

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1**

YALE UNIVERSITY

and

UNITE HERE LOCAL 33

Case Numbers

01-RC-183014

01-RC-183016

01-RC-183022

01-RC-183025

01-RC-183031

01-RC-183038

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01-RC-183050

**UNION'S POST-HEARING BRIEF
TO THE REGIONAL DIRECTOR**

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INTRODUCTION

Under the Act, employees may seek to organize any unit that is appropriate. There is no requirement that it be the most appropriate unit. Each above-captioned petition seeks an election in a separate department unit. The Board in *Specialty Healthcare* specifically named units organized by “department” as one type of appropriate unit, and there are decades of Board cases approving department units.

Each petitioned-for Department Unit is readily identifiable, and each has a community of interest within itself. Since 1951, the Board has repeatedly emphasized that the most important consideration in determining unit appropriateness “is the manner in which the particular employer has organized his plant and utilizes the skills of his labor force.” *International Paper Co.*, 96 NLRB 295, 298, n. 7 (1951).

Yale University has organized its Graduate Teacher operations on the basis of departments. Indeed, each petitioned-for Department has been established by an official action of the University’s highest governing body: the Yale Corporation. Each Department is identified in the Yale Corporation By-Laws as a designation of distinct “teaching . . . staff.”

Each of the petitioned-for Departments has existed for decades, and is structurally and operationally distinct from other Departments at Yale. Each petitioned-for Department has at least a Chair, Director of Graduate Studies (“DGS”), Director of Undergraduate Studies (“DUS”), and administrative staff. Each has its own Department building.

Each petitioned-for Department has its own unique set of published Graduate Teacher policies, many of them either online or in an official Department Handbook. Each Department also institutes numerous policies, procedures, and practices applicable to Graduate Teachers that are not contained in the Handbook. Yale’s only restriction on such policies is that they not *conflict* with any explicit rule in the GSAS Programs & Policies guide (“P&P”). But Yale admits that the P&P and other GSAS policies are merely a “framework.” For example, each petitioned-for Department receives a unique numerical allocation of 10-hour-per-week Teaching Fellow Resources (“TF slots” or “TF positions”) to distribute; within that framework, it can distribute

the TF slots in any way it sees fit. Indeed, subject to such broad parameters, the Employer admits that each petitioned-for Department can autonomously manage its courses, hire Graduate Teachers, and supervise Graduate Teachers as it deems best for the subject matter in question.

Indeed, the Departments have the greatest autonomy precisely in the areas most important here: course management, and the hiring and supervision of Graduate Teachers. *First*, each Department creates a structured workplace for Graduate Teachers by deciding which courses will be taught in the Department. *Second*, the Department determines which of those courses will have Graduate Teachers by distributing TF slots to those courses. *Third*, the Department autonomously hires (“assigns” or “appoints”) Graduate Teachers to the TF positions, making it the “Assigning Department” for that Graduate Teacher. *Fourth*, the Assigning Department faculty supervises those Graduate Teachers. With respect to the foregoing operations, *only* the Assigning Department has directive authority.

As the Employer admits, a Department’s faculty supervises Graduate Teachers in the Department’s courses. This supervision is subject to standards set by that Department. Department faculty sometimes decide, in committees within the Department, to propose or adopt policies regarding Graduate Teacher supervision. Sometimes they codify these department policies in the Department Handbook. Everything that results in courses taught and what faculty supervises them is coordinated by the Department’s faculty—through the Department’s officials and committees.

The Employer’s witnesses even admitted that Graduate Teacher grievances and discipline are managed at the Department level. When teaching issues get troubling enough, the Graduate Teachers will discuss them first with other Graduate Teachers in the course where the challenge arose; then, with other Graduate Teachers in the Department; then, sometimes in a group, with the faculty supervisor or Department registrar; and then with the administration in the Department. If these teaching issues rise to the central administration, it is only if they cannot be resolved at the Department level. At that point, the Department would still have agency: the

teaching concerns are typically negotiated between the central administration and the Department itself.

And the particular manner of such management differs from one petitioned-for Department to the next. These differences, the Employer admits, are a function of decisions made by Department officers and faculty committees the Department convenes. Operational distinctions between Departments reinforce that each petitioned-for Department—established by the Yale Corporation itself—is readily identifiable and has a distinct community of interest.

Thus, the Employer shoulders an impossibly heavy burden. Under *Specialty Healthcare* and related Board law, the Employer must demonstrate that its proposed alternate unit of all Graduate Teachers throughout the University is *the only* appropriate unit here. Indeed, the Employer must demonstrate that the community of interest within each petitioned-for Unit “overlaps almost completely” with the communities of interest of every other department and school where Graduate Teachers teach at Yale—and that there is “no rational basis” for any unit smaller than its proposed unit. The Employer cannot meet that burden here.

The Board and courts have held, again and again, that “more than one appropriate bargaining unit logically can be defined in any particular factual setting.” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000); *Specialty Healthcare*, 357 NLRB No. 83, at *10 (2011) (“The suggestion that there is only one set of appropriate units in an industry runs counter to the statutory language and the main corpus of our unit jurisprudence.”). The factual setting here—where Yale has established each petitioned-for Department with autonomy to hire and supervise Graduate Teachers—makes clear that Department Units are appropriate.

Department autonomy in hiring and supervision of Graduate Teachers has translated into an autonomous work community in each petitioned-for Department. Graduate Teachers’ functional integration is concentrated within the petitioned-for Assigning Department where they teach, and they have little such integration with any Graduate Teachers teaching elsewhere.

Similarly, throughout a semester of teaching, Graduate Teachers interact constantly and predominantly with other Graduate Teachers teaching in the same Department. Where a group of

Graduate Teachers is teaching the same course, many of the interactions are within that group—including weekly trainings for the course where Graduate Teachers discuss teaching in detail. Departmental events and trainings also provide opportunities for interactions among Graduate Teachers teaching in different courses within the same Department.

This Department autonomy alone should block any conclusion that any petitioned-for Department Unit's community of interest “overlaps almost completely” with Graduate Teachers in other departments. But there is an additional yoke on Yale's burden: Each of the petitioned-for Departments' operates its Graduate Teacher program differently, further foiling any attempt to prove an “overwhelming” community of interest between them.

