



Is the NLRB Still Relevant to the Unionization of Graduate Students?

September 6, 2018

KNOWLEDGE | RESOURCES | ADVOCACY | CONNECTIONS

cupa·hr™ Webinar

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NLRB Chairman and Board Member (2013-2017)

KNOWLEDGE | RESOURCES | ADVOCACY | CONNECTIONS

Framework

1. Background: Development of the Law

2. The Obama NLRB, Students and Graduate Assistants

- Columbia University (2016)
- Yale University (2017)
- The NLRA Impact When Student Assistants are Unionized “Employees”

3. Private Election Agreements – Rush Away from the Trump NLRB?

4. Pressure for Student Assistant Union Representation/Bargaining

- Corporate Campaigns
- Other Pressure
- Possible Responses

5. Future Predictions

- Can Unions Keep the “Student Assistant” Issue Away from the Trump NLRB?
- What can we expect from colleges/universities? From graduate students/unions? From the NLRB?

6. Questions

Participant Poll

1. Unions on Campus. Excluding graduate students (and student assistants), what other employees are union-represented at your institution?

- Nobody
- Certain outside contractor/vendor employees who work on campus
- Maintenance and housekeeping
- Full-time faculty
- Adjunct faculty

Participant Poll

2. Graduate Students and Assistants. Do you currently have union-represented student “employees” on your campus?

- Teaching or research assistants
- Students who do office/administrative work
- Resident advisors
- Student guards
- Other categories of student workers
- None of the above

Participant Poll

3. Experience with Union Campaigns/Elections. What experience do you or others have with union organizing campaigns or union elections?

- I have participated in a union campaign/election at my college/university
- I have participated in a union campaign/election somewhere else
- I don't have hands-on experience with a union campaign/election
- Nobody at my college/university (to my knowledge) has hands-on experience with a union campaign or election

Participant Poll

4. Graduate Students and Assistants. What experience do you or others have with collective bargaining?

- I have participated in collective bargaining at my college/university
- I have participated in collective bargaining somewhere else
- I don't have hands-on experience with collective bargaining
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BACKGROUND

Development of the Law

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Early Cases: Mixed Approaches

Adelphi University, 195 NLRB 639, 648 (1972)

- Graduate assistants were found to be “primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the [faculty] unit”
- The collegiality that characterizes universities “does not square with the traditional authority structures with which [the NLRA] was designed to cope in the typical organizations of the commercial world.”

NLRB v. Yeshiva University, 444 U.S. 672 (1980)

- Supreme Court held that faculty members participating in university governance, with absolute authority over academic matters, are “managerial” employees excluded from collective bargaining
- The NLRA was intended for application to “management-employee relations that prevail in the pyramidal hierarchies of private industry,” which contrasts with a “mature” private university where authority typically “is divided between a central administration and one or more collegial bodies”

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Early Cases: Mixed Approaches

Leland Stanford Junior University, 214 NLRB 621, 623 (1974)

- certain research assistants were “primarily students” and not statutory employees
- relationship between research assistants and university was “not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer.”

Boston Medical Center, 330 NLRB 152 (1999)

- teaching hospital’s “house staff” – interns, residents, and clinical fellows – were found to be statutory employees (with Member Hurtgen dissenting)
- Board majority relied on several facts . . .
 - The house staff worked for compensation,
 - They spent 80% of their time on patient care,
 - They resembled “junior professional associates” that were analogized to “apprentices” who were always allowed to vote in Board elections

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Early Cases: Mixed Approaches

New York University (NYU), 332 NLRB 1205 (2000)

- Board finds – for the first time – that university graduate assistants are statutory employees
- Board found that graduate assistants were like the “house staff” found to be employees in Boston Medical Center:
 - graduate assistants performed services for compensation,
 - their work was not a requirement for graduation, and
 - bargaining, according to the Board, would not interfere with academic freedom

Brown University, 342 NLRB 482 (2004)

- Divided Board – overruling *NYU* – finds that graduate teaching assistants are not employees
- Board majority holds the teaching assistants “are primarily students and have a primarily educational, not economic, relationship with their university”
- Board majority also held: “Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration”

