as leaders and exemplars in their residential communities. Indeed, the ability of RAs to serve in their positions is subject to conformity with student conduct rules and expectations. They are student leaders judged as students, not workers. *Amici* do not dispute that RAs in many institutions receive

"remuneration" in the form of free room rental, meal privileges and/or stipends. But *amici* submit that these privileges are the equivalent of financial aid to support the academic experience that enriches both the RAs and their fellow students.

The NLRB has never once considered whether RAs at private sector universities and colleges are employees within the meaning of the Act, or whether, even if they are deemed employees, it would effectuate the purposes of the Act to assert jurisdiction over them. Because this is a case of first impression affecting thousands of institutions nationwide, *amici* contend that this decision should not be made by the Regional office. The Region should dismiss the petition because there is no extant law holding that RAs are employees. Should the Petitioner then seek review, and if review is accepted by the Board, this decision should be made in the first instance by the Board.

II. The Role of RAs in America's Colleges and Universities

RAs are not mere rule-enforcers who instruct fellow undergraduates to lower the volume of their speakers or report underage drinking. Extensive scholarship has studied the critical role played by RAs in the educational fabric of their institutions. There are literally dozens of articles which have considered the role of RAs and the methodologies for training them to assume the student leadership role which is the essence of the position. Entire institutes are devoted to theories and methods of teaching student leadership skills. *See, e.g.* Dugan, J. P., & Komives, S. R. (2007). *Developing leadership capacity in college students: Findings from a national study. A Report from the Multi-Institutional Study of Leadership.* College Park, MD: National

Clearinghouse for Leadership Programs, available at http://leadershipstudy.net/wp-content/uploads/2012/05/mslreport-final.pdf. [1]

Amici institutions view the role of RAs as student leaders who learn from and support the educational environment of each campus. They are like other campus leaders, i.e. heads of student government; team captains; band leaders; club presidents and the like, all of whom learn from their roles and mentor and support their classmates. In many institutions, student leaders, like RAs, receive financial support for their activities. In no case is such support considered payment for "work."

Most *amici* institutions require RAs to take training courses in anticipation of their service as RAs and/or during their service. Some of the courses are offered for academic credit; some are simply required as part of the position. The topics included in the training cover essential skills that RAs must be aware of when serving as a mentor and resource to fellow students. Among the topics are:

- Helping
- Crisis Management
- Conflict Resolution
- Multicultural understanding
- Administrative understanding
- Serving as a resource
- Problem-solving guidance
- Leadership skills
- Educating others

[1] Attached as Appendix A is a representative list of publications addressing the critical role played by RAs and the methods used by institutions to train them.

- Fostering relationships
- Student skills[2]

Amici member institutions consider the RA experience an educational one, not an employment one. To qualify as RAs, *amici* institutions require applicants to satisfy minimum academic and conduct standards; they are assessed and selected because of their *student* attributes, not because they want a job.

Amici also view the role of RAs as an essential part of the educational experience of each institution. The learning experience is not simply confined to the classroom. It occurs in many venues, in many ways, all of which contribute to an undergraduate's college experience. Justice Powell recognized this powerful concept when he wrote this footnote in his famous opinion in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978):

> Fn. 48 The president of Princeton University has described some of the benefits derived from a diverse student body:
>
> "[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, `People do not learn very much when they are surrounded only by the likes of themselves.'
>
> .....
>
> "In the nature of things, it is hard to know how, and when, and even if, this informal `learning through diversity' actually occurs. It does not occur for everyone. *For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding*

[2] See Employer Exhibit #8. The skills taught at the George Washington University are illustrative of RA skills taught nationwide at *amici* institutions.

and personal growth." Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)(emphasis supplied).