Each petitioned-for Department develops its own terms and conditions of employment. For each TF position created, the Department decides its level of pay and its type. The Department also decides what sorts of work will be assigned to that TF assignment type. For example, some “Grader/Tutors” only grade, others only tutor, and some do both. And the “PTAI” designation does not mean the same thing in the History Department as it does in East Asian Languages and Literatures: Although both are entitled “PTAIs,” and each Department may choose to designate to each a pay rate of \$8,000 at the TF20 level for the semester, they have different employment conditions, including different hours, different authority structures, different stressors, and different scheduling flexibility. These Department choices often result in a different effective hourly wage rate, as hours of work vary greatly in practice.

Indeed, teaching responsibilities vary substantially by Department. The nuts and bolts of teaching a Physics lab are worlds away from the brass tacks of teaching History of Art in an art gallery, the nitty-gritty of leading a Geology Department field trip, or the tenor of “team-teaching” intonation techniques with rotating responsibilities in an East Asian Language course.

Further, the Departments have distinct grading and operational policies. Some Departments allow Graduate Teachers to design classes and assignments. In others, groups of lecturers or faculty supervisors rigorously hold Graduate Teachers to an intradepartmental training regimen and traditional teaching practices.

There is no question but that the petitioned-for Departments have distinct communities of interest. Thus, the Employer cannot meet its burden to show an “overwhelming community of interest” that would justify its proposed unit as somehow the *only* and *the smallest* appropriate unit here. There is no evidence that begoggled Lab Leaders leading laser labs in Physics, discussion-section leaders in large introductory History courses, five-day-per-week East Asian Language instructors, and Geology teachers who go on field trips to Patagonia have an “overwhelming” community of interest with one another. These groups plainly all have distinct interests in relation to the Yale University Employer.

Interests are disparate in more ways than they are similar. More importantly, similar interests certainly are not overwhelming. Graduate Teachers in different departments have different teaching concerns, and those concerns fall primarily along Department teaching lines drawn by the Yale Corporation itself.

As such, the Employer cannot meet its heavy burden to prove that there is “no legitimate basis upon which to exclude” extra-departmental employees from any petitioned-for Department Unit. *Specialty Healthcare*, 357 NLRB at 944. The basis is not only legitimate but compelling: each petitioned-for Department is established by the Employer and controls the hiring and supervision of Unit employees. Thus, each petitioned-for Unit is appropriate.

STATEMENT OF THE ISSUE

The Regional Director requested briefing “solely limited to the issue of the community of interest, appropriate unit.” (Tr. 1947.)¹ Thus, the issue in each above-captioned case is whether the petitioned-for department unit is an appropriate unit under *Specialty Healthcare*. (Bd. Ex. 3 [Clarified Unit Definitions].)

¹ References to the official record of the hearing in this matter shall be designated as follows: (1) “Tr.”: Transcript; (2) “Pet.”: Petitioner’s Exhibit; (3) “Er.”: Employer’s Exhibit; (4) “Bd. Ex.”: Board Exhibit.

FACTS

I. Each Petitioned-for Unit Tracks a Dividing Line Drawn by the Employer: Yale Corporation has Established Each Department with Autonomy to Distribute, Hire, and Supervise Graduate Teachers Separately from Other Yale Subdivisions.

The Employer admits that it divides its Graduate Teachers into departments.²

Specifically, it admits that each petitioned-for Department was designated to be a separate Department by the official action of Yale Corporation, the Employer's highest governing body. (Tr. 86 [Gendler].)

Yale Corporation's By-Laws state that a Department is a designation of teaching staff:

Members of the teaching . . . staff of the University . . . may be designated as a Department by the Corporation It is the function of the Departments and Academic Programs to provide the instruction necessary to meet the requirements of the course of study as formulated by each faculty."

(Pet. 3, p. 8 [By-Law 33].) The Employer admits each petitioned-for Department has a Chair, a Director of Graduate Studies ("DGS"), and a Director of Undergraduate Studies ("DUS") (*See, e.g.*, Tr. 81-85 [Gendler]; Tr. 1349-1350 [Shen]), which are collectively known as the "Departmental Officers." (Tr. 568 [Schirmeister].) Each Department's "day-to-day operations . . . are under the supervi[sion] of the Department Chair." (Tr. 45 [Gendler].)

There are two authorities for the process for appointing the Department Chair: The University bylaws and the Faculty Handbook. They differ slightly:

Yale Corporation By-Law 33: "The Chairmen of Departments shall be appointed by the Corporation for terms of not more than three years on nomination by the President after consultation with the Professors of the Departments." (Pet. 3 p. 8].)

² The term "Graduate Teachers" refers collectively to Teaching Fellows, Discussion Section Leaders, Part-Time Acting Instructors (PTAIs), Associates in Teaching, Lab Leaders , Grader/Tutors, Graders without Contact, and Teaching Assistants. Whenever someone is referred to as a Graduate Teacher "in" a certain Department, this means that they are teaching in that Department, not that they are enrolled as a student in that Department (*cf.* Tr. 19). Whenever the term "home department" is used, it refers to the department in which a Graduate Teacher is a enrolled as a student. (Tr. 17.)

Yale Faculty Handbook: “Chairs are appointed by the Corporation on nomination by the President after consultation with the deans and faculty, normally for a term of three years”. (Pet 12, p. 28.)

Although Dean Gendler testified that “the chairs of academic departments are appointed by the President upon recommendation of the Dean of the Faculty of Arts and Sciences” (Tr. 42), the foregoing sources state that the appointment is made by the Yale Corporation. The Department faculty (expanded, in the Faculty Handbook, to include the “deans”) have a consulting role, but the Dean of the Faculty of Arts and Sciences has no official role.

The Department Chair is responsible for nominating a faculty member to serve as DGS. The Chair makes this nomination to the Graduate School Dean, who—in the recollection of the Employer’s witnesses—invariably accepts the nomination. (Tr. 378 [Gendler]; Tr. 1078 [Tipton].) The basic structure of a Department is summarized below in Figure 1.