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THE OBAMA NLRB

Students and Graduate Assistants

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Northwestern University: Student-Athletes

**Northwestern University and College Athletes Players Association (CAPA),
Petitioner. Case 13-RC-121369**

August 17, 2015

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA,
HIROZAWA, JOHNSON, AND MCFERRAN

In this representation case, the Petitioner asks the Board to find that Northwestern University's football players who receive grant-in-aid scholarships are employees within the meaning of Section 2(3) of the National Labor Relations Act and direct an election in a unit of these grant-in-aid players. The Regional Director agreed with the Petitioner, found that the grant-in-aid scholarship players are employees within the meaning of Section 2(3), and directed an election. Because this case raises important issues concerning the scope and application of Section 2(3), as well as whether the Board should assert jurisdiction in the circumstances of this case even if the players in the

362 NLRB No. 167

Northwestern University: Student-Athletes

**Northwestern University and College Athletes Players Association (CAPA),
Petitioner. Case 13-RC-121369**

August 17, 2015

- NLRB (unanimously) declined to exercise jurisdiction over scholarship-eligible football student-athletes without deciding whether student-athletes are “employees”
- The Board’s focus . . .
 - all existing professional sports bargaining units (e.g., baseball, football, hockey) encompassed the entire league
 - all Northwestern competitors in the “Big Ten” – and nearly all of the 125 colleges in the NCAA Division I Football Bowl Subdivision (with only 17 exceptions) – were public universities (government employers) not even subject to NLRB jurisdiction

concerning the scope and application of the Act. The Board will not
assert jurisdiction in the circumstances of this case even if the players in the
362 NLRB No. 167

Columbia University: Student Assistants (Wall-to-Wall)

The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia–GWC, UAW. Case 02-RC-143012

August 23, 2016

DECISION ON REVIEW AND ORDER

**BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA,
HIROZAWA, AND MCFERRAN**

The threshold question before us is whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. Here, after a hearing directed by the Board, the Regional Director applied *Brown University*, 342 NLRB 483 (2004), where the Board found that graduate student assistants were not employees within the meaning of Section 2(3), and dismissed a petition filed by the Graduate Workers of Columbia-GWC, UAW, which seeks to represent both graduate and undergraduate teaching assistants, as well as graduate research assistants. The Board granted review in this case

364 NLRB No. 90

Columbia University: Student Assistants (Wall-to-Wall)

The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia–GWC, UAW. Case 02-RC-143012

- UAW affiliate seeks to represent a wall-to-wall unit of student assistants: all student employees providing “instructional services,” including graduate and undergraduate . . .
 - Teaching Assistants,
 - Teaching Fellows,
 - Preceptors,
 - Course Assistants,
 - Readers
 - Graders
 - Departmental Research Assistants
 - Graduate Research Assistants (including those compensated through Training Grants)
- Board majority – overruling Brown University – held . . .
 - all of the student assistants had a “common-law employment relationship” and were statutory “employees”
 - the bargaining unit was appropriate, encompassing graduate students, terminal Master’s degree students, and undergraduate students
 - None of the petitioned-for classifications involved “temporary employees” (who would have been excludable from the unit)

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Member Miscimarra, dissenting.

The Board here changes the **treatment that has been afforded student assistants throughout the Act's history of 80 years**, with the exception of a four-year period that was governed by the Board's divided opinion in *New York University (NYU)*. . . .

I disagree with my colleagues' decision to apply the Act to college and university student assistants. In my view, this change is **unsupported by our statute**, and it is **ill-advised based on substantial considerations**, including those that far outweigh whether students can engage in collective bargaining over the terms and conditions of education-related positions while attempting to earn an undergraduate or graduate degree.

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Member Miscimarra, dissenting.

I agree with the Board majority’s reasoning in *Brown* . . . that “graduate student assistants, who perform services at a university in connection with their studies, have a predominately academic, rather than economic, relationship with their school.”