III. Collective Bargaining is Incompatible With the Academic Nature of the Duties Undertaken by RAs.

Characterizing RAs as employees and making them subject to collective bargaining would intrude into the essential nature of residential life in our nation's private-sector universities. The "work" that RAs perform has no specific hours; it emerges organically from the RAs' informal relationship to the students for whom they serve as peer advisors; it is often predicated on the confidential nature of information residents routinely share with RAs, much of which is protected from disclosure by the federal Family Educational Rights and Privacy Act (FERPA) and it is universally considered to be a critical aspect of the educational experience of each RA. Collective bargaining about wages, hours and other terms and conditions of RA "employment" would intrude into the unique educational interchange between RAs and their fellow students. Grievances relating to RA performance issues would frequently involve an invasion of the privacy of students served by RAs - information that could not be revealed without the students' written consent due to FERPA. Most importantly, collective bargaining about the job duties and conditions of students who lead, learn from and mentor fellow students would intrude into the academic freedom of private sector institutions to determine the means and methods by which the residential component of the educational experience of their undergraduates should be structured. Bargaining over the duties of RAs would be no different than bargaining with a union about other fundamental elements of college life, such as course requirements, student discipline, student regulations and academic credit. None of these issues is appropriate for collective bargaining.

Consider the following circumstances that are likely to arise if bargaining were permitted with a union representing RAs:

- The hours of RAs are typically unstructured. RAs often are required to be available around-the-clock to attend to emergencies. If universities and colleges had to bargain about the "hours" of RAs, it is entirely possible that any agreed-upon hours limits would conflict with real-life emergencies. Could an RA rely on a union contract's hours limitation to refuse to assist a depressed student in the middle of the night?
- RAs are subject to discipline as *students*, not employees. Would an RA who is subject to investigation of a Student Code of Conduct violation which could simultaneously result in dismissal from the RA position be entitled to a *Weingarten* representative before a student disciplinary board?
- Could a union insist that any changes an institution wishes to make to a Student Code of Conduct be the subject of collective bargaining, since any changes could impact the "terms and conditions" of an RA's employment? This would impermissibly intrude into the educational nature of Student Code of Conduct procedures, which are a matter of an institution's academic freedom.
- If an RA contract contained a "just cause" provision for dismissal, and an RA was dismissed for a violation of student conduct rules, would an arbitrator have the authority to substitute his or her judgment for the institution and overturn the dismissal? And would the institution then be forced to continue an RA's "employment" in a residence hall to serve as a "role model" for residents?
- All student records are protected by FERPA. Assume that an RA was subject to discipline because s/he violated procedures regarding how to handle a particular student

crisis. Assume further that the union demanded full information about the incident, including all reports about the affected student, in order to fully represent the RA in whatever proceeding might arise. Under FERPA, no institution would be allowed to divulge personally identifiable information from student records without the affected student's written consent, or a subpoena, which would be subject to objection by the affected student. The institution would therefore be unable to comply with the information request. Time-consuming unfair labor practice charges would likely follow.[3]

- Assume further that a union representing RAs made information requests about student records concerning members of its own bargaining unit. That information, as well, would not be disclosable to the union without a subpoena (or the written consent of the RA and the consent of other students whose personally identifiable information may also be contained in the RAs education record) because it is not considered "directory information" under FERPA.[4] As stated above, time-consuming unfair labor practice charges would likely follow.
- Assume that an institution sets the value of a dormitory room at $X. Further assume that RAs at that institution are excused from paying a portion of the room fee as part of the financial support that accompanies the position. If the institution then decided to increase the room fee for all students, would the institution then be foreclosed from correspondingly increasing the proportionate fee for RAs without bargaining with the union, even though room fees are established for all students?

[3] It is noteworthy that while the Board majority acknowledged the FERPA issue in its *Columbia* decision (at fn. 93), it did not address it substantively. FERPA would likely play a much more significant role in matters relating to undergraduate RAs and their student peers than it would in cases involving teaching or research assistants. This is a critical issue that cannot be ignored.

[4] Directory information is information contained in a student's education record that would not generally be considered harmful or an invasion of privacy if disclosed. FERPA requires each institution to define its directory items. Employment status or records are not considered directory information.

- Assume that an institution determined for educational and safety reasons that RAs are required to remain in their residences during certain hours of the day or week. Assuming that this is a management rights educational decision, would the institution nevertheless have to bargain with a union representing RAs about the impact of such a decision? Disputes could lead to time-consuming unfair labor practice charges.

The foregoing are simply illustrative examples of the inevitable collision between "employment" conditions and academic matters. The intersection of these issues is especially significant in light of the fact that virtually all RAs are undergraduates whose role is a unique educational one.