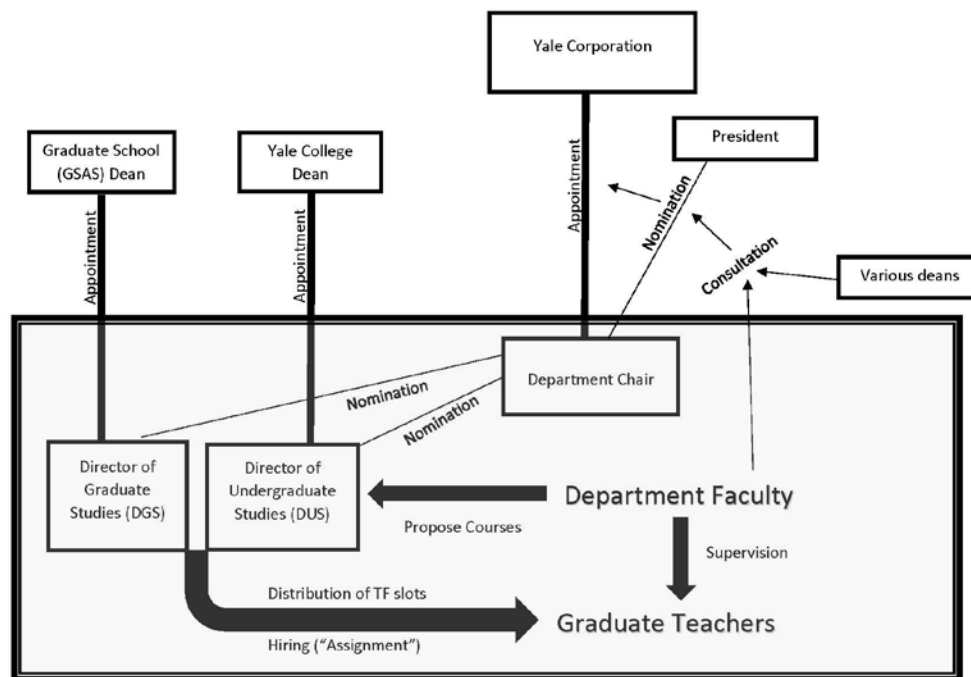


Figure 1 Organizational Chart of Department Officers

The Department has “direct oversight over day-to-day departmental operations.” (Tr. 41 [Gendler].) Those day-to-day operations include the three key processes at issue in this case: (a) distribution (sometimes called “allocation,” Tr. 2515 [Schirmeister]) of TF positions (“TF slots”) to courses; (b) hiring (also called “assignment” or “appointment”) of Graduate Teachers to fill those TF slots; and (c) supervision of Graduate Teachers. (*See supra* p. 7 [Figure 1].) These processes will be generally addressed, and then followed with a review of department-by-department community-of-interest facts for each petitioned-for Department.

In late Spring of each year, the Employer provides each of the petitioned-for Departments with its own unique numerical “allocation” of “teaching resources” (“TF Resources”), department-by-department. (*See, e.g.*, Er. 28; Er. 18-26, p. 4 [Schirmeister memos to each Department]; Tr. 493, 524 [Schirmeister: “I send the allocation number to the department”]; Tr. 1030 [Tipton: referring to the numerical allocation as a “budget line.”].)

The Department then autonomously “distribute[s] the allocations and assign[s] students” to courses in whatever manner it deems best. (Tr. 493 [Schirmeister: “They distribute the allocations and assign students.”]) Each Department is “free to redistribute these resources in whatever manner you think best” (*see, e.g.*, Er. 25, p. 2 [Schirmeister memo to the Mathematics Department]), and is expected to “solve distribution issues” on its own (Er. 28, p. 2).

Employer and Union witnesses alike sometimes used the term “allocation” to refer to the Department-level “distribution” of TF Resources, because, as Associate Dean Schirmeister explained, “The two processes used to be one. Now there are two different or two steps in the process of getting teaching fellows to courses”: (i) the first step when the department receives the allocation; and (ii) the second step when the department “puts TF resources on particular courses.” (Tr. 2515.) This second step—deciding which courses will have TF positions, and assignment of each TF slot’s level and type—used to be handled by the central administration.

In January 2015, the Employer transferred that significant authority to the Departments. (Pet. 37; *see* Tr. 2514-2515 [Schirmeister].) Before the Spring 2015 semester, the central administration both “allocated the number of Teaching Fellows *and* [] allocated [TF positions] to

particular courses”; then, the department had decisive authority only over which individuals would fill those TF positions. (Tr. 2515; *see also* Tr. 642 [Schirmeister].)

Now, however, there are “two *different* [] steps in the process of getting teaching fellows to courses,” i.e., allocation: (1) the Graduate School still determines the number of TF Resources to budget to each department; but now (2) *the Department* has the authority and autonomy to decide which courses will have TF positions, and the pay grade and assignment type for each position. (Tr. 2515 [Schirmeister: “The first step is I allocate a number of resources to a program and then the program you could say allocates, distributes, gives to, whatever terminology you want to use, it puts TF Resources on particular courses.”]; *see* Pet. 7, p. 1) The term “distribute” is used here in order to distinguish between: (a) the central administration’s numerical allocation of a TF resources (“allocation”); and (b) the Department’s separate and autonomous function of deciding which courses will have TF positions (“distribution”). (*See* Tr. 524 [Schirmeister: I’m not allocating on a course-by-course basis. I’m allocating to programs.”]; Er. 26, p. 21 [Schirmeister: “I’m trying to provide a block for you [the Department] to distribute.”].)

This transfer of authority allows the Departments to create TF positions as they see fit so long as it stays within the numerical allocation—which they usually do. (Tr. 1685 [Kaufman]; Bd. Ex. 11 [Stip. 36: applying Kaufman distribution testimony to other Departments].) Moreover, each Department is responsible not only for “allocating Teaching Fellows to courses,” (i.e. “distribution”), but also for “determining the level of the assignment and its type.” (Pet. 7, p. 1; *see also* Tr. 356-357 [Cooley]; Tr. 496 [Schirmeister].)