The instant case does not involve “industrial life.” Yet this only serves to reinforce the inappropriateness of “blindly” imposing collective bargaining and the rest of the NLRA on students in “the academic world.” . . . The best interests of *students* . . . necessarily revolves around whether they obtain the education that costs so much in time and money and means so much to their future. The Board has no expertise regarding these issues, and Congress did not adopt our statute to advance the best interests of college and university students. This makes it inappropriate to summarily dismiss concerns in this area as being “not dispositive.”

well as graduate research

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Nor can the Board freely disregard the fact that **the potential resort to economic weapons is part and parcel of collective bargaining**. . . . For the students who may find themselves embroiled in them, **labor disputes between universities and student assistants may have devastating consequences**.

* * *

Now that, with today's decision, student assistants are employees under the NLRA, **what economic weapons** are available to student assistants and the universities they attend? They would almost certainly include the following:

- Strikes
- Lockouts
- Loss, Suspension or Delay of Academic Credit
- Suspension of Tuition Waivers
- Potential Replacement
- Loss of Tuition Previously Paid
- Misconduct, Potential Discharge, Academic Suspension/Expulsion Disputes

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Member Miscimarra, dissenting.

Full-time enrollment in a university usually involves **one of the largest expenditures a student will make in his or her lifetime. . . . Congress never intended that the NLRA and collective bargaining would be the means by which students and their families might attempt to exercise control over such an extraordinary expense.**

I believe **collective bargaining is likely to detract from the far more important goal of completing degree requirements in the allotted time**, especially when one considers the potential consequences if students and/or universities resort to economic weapons against one another. I also believe that the Board's processes and procedures are poorly suited to deal with representation and unfair labor practice cases involving students. Add these up, and the sum total is **uncertainty instead of clarity, and complexity instead of simplicity, with the risks and uncertainties associated with collective bargaining**—including the risk of break-down and resort to economic weapons—**governing the single most important financial decision that students and their families will ever make.**

Yale University: Student Assistants (Multiple Units)

Yale University and Unite Here Local 33 Petitioner. Cases 01-RC-183014, 01-RC-183016, 01-RC-183022, 01-RC-183025, 01-RC-183031, 01-RC-183038, 01-RC-183039, 01-RC-183043, and 01-RC-183050

February 22, 2017

ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS
PEARCE AND MCFERRAN

The Employer's request for expedited review of the Regional Director's Decision and Direction of Election, and its request to stay the elections scheduled for February 23, 2017, or alternatively impound the ballots, is denied.

Dated, Washington, D.C. February 22, 2017

365 NLRB No. 40

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Yale University and Unite Here Local 33 Petitioner. Cases 01-RC-183014, 01-RC-183016, 01-RC-183022, 01-RC-183025, 01-RC-183031, 01-RC-183040, and 01-RC-183050

- Unite Here Local sought nine elections – involving nine separate bargaining units – corresponding to nine University Departments (English, East Asian Languages and Literature, History, History of Art, Political Science, Sociology, Physics, Geology and Geophysics, and Mathematics).
- The petitioned-for students included teaching fellows, discussion section leaders, part-time acting instructors, associates in teaching, lab leaders, grader/tutors, graders without contact, and teaching assistants
- Board majority denied the University's request for expedited review of the Regional Director decision ordering nine elections, and declined to stay the election
- Acting Chairman Miscimarra dissented, based on . . .
 - his dissenting opinion in Columbia University, and
 - substantial questions that existed regarding the appropriateness of nine different bargaining units rather than the wall-to-wall unit upheld in Columbia University

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PRIVATE ELECTION AGREEMENTS

Rush Away from the Trump NLRB?

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What Is a Private Election Agreement?

- Election administered by a neutral arbitrator, rather than the NLRB
- Definition of the bargaining unit that is subject to union organizing
 - The parties can define it in the agreement
 - Or the arbitrator can define it
- Procedures for the election
 - Initial showing of interest based on authorization cards
 - Election notice
 - List of eligible voters (which may raise privacy concerns for student information)
 - Dates, times, and locations for the election
 - Mail ballots or absentee ballots?