The fact that the Board in *Columbia* determined that student *teaching assistants* and *research assistants* are eligible for collective bargaining is not relevant to consideration of whether students who receive either housing fee reductions or a stipend as an RA are serving in an employment capacity that should be subject to the Board's jurisdiction. Unlike student teaching or research assistants, RAs do not perform services that are otherwise performed by faculty, nor do they augment such services by serving as a reader, grader or preceptor. Their role is purely as a peer counselor and advisor in order to enrich the educational experience both of their advisees and themselves. There are no other "employees" who could possibly substitute for RAs, because the very nature of the position *requires* the RA to be an undergraduate student leader.

IV. The History of Litigation Concerning Student Status Demonstrates that the Board Makes Decisions About Student Categories on a Case-by-Case Basis.

The Board's history of litigation concerning students reflects careful attention to the specific student experience in each case before it. The *Columbia* and *Brown*[5] decisions exemplify this practice. In both the *Columbia* and *Brown* decisions, the majorities reviewed the history of cases pertaining to *graduate student teaching and research assistants* exclusively. Moreover the majority in *Brown* also noted that in *St. Claire's Hospital,* 229 NLRB 1000 (1977), the Board "…carefully delineated *several categories of Board cases involving students*, including those students who perform services at an educational institution where those services are directly related to the university's educational programs." *Brown*, 342 NLRB at 491 (emphasis supplied). The Board's decision in *Boston Medical Center*, 330 NLRB 152 (1999), finding medical house officers to be employees, was likewise careful to distinguish house officers from other categories of students.

Similarly, the Board's decision in *Northwestern University*, 362 NLRB No. 167 (2015) focused exclusively on the status of certain college football players and no other categories of students: "Our decision today is limited to the grant-in-aid scholarship football players covered by the petition in this particular case; whether we might assert jurisdiction in another case involving grant-in-aid scholarship football players (or other types of scholarship athletes) is a question we need not and do not address at this time." *Id.* at 1. Moreover, the Board in *Northwestern* pointedly distinguished its consideration of the Northwestern grant-in-aid football players from the Board's decisions regarding student cafeteria workers and student janitors (*San Francisco Art Institute,* 226 NLRB 1251 (1976) (student janitors excluded from unit*); Saga*

[5] 342 NLRB 483 (2004)

Food Service of California, 212 NLRB 786 (1974) (student cafeteria workers excluded from unit).

Because the Board considers the employment status and jurisdiction over each category of students on a case-by-case basis, there is in fact no existing precedent that can guide the Regional Director in the case of RAs.

a. The *Columbia* Decision Does Not Establish Employment Status for RAs.

Blind application of the *Columbia* decision to the status of RAs would fly in the face of the reality that RAs are student leadership positions whose functions and attributes are woven into the fabric of the academic experience of university undergraduates – both the undergraduates advised by the RAs and the RAs themselves. Characterizing these individuals as "employees" within the meaning of Section 2(3) of the Act will do significant damage to the role of RAs in private educational institutions across the United States. Moreover, since the *Columbia* decision did not, either explicitly or implicitly, consider the status of RAs, the Regional Director should not use this case as a vehicle to attempt to create new Board law. *Amici* respectfully suggest that the Regional Director should decline to find that there is a question of representation in this case. If the Petitioner requests review by the Board, the issue can be addressed as a policy matter by the Board at that time, if it grants review.[6]

b. The *Columbia* Decision Does Not Address the Role of Undergraduates Who Do Not Serve as Assistants in a Teaching or Research Role.

The *Columbia* decision focused exclusively on the determination whether "student assistants" are statutory employees. As the Board held in that decision:

> Thus, we hold today that *student assistants* who have a common-law employment relationship with their university are statutory employees under the Act. We will

[6] This has special importance in this case because the Regional Director has recused himself and the Regional decision will be made by a designee. First impression cases of national importance should not be decided in this fashion.

> apply that standard to student assistants, including assistants engaged in research funded by external grants. 364 NLRB No. 90, at 2 (emphasis supplied).

The Board went on to say that "We do not hold that the Board is required to find workers to be statutory employees whenever they are common-law employees, but only that the Board may and should find here that student assistants are statutory employees." *Id.* at 4, fn. omitted. Additionally, the Board majority agreed that the Board has *discretion* to determine whether it would effectuate national labor policy to extend collective bargaining rights to any particular group. Thus, it cited its decision in *Northwestern University* as an example in which it declined to extend collective bargaining rights to certain college athletes because it "would not advance the purposes of the Act." *Id.* at p. 7, fn.56.

c. <u>In Reaching Its Conclusions in *Columbia*, The Board Relied on Empirical Evidence, Which Is Absent in this Case.</u>

Not only did the Board carefully limit its *Columbia* decision to the category of "student assistants," but it emphasized a key factor that is lacking in this case.