The distribution process works as follows: One TF Resource constitutes 10-hours-per-week of Teaching Fellow work. (Tr. 423 [Schirmeister].) For each Graduate Teacher position the Department decides to create in a course, the Department distributes either one or two TF Resources. The Department can create one TF position at the TF10 level (10 hours per week), which would require one TF Resource; or the Department can create one TF position at the TF20 level (20 hours per week), which would require two TF Resources. Further, the Department is free to choose the Teaching Fellow “assignment type” applicable to each such TF position—i.e.,

whether the Graduate Teacher assigned to the position will be a Discussion Section Leader, Lab Leader, Part-Time Acting Instructor (PTAI), Grader/Tutor, or otherwise. (See Pet. 7-8.)³ The Departments, not the central administration, are responsible for “solving distribution issues.” (Er. 28, p. 2; *see also* Er. 29, p. 1; Tr. 674 [Schirmeister].)

The various Departments have their own policies regarding these classifications and their job duties. For example, the History Department appoints PTAs pursuant to a Department-specific competitive application process, and the PTAI largely teaches the course alone; by contrast, the East Asian Languages and Literatures Department assigns Graduate Teachers to be language PTAs by fiat and those PTAs teach alongside Lecturers within a rotating, hierarchical “team teaching” program. (*See supra* pp. 32-39, 44-50 [Parts II.C., II.E.].)

Also in Spring of each year, often before the central administration provides the initial numerical allocation, departments conduct their own independent analysis to predict the number and types of TF positions they will need the following year. (*See* Er. 18; Tr. 1612 [Kaufman determines how many Graduate Teachers the department will need and which courses will need them a full month before she receives an “allocation memo” from the central administration].) They base this analysis on the courses the Department’s faculty chose to teach earlier that Spring, and on the number of available teaching fellows enrolled in their department’s graduate program. (Tr. 1613-1614, 1624-1626 [Kaufman].)

Based on the Department’s predicted allocation, the Department provisionally distributes Graduate Teacher positions to courses. The outer bounds of this distribution process will ultimately be subject to the central administration’s numerical TF Resource allocation when it comes in May or June, but the petitioned-for Departments often distribute fewer TF Resources than they know they will receive so that they have room to maneuver at that time and during the

³ Prior to this year, the Employer also had a separate classification known as “Grader without Contact.” At present, the classification “Grader/Tutor” refers to all graders whether or not they have student contact; Grader/Tutors are not required to have student contact (Pet. 41, Tr. 2515 [Schirmeister]. *Compare* Pet. 7 with Pet. 8 [“Graders without Contact” removed from Yale website after the petitions were filed in the above-captioned cases].)

two-week Shopping Period early in each semester. (Tr. 1684 [Kaufman]; Bd. Ex. 11 [Stip. 36: applying Kaufman distribution testimony to other Departments].)

In her memos to each petitioned-for Department, Schirmeister asks the Department to “allocate teaching resources to specific courses for the full year before making any actual appointments.” (*E.g.* Er. 18, p. 7 [Schirmeister memo to the History Department].) By “allocate,” she is referring the Department’s “distribution” of TF positions. (Tr. 2515 [Schirmeister: “you could say allocates, distributes, gives to, whatever terminology you want to use.”])

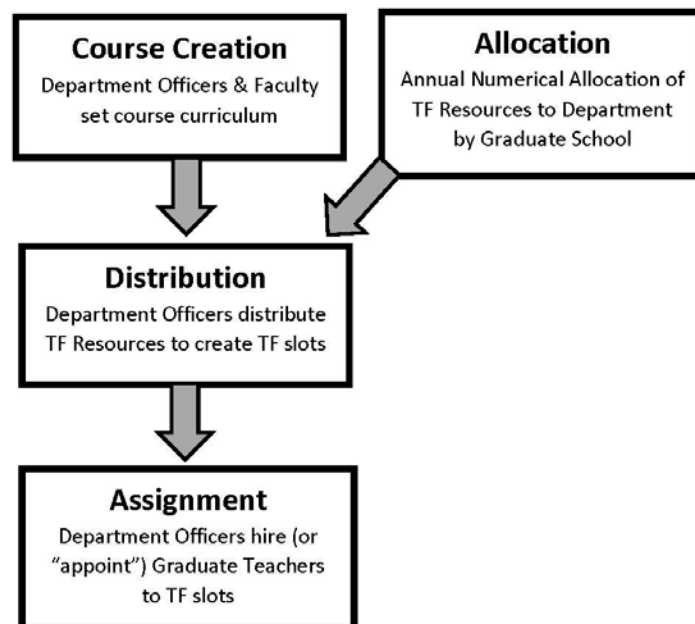


Figure 2: Graduate Teacher Hiring Flowchart

After distribution, each Department hires (“assigns” or “appoints”) Graduate Students to the TF positions it has created for certain courses. (*See* Figure 2, above; Tr. 2506 [Schirmeister, admitting that “the assignment processes originate in the departments”].) Certain eligibility parameters apply to teaching assignments, based on the central administration’s broad framework. For example: a graduate student must be in good academic standing to be eligible for a TF position (Bd. Ex. 4 [Stip. 19]); a graduate student from a non-English-speaking country

must first pass an English proficiency exam before being assigned to a teaching position which involves student contact (Pet. 41; Tr. 2522, 2524 [Schirmeister]); and graduate students receive assignment priority in their “teaching years”—the years when their Ph.D. program requires them to teach in order for them to receive compensation (see Bd. Ex. 12 [showing the years in which every petitioned-for Department requires its Ph.D. students to teach in order to receive stipend money]). But each petitioned-for Department is free to assign *eligible* Graduate Teachers in any manner it sees fit. (*See* Er. 19, p. 1 [Schirmeister: “You should have sufficient flexibility to provide your graduate students with optimal teaching assignments . . . You are free to redistribute these resources in whatever manner you think best”].)