Regulation of Speech and Conduct

- Regulation of speech/communications related to the election
 - Neutrality or mutual non-disparagement
 - Limitations on who may speak on behalf of the University, through what channels, and how often
 - Restrictions on access to campus by union representatives in order to meet with students
 - Restrictions on posting/distribution of literature
 - Prohibitions on threats, intimidation, coercion
- How are these restrictions enforced?
- What are the possible remedies under the agreement?

Regulation of the Bargaining Process?

- Will the agreement govern what happens if the Union wins the election?
 - Definition of the subjects for bargaining
 - Mandatory subjects of bargaining
 - Academic issues that are not subject to bargaining
 - Disputes over whether a party has engaged in good faith bargaining
 - Remedies if a violation is found by the arbitrator
 - What happens if the parties can't reach agreement?
 - Strikes, lockouts, picketing, or other disruptions
 - Mediation
 - Interest arbitration

More on Bargaining Subjects

Columbia College Chicago and Part-Time Faculty Association At Columbia College Chicago—IEA/NEA. Cases 13-CA-073486, 13-CA-078080, 13-CA-081162, 13-CA-084369

- The faculty CBA gave the college the right to unilaterally change course credit hours (under the CBA's management rights clause).
- **NLRB majority**: college still had an obligation to bargain with part-time faculty union over the effects of reducing course credit hours.
 - The effects of the change in course credit hours were not the "inevitable consequence" of the decision.
 - For example, the CBA did not preclude the union from seeking different levels of compensation for the courses affected.
 - The union could have sought to bargain over other alternatives as well.
- **Court of Appeals (and Member Miscimarra, dissenting)**: the college's contractual right to change course credit hours also waived any potential effects-bargaining obligation

PRESSURE FOR Student Assistant Union Representation/Bargaining

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Corporate Campaigns

- A form of public pressure to damage the employer's credibility with students, employees, the media, and government officials . . .
 - Designed to force the employer to capitulate to the union's demands
- Typical tactics include
 - public demonstrations,
 - picketing,
 - boycotts,
 - targeted media attacks,
 - litigation