The *Columbia* majority first referred to the alleged "theoretical" nature of the *Brown* majority's contentions:

> The claims of the *Brown* majority are almost entirely theoretical. The *Brown University* Board failed to demonstrate that collective bargaining between a university and its employed graduate students cannot coexist successfully with student-teacher relationships, with the educational process, and with the traditional goals of higher education. Labor law scholars have aptly criticized the *Brown University* decision as offering "no empirical support" for its claims, even though "those assertions are empirically testable." Id. at p. 7, fn. omitted.

The majority then referred to scholarly research concerning collective bargaining with graduate assistants in public universities which, it claimed, demonstrated that collective bargaining could co-exist with concerns about academic freedom in those institutions: "When the best analytical

evidence offered by Columbia suggests merely that neither harm nor benefit from collective bargaining can be ruled out, the dire predictions of the *Brown* University Board are undercut." *Id.* at 9. Hence, the majority proceeded to overrule *Brown* without hesitation.

To our knowledge, there are no scholarly articles whatsoever challenging *amici's* contention that characterizing RAs as employees would interfere with the core educational goals of this student leadership position. Not only are there no scholarly studies of the effect of collective bargaining with RAs, but there is no evidence *at all* that there has been any collective bargaining with RAs anywhere in the United States, with the sole exception of the University of Massachusetts Amherst, a public institution. And there are no studies assessing the impact of that bargaining on that University's residential life function.[7] The only evidence of the possible impact of collective bargaining with RAs has been presented by the George Washington University in this case, and it demonstrates that bargaining would have severe negative consequences. Since the Board apparently intends to rely on empirical evidence when considering collective bargaining with students, the *absence* of any empirical evidence whatsoever demonstrating that collective bargaining would have a positive effect on the residential life activities at the Respondent or at any of the thousands of private sector institutions which have RA programs should compel the Region to decline to exercise jurisdiction over this group of students and allow the matter to be resolved by the Board if the Petitioner seeks review of a dismissal of the petition.

[7] As noted in the Appendix to this brief, there are dozens of studies analyzing the educational and leadership roles of RAs in college life.

V. Asserting Jurisdiction over RAs Would Not Effectuate the Purposes of the Act.

The Board clearly has the discretion to decline to assert jurisdiction, even where it otherwise might find that a particular group of individuals satisfies the statutory definition of "employee" under the Act. Should the Region conclude that RAs satisfy the Section 2(3) definition of employee, *amici* submit that it should nonetheless decline to assert jurisdiction over them because doing so would intrude so deeply into the academic nature of their appointments as to make collective bargaining unworkable. Never in its history has the Board found undergraduate students serving in leadership roles to be statutory employees. It has never even considered the myriad factors that link RA status to student status, or the consequences of requiring collective bargaining in such circumstances. There is no justification to foist collective bargaining onto a student leadership position. Rather than fostering the purposes of the Act, doing so would create confusion, controversy and litigation on campuses all over this country.[8]

Conclusion

For the reasons stated in this brief, *amici* urge the Region to find that the RAs at the George Washington University are not statutory employees, or if they are, to decline to assert jurisdiction over them because it would not effectuate the purposes of the Act. If the Region dismisses the petition, the Petitioner can request review before the Board, and if review is accepted, the Board can decide this matter of first impression just as it has individually

[8] The only court which has considered the status of RAs in the FLSA context ruled that they are not employees. *Marshall v. Regis Educational Corp.*, 666 F.2d 1324 (10th Cir. 1981). Similarly, just last week the Seventh Circuit ruled that student athletes are not employees under the FLSA. *Berger v. National Collegiate Athletic Association,* No. 16-1558 (7th Cir. 2016).

considered every other case involving students.

Respectfully submitted,

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December 16, 2016

CERTIFICATE OF SERVICE

I, Joseph W. Ambash, hereby certify that on this 16th day of December, 2016, I served the foregoing *amicus* brief, via the Board's electronic filing system and via e-mail, upon the following:

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APPENDIX A

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