Most petitioned-for Departments hire Graduate Teachers after soliciting applications (*e.g.* Tr. 1104-1105 [Political Science]; Tr. 1635-1636 [History]), though in some a Department official (DGS or DUS) assigns Graduate Teachers by fiat to some Graduate Teacher positions. (Tr. 1731-1732 [Physics].) Graduate Teachers cannot, as a purely technical matter, be assigned to courses until the central administration’s Teaching Fellow System (“TFS,” a computer-based system opened for Department use when numerical allocations are made in May or June) is fully functional. (Tr. 475 [Schirmeister].) But the petitioned-for Departments can and do run their operations independently of TFS, before TFS is online, and then simply input the hiring choices the Department made into the system. (Tr. 1621, 1684 [Kaufman]; *see also* Bd. Ex. 11 [Stip. 36: applying Kaufman testimony to other Departments].)

During the “Shopping Period” in the first few weeks of each semester, each petitioned-for Department recalibrates its Graduate Teacher needs for courses proposed and supervised by the Department’s faculty (Pet. 7 p.1 [Graduate School website: “It is occasionally necessary for departments to change teaching fellow appointments in response to unexpectedly high or low enrollments”] [emphasis added].) Sometimes a petitioned-for Department decides to eliminate a TF position because of under-enrollment or otherwise, and: (a) creates a new TF position in another course in that Department and reassigns the Graduate Teacher to the new position (*e.g.*, Tr. 1665 [Kaufman]; (b) assigns the Graduate Teacher in the TF position to a course in a future

semester (*e.g.*, Tr. 1337-1338 [Shen]); or (c) communicates with other departments which may need someone with the Graduate Teacher's qualifications (*e.g.*, Tr. 2484 [Schirmeister].)

Other times, TF positions must be added to a course due to over-enrollment during Shopping Period, in which case the petitioned-for Department will reach out within the Department, or to other departments and schools, for new applicants. (Tr. 1633 [Kaufman]; Tr. 2026 [Winant]; Tr. 1051 [Tipton].) Associate Dean Schirmeister testified that sometimes a petitioned-for Department with open Graduate Teacher positions in a course will also contact her to see if she has heard about graduate students in other departments who might want to apply to the Department to teach the course in question. [Tr. 2482 [Schirmeister].) In this way, the central administration can play a facilitating role to encourage applications to the department with a teaching need during Shopping Period. [Tr. 1640 [Kaufman].) However, Schirmeister typically recommends that, in order to fill open positions, the Department officer with open positions directly contact other department officers who have eligible graduate students seeking employment. (*See, e.g.*, Er. 27 p.13 [Schirmeister: "Although the TFP can try to help identify opportunities for unplaced graduate students, it is in fact *the responsibility of each program* to work with its graduate students to do this."]; Er. 27 p. 29 [Stevens to Schirmeister: "This is the second time you asked me to contact WGSS and they said they did not have openings."]; Er. 20, p. 16 [Schirmeister to Bozovic: "Please consult with HSAR about this."]; Er. 26, p. 13 [Schirmeister to the Sociology Department Registrar Nancy Hopkins: "I think you should call HSHM to see if there's a position . . . You should also check with WGSS and perhaps American Studies. In other words, you need to find 3 more positions outside of the department"].)

There is no requirement that any petitioned-for Department refer to Schirmeister for such facilitation. Positions are often filled during Shopping Period with no involvement of the central administration. (Tr. 1665-1666 [Kaufman]; *see also* Tr. 525 [Schirmeister]. *See generally* Tr. 481 [Schirmeister: "The matchmaking function is—depends entirely on the—somebody has to know who the students are and what their areas of expertise are. I don't know that. And somebody has to know what a course is about, an individual course, and then they have to

decide, well, this student would be well served by teaching in this course, and the course would be well served.”].)

In these situations when more undergraduates than anticipated attempt to enroll in a course, the undergraduates are put on a “waitlist.” The Department can then request an additional number of TF allocations from the Graduate School, to hire additional Graduate Teachers so that the over-enrolled undergraduates can take the course (Tr. 1644 [Kaufman].) Theoretically, the central administration might refuse to provide any additional resources, but it routinely provides them based on the Department’s representations. (*E.g.* Tr. 1685 [Kaufman]; Er. 20, p. 15.)

In short, the Department creates TF positions by distributing the TF Resources it has received to the courses its faculty proposed. (Tr. 2515 [Schirmeister]. Then, the Department hires Graduate Teachers into those positions. (Tr. 248 [Cooley: “The departments are the main – we think of them as ‘matchmakers’ between the TFs and the available teaching assignment”].)

Complaints about teaching-related matters—*e.g.*, (a) complaint from the Graduate Teacher about workload; (b) complaint from a colleague or student about the Graduate Teacher; or (c) complaint from a Graduate Teacher about policy—are usually handled within the Department. They generally go first to the faculty supervisor and then to the faculty member who is a Department officer, and that Department officer deals with the issue directly or negotiates with the central administration. (*See. e.g.* Tr. 1036 [Tipton]; [Tr. 1107 [Wilkinson]; Tr. 1472, 1487 [Sessions]; Tr. 1856, 1865 [Niedermaier]; Pet. 28; Tr. 1989 [Winant]; *see also* Bd. Ex. 11 [Stip. 36: material testimony from some Department witnesses applies to other Departments].)

Whenever a petitioned-for Assigning Department hires a Graduate Teacher who is a graduate student in another department or school, the Department makes the decision to hire the person based on applications submitted to the Department. (Tr. 1137 [Wilkinson]; Tr. 2393-2393 [Rosenblum].) All of the Graduate Teacher positions in an Assigning Department are appointed through *that* Department’s numerical TF allocation and none other, regardless of the department in which the student is enrolled. (*See* Tr. 482 [Schirmeister: the Allocating Department is the one that proposed the course]; Tr. 903 [Plummer] [explaining that “Allocating Department” or

“Assigning Department” are equivalent terms].) No course which hires Graduate Teachers can be listed in multiple departments for purposes of Graduate Teacher hiring and supervision; the Graduate Teacher is hired by the Assigning Department and supervised by the faculty member appointed in the Assigning Department who proposed the course. (Tr. 586-7 [Schirmeister]; Er. 14, p. 3 et. seq [“Undergraduate courses are listed with one program only”]).