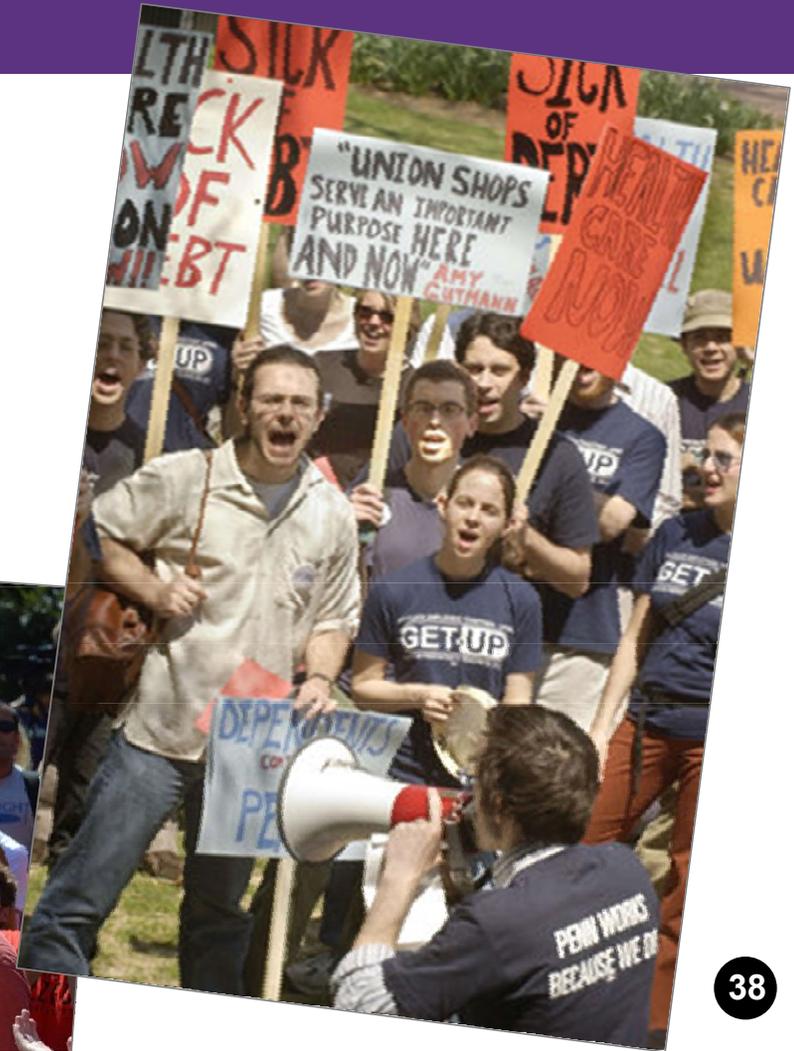
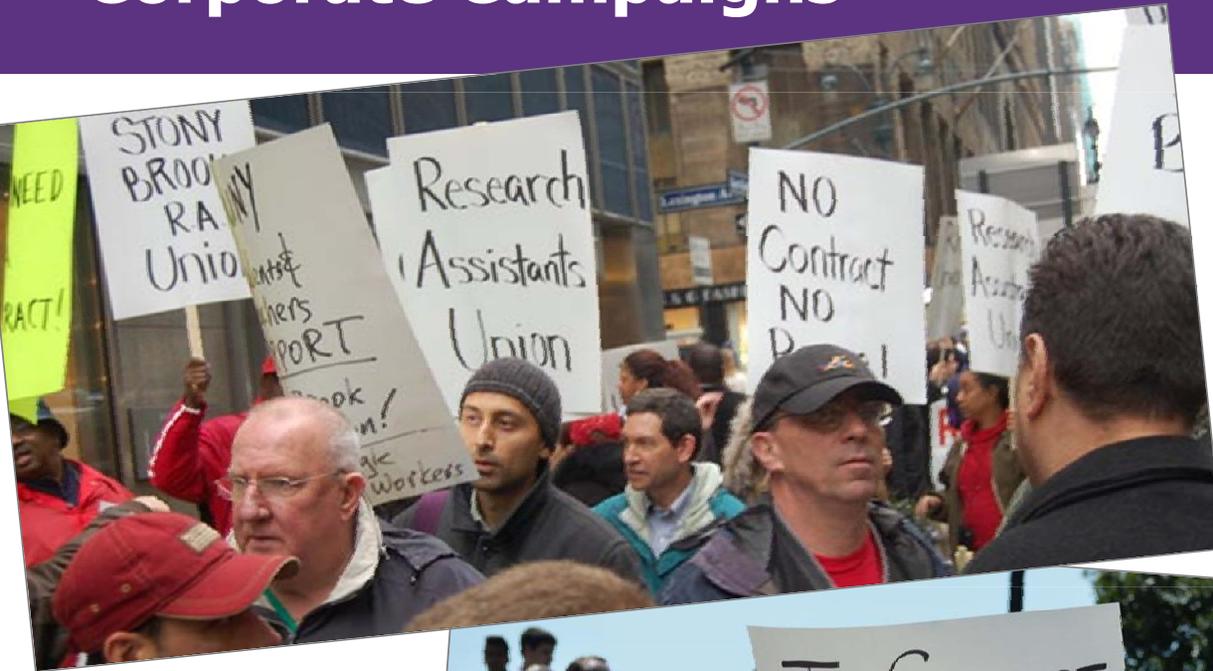
Corporate Campaigns

- Potential tactics directed against Universities based on student demands for collective bargaining . . .
 - disruption of University events,
 - disruption of speeches/public appearances by University officials,
 - pressure directed at University benefactors, trustees, donors, and local politicians,
 - social media attacks, including a dedicated website profiling alleged unfair treatment by the university, chat rooms, YouTube videos
 - media events, including press conferences and articles in student publications
 - picketing, demonstrations, and rallies on campus
 - union alliances with politicians, community, and public interest organizations
 - personal attacks on administrators, including sit-ins in offices and appearances at residences
 - other activities calculated to produce publicity and to embarrass, intimidate or cause time-consuming problems for University officials

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Corporate Campaigns



University of Florida – “Graduate Assistants United”

**Paying those fees
ain't no joke! UF GAs
are flat spring
broke!**



Join GAU in rallying for change on March 13!