The parties have stipulated “that the faculty members that are assigned to teach the class are the supervisors of the Teaching Fellows working in that class.” (Tr. 1531-1532.) The Employer’s witnesses testified that Departments are distinct groups of faculty (Tr. 40 [Gendler]; Tr. 199, 370 [Cooley]—i.e., distinct groups of TF supervisors. (See Pet. 3, p. 8 [By-Law 33: Departments are designated by the Yale Corporation as groups of “teaching . . . staff”].)

There is no example of the central administration could ever unilaterally transfer and install anyone into any TF position in any petitioned-for Department. (Tr. 1642 [Kaufman].) The petitioned-for Departments always do the hiring. (Tr. 58 [Schirmeister: “The particular matching of one graduate student to course is done at the department level. It would be *logistically impossible* to do all of that from the center.”]) Indeed, while Schirmeister testified that inter-departmental hiring of Graduate Teachers “happens all the time” during Shopping Period (Tr. 525 [no mention of whether it happens in the petitioned-for Departments]), it is undisputed that the decision to hire rests with the “Assigning Department.” (Tr. 1037-1038 [Tipton: “We are free to do that. And in fact that’s the way it should be, right, because we know our students. We know our classes. We know how to best make those decisions”]; see Bd. Ex. 6-7 [identifying “Assigning Department” for all employees in each petitioned-for Unit].) And there is no evidence of inter-departmental hiring after Shopping Period (Tr. 765 [Schirmeister: could not think of any post-Shopping Period hiring]; Tr. 2319 [Winant: no known example of any Graduate Teacher transferring between teaching departments after Shopping Period].)

Because each petitioned-for Department has the freedom to distribute TF Resources and hire Graduate Teachers in whatever manner it sees fit, there are variations between and among the petitioned-for Departments. Material variations are reviewed in the following subsections.

II. Additional Ways in Which Each Petitioned-For Unit has a Separate and Discrete Community of Interest.

As discussed above (*see supra* pp. 6-15 [Facts, Part I]): (a) the Employer divides its “teaching . . . staff” into Departments. (Pet. 3, p. 8 [By-Law 33]; (b) Graduate Teachers in each petitioned-for Department are supervised by faculty appointed in that Department: and (c) Departments are responsible for creating TF positions in courses (“allocation” or “distribution”) and hiring (“assignment” or “appointment”) Graduate Teachers into TF positions.

In addition, Graduate Teachers in each Department share specialized skills and training, have discrete job functions, are functionally integrated in their Department, have frequent contact with other Graduate Teachers in their Department, have different terms and conditions of employment, and have virtually no interchange with Graduate Teachers in other Departments. This introduction provides a general overview of these features and how they differ by department; further unique features of each Department will be described in the subsections on each Department, below.

Skills

The knowledge and skills required to teach a course in a petitioned-for Department are determined by the nature of the courses offered in that Department. Graduate Teachers in each petitioned-for Department draw on different skills and knowledge than Graduate Teachers in other departments. (Tr. 699 [Schirmeister]; Tr. 1566-1567 [Sessions]; Tr. 1724 [Hoeller]; Tr. 1851 [Niedermaier]; Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].) This is because teaching undergraduates requires different skills and training in each Department. (*See, e.g.*, Tr. 1444-1445 [Sessions]; Tr. 1966, 2173 [Winant].)

The Department screens prospective Graduate Teachers for their experience, training, and background in the field, and makes assignments based in part on that information (*See, e.g.*, Tr. 1051 [Tipton]; Tr. 1137-1138 [Wilkinson]; Pet. 16; Tr. 1306-1307 [Lamoreaux]; Tr. 1634 [Kaufman]; Tr. 1625 [Kaufman]; Tr. 1983 [Winant]; Tr. 2392-2393 [Rosenblum].) Graduate Teachers with less background or training ask other Graduate Teachers for help or advice, or

appear less successful in their teaching duties than Graduate Teachers with a stronger background. (Tr. 1461 [Sessions]; Tr. 1937 [Niedermaier]; Tr. 1991-1992 [Winant]; Tr. 2410-2411 [Rosenblum]; Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].) The specific skills required to teach in each Department will be outlined in the departmental subsections below.

Training

Graduate Teachers working for a petitioned-for Assigning Department, regardless of whether they are enrolled as students in that Department, receive training related to their teaching responsibilities from the Assigning Department's faculty. Graduate Teachers in each Department have weekly meetings with the professor and other Graduate Teachers for their course, at which the group discusses weekly lesson plans and how to teach them, including advising any Graduate Teachers with particular difficulties. (*E.g.*, Tr. 443 [Schirmeister]; Tr. 673 [Schirmeister]; Tr. 1367 [Shen]; Tr. 1444 [Sessions]; Tr. 1707 [Hoeller]; Tr. 1957 [Winant]) Many also have a pre-semester meeting with the professor to discuss the overall expectations of and plan for the course. (*E.g.*, Tr. 1849 [Niedermaier]; Tr. 1965 [Winant]; Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].) Graduate Teachers who are assigned before shopping period receive a copy of the syllabus and sometimes instructions from the professor on what to review, and prepare for the course based on the syllabus and their notes or recollections from their previous studies in the area. (Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies]; Tr. 1442 [Sessions]; Tr. 1597 [Sessions]; Tr. 2143 [Winant])

Departments often hold Department-specific group-training sessions for Graduate Teachers. (Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies]; Tr. 744, 745, 817-818 [Schirmeister]; Tr. 1036 [Tipton]; Tr. 1341 [Shen].) The specific training provided in each Department will be outlined below.

Functional Integration

Graduate Teachers teaching for each petitioned-for Department have a shared purpose and functional integration with each other: they all teach the subject matter of the Department to

undergraduates. *Cf.* Macy’s, 361 NLRB No. 4 (2014) (beauty-department salespeople had a “shared purpose and functional integration, as they all sell cosmetics and fragrances products to customers”—even though the salespeople sold beauty products alone at separate counters that were surrounded by other departments that sold products to customers). The nature of the subject matter within a Department dictates the knowledge and skills required to teach it, and dictates the nature of the work performed by Graduate Teachers.

Graduate Teachers teaching the same course also exchange or collaborate to write materials such as lesson plans, course policy sheets, power points, and rubrics for the class. (*See, e.g.*, Tr. 1371-1372 [Shen]; Tr. 1448-1452 [Sessions]; Tr. 1587-1588 [Sessions]; Tr. 1977, 1981, 2164-2165 [Winant]; Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].) They seek out advice on teaching from the other Graduate Teachers for the course. (*See, e.g.*, Tr. 1461 [Sessions]; Tr. 1714 [Hoeller]; Tr. 2187-2188 [Winant].)

Graduate Teachers often hold their office hours in a shared Department space like a lounge or shared office. (*See, e.g.*, Tr. 1074 [Tipton]; Tr. 1086 [Wilkinson]; Tr. 1363 [Shen]; Tr. 1430 [Sessions]; Tr. 1713 [Hoeller]; *see also* Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].) Graduate Teachers may also sometimes have their office hours together or join another Graduate Teacher’s office hours, including a Graduate Teacher from a different course in their Department. (Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies]; Tr. 1765 [Hoeller]; Tr. 1396 [Shen])

Graduate Teachers grade exams and/or assignments (Tr. 446 [Schirmeister]) and have regular meetings with the professor and other Graduate Teachers for the course. (*See, e.g.*, Tr. 442-443 [Schirmeister]; Tr. 1407 [Shen]; Tr. 2200 [Winant]; Tr. 1707 [Hoeller].) They sometimes compare their grading standards or distributions with other Graduate Teachers for the same course. (Tr. 1411 [Shen]; Tr. 2406 [Rosenblum]; *see also* Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].) Graduate Teachers for the same course will often grade exams together. (*See, e.g.* Tr. 1756 [Hoeller]; Tr. 1455 [Sessions]; Tr. 1053 [Tipton].) Graduate Teachers sometimes trade exams or assignments to grade with other Graduate Teachers

in the Department, so that Graduate Teachers don't grade their own students' exams or so that the grading workload is balanced. (*See, e.g.*, Tr. 1762, 1764 [Hoeller]; Tr. 1542 [Sessions]; *see also* Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].)

Within a Department, Graduate Teachers will sometimes substitute for one another—for another Graduate Teacher teaching either the same course or a different course in the same Department. (Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies]; *see, e.g.* Tr. 1368, 1400 [Shen]; Tr. 1769 [Hoeller]; Tr. 2437 [Rosenblum]; Bd. Ex. 11, p. 4 [Stip. 34].)

Frequent Contact

In addition to scheduled meetings with the professor and other Graduate Teachers, Graduate Teachers have formal or informal meetings with the other Graduate Teachers teaching the same course, regardless of the other Graduate Teachers' home departments. (*See, e.g.*, Tr. 1460 [Sessions; Tr. 1960 [Winant]; Tr. 2399 [Rosenblum].) Regardless of the program from which they are receiving a degree, Graduate Teachers for a given course will frequently meet with each other and the professor for the course to discuss their teaching, share advice, and plan lessons; these meeting include all Graduate Teachers for the course. (*See, e.g.*, Tr. 442-443 [Schirmeister]; Tr. 1407 [Shen]; Tr. 1707. [Hoeller]; Tr. 2200 [Winant].)

Graduate Teachers also have frequent conversations about teaching with other Graduate Teachers who are teaching different courses in the same Department about “teaching work and issues that arise in the course of teaching.” (Bd. Ex. 11, p. 1; *see, e.g.*, Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies to other Departments]; Tr. 1362, 1405 [Shen]; Tr. 1526 [Sessions]; Tr. 1720, 1735, 1759 [Hoeller]; Tr. 1841, 1845, 1870, 1937 [Niedermaier]; Tr. 1961, 1990 [Winant]; Tr. 2347-2348, 2350, 2417 [Rosenblum].) These discussions about teaching often take place in Department spaces, such as Department lounges and offices. (Tr. 1362, 1372 [Shen]; Tr. 1430 [Sessions]; Tr. 1845, 1935, 1941 [Niedermaier].)

The vast majority of discussions about teaching are with Graduate Teachers who are also teaching in the same Department, not with Graduate Teachers teaching for other departments.

(*See, e.g.*, Tr. 1371 [Shen]; Tr. 2171 [Winant]; Tr. 2352-2353 [Rosenblum]; *see also* Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].)

Job Duties

Departments are responsible for “determining the level of the assignment and its type.” (Pet. 7, p.1.) Furthermore, not all Graduate Teachers of the same “type” have the same duties: the Department determines the job duties assigned to a particular type in that Department. For example, a History Department PTAI largely teaches in the classroom alone (Tr. 1617 [Kaufman]); by contrast, a PTAI in East Asian Languages and Literatures Department teaches alongside Lecturers within a “team teaching” program (Tr. 1834-1836 [Niedermaier]). A Grader/Tutor in the East Asian Languages and Literatures Department may do no grading, but instead will meet with students one-on-one outside the classroom (Tr. 1938 [Niedermaier]); meanwhile, a Grader/Tutor in Math does intensive grading and also holds study groups, but has no structured one-on-one time with students (Tr. 1404-1405 [Shen]). The specific job duties required in each Department are outlined in the specific departmental subsections below.

Terms and Conditions

Specific terms and conditions vary according to the petitioned-for Department’s unique policies and practices, as outlined in the specific Department subsections below. Regardless of the department or program in which a Graduate Teacher is a student, he or she does the same work, has the same contact with other Graduate Teachers, and is supervised in the same way as other Graduate Teachers also teaching in the same Assigning Department. (*See, e.g.*, Tr. 2288-2297, 2319 [Winant]; *cf.* Bd. Ex. 11 [Stip. 36].)

No Interchange

There is no evidence of any inter-departmental interchange in job assignments between Graduate Teachers in any petitioned-for Department and Graduate Teachers in any other subdivision of Yale within a semester. The parties stipulated that the term of Graduate Teachers’ employment is one semester (Tr. 157), and there was no evidence of any longer teaching assignment. There was evidence presented that, during “Shopping Period”—i.e., the first two

weeks of each semester—a Department will sometimes remove a Graduate Teacher from one teaching assignment and assign him or her to another within the same Department. (*See, e.g.*, Tr. 1337-1338 [Shen].) But the Employer presented no evidence of any Graduate Teacher who had been assigned to teach in one Department being removed from that TF position after the semester started and transferred by the Employer into a different department.

Associate Dean Schirmeister testified that this sort of inter-departmental transfer supposedly “happens all the time” during Shopping Period (Tr. 525), but the Employer presented no example to that effect. The Petitioner knows of no such example. (Tr. 2319 [Winant: no known example of any Graduate Teacher transferring between teaching departments after Shopping Period].) Associate Dean Schirmeister testified that she works with Departments to collect information about “those students” in one department who *have not yet been hired* and conveys that information to another department; and the latter department (not the central administration) is free to express interest in and potentially decide to hire the student. (*Id.*) Schirmeister could not recall one instance of inter-departmental hiring after Shopping Period (Tr. 764-765 [Schirmeister].)

Each of the following subsections, with respect to one petitioned-for Department, cites additional facts showing its distinct features with respect to Graduate Teachers. For convenience, the subsections follow the order in which witnesses were presented at the hearing.

A. The Math Department.

The Math Department differs from other departments in several respects. The Math Department is located in two buildings connected by a sky bridge: the fourth floor of 10 Hillhouse Avenue and 12 Hillhouse Avenue. (Tr. 1362-1363 [Shen].) Courses to which the Math Department assigns Graduate Teachers are typically held in the Department’s Leet Oliver Memorial Building or “if really we cannot find a classroom there preferably somewhere not too far from the math department.” (Tr. 1370-1371 [Shen].)

The Math Department publishes its own Graduate Handbook, a “Teaching Information for New PhD Students” web page on its website. (Pet. 38.) In the Math Department, other than

faculty supervisors, the DUS and Registrar communicate with Graduate Teachers about their teaching. (Pet. 19.) For “help or advice” on teaching, the Handbook suggests Math Professor Michael Frame as a resource for all Graduate Teachers in the Math Department. (Pet. 38, p. 2.)

The Math Department decides what courses Graduate Teachers teach and what kind of teaching duties they perform in exchange for the pay they receive. Then, through its Graduate Teacher assignment process, the Math Department has the authority to cancel a teaching assignment or transfer a Graduate Teacher to a new teaching assignment in the Department. (Tr. 1337-1338 [Shen].) Potential Graduate Teachers in the Math Department submit their applications for calculus assignments to the Math Department Registrar, and hear back from Department staff (either the Department’s Graduate Registrar, the DUS, or a Department lecturer overseeing a calculus course) regarding the particular terms of their teaching that semester. (Tr. 1342, Tr. 1349-1350 [Shen].)

Graduate Teachers teaching for the Math Department typically have undergraduate training in mathematics, and in-depth knowledge and training in subjects such as “the theory of calculus,” which is called “Analysis.” (Tr. 1330, 1366 [Shen].) First year Math graduate students are usually hired as “Teaching Fellow I: Calculus Tutor/Leader for Problem Solving Sessions;” second years are hired as “Teaching Fellow II: Linear Algebra TA”; and third-year graduate students and up are hired as calculus PTAs. (Pet. 38, p. 1; see also Pet. 19.)

Graduate Teachers teaching for the Math Department have a shared purpose: they all teach Mathematics to undergraduates. At the beginning of each year, all Graduate Teachers in Math are required to attend a training with the DUS and the Department’s Lecturers. (Tr. 1338-1339, 1354 [Shen].)

The nature of the subject matter dictates the knowledge and skills required to teach Math and the nature of the work performed by Graduate Teachers. In order to teach calculus, a technical knowledge of Analysis is insufficient; Graduate Teachers in the Math Department must be able to “dilut[e] Analysis” and thereby make calculus accessible to “non-math people”—something which requires special training. (Tr. 1367 [Shen].) Thus, those preparing to teach as

PTAI Graduate Teachers in calculus, which almost all Graduate Teachers in the Department teach for three semesters, undergo special trainings led by a Lecturer in the Math Department; these mandatory trainings are called “Lang Lunches.” (Tr. 1341-1342, 1357-1359, 1401 [Shen]; Tr. 2460 [Schirmeister: Lang Lunches are a “Math-specific training”].) Associate Dean Schirmeister testified that she was “always impressed when the math students are nominated to be Prize teaching fellows” (Tr. 702 [Schirmeister]), because she has “not been the beneficiary of wonderful math teaching” and “with [her] background” she’s “not sure that [she] could” (Tr. 745-746 [Schirmeister].) However, the quality of teaching among Yale’s Math Graduate Teachers should surprise no one who is familiar with the special teacher training provided by the Department.

All Math Graduate Teachers are also required to attend a training with the DUS and the Department’s Lecturers at the beginning of each year. (Tr. 1338-1339, 1353-1354 [Shen].) Teacher training is further embedded throughout the Math Department’s calculus instruction: the faculty, the course coordinator, and the calculus lecturers.

First, Math Department faculty supervise Graduate Teachers in calculus courses (Tr. 1366 [Shen]), and evaluate Graduate Teachers, providing feedback on their graduate teaching. (Tr. 1367 [Shen].) The course supervisors for a Math class sometimes sit in and observe the Graduate Teacher’s sections. (Tr. 1367 [Shen].)

Second, Math Department calculus courses have a “course coordinator” who is usually a senior faculty member that oversees multiple PTAIs’ class-planning. (Pet. 38). That coordinator meets with the instructors before the start of classes and is “available to answer any questions you have about the logistics of teaching your particular section.” (Pet. 38).

Third, Lecturers in the Math Department provide ongoing training to Graduate Teachers who are PTAIs in any calculus course. (Tr. 1367, 1406-1407 [Shen].) All instructors for a given calculus course—Lecturers and Graduate Teachers—meet weekly with each other to “offer each other advice and training.” (Tr. 1367 [Shen].) At these weekly trainings, Graduate Teachers “giv[e] each other advice on how to teach what’s going to come next class.” (Tr. 1407 [Shen].)

Math Department Graduate Teachers also discuss grading with one another. When serving as Grader/Tutors, they discuss concerns about how to grade homework with more experienced Graduate