**Who: Graduate Assistants and anyone who cares about UF's
quality of education**

What: Rally against GA fees

Where: Turlington Plaza

When: Friday, March 13 (time TBA)

Why: Because we are tired of paying to work!

**Graduate
Assistants
United**

YOUR LABOR, YOUR VOICE

FUTURE PREDICTIONS

College and University Graduate/Student Assistants

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Future Predictions

- Can Unions Keep the “Student Assistant” Issue Away from the Trump NLRB?
 - In other words, is Columbia University the NLRB’s last word – forever – recognizing the right of student assistants to be “employees” under the NLRA?
- How will colleges/universities react to demands for private election agreements?
- What can we expect from graduate students/unions regarding tactics aimed at producing pressure on colleges and universities to recognize/engage in bargaining with student assistant unions?
- Will colleges/universities construct other processes for engaging student assistants that do not involve participation by unions?
 - Could these “processes” be considered unlawful management-dominated labor organizations in violation of Section 8(a)(2) of the NLRA?
- What can we expect from the Republican NLRB regarding the Columbia University decision and other cases affecting colleges and universities?

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QUESTIONS

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Summary and Questions



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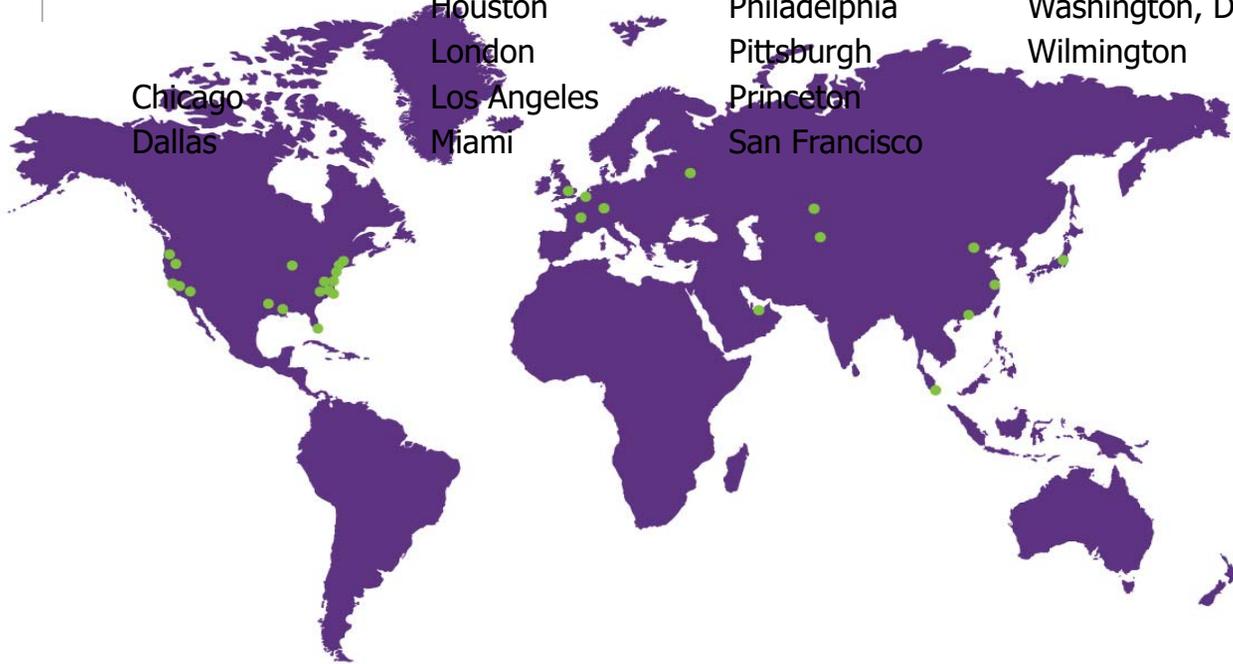
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Our Global Reach

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Thank You!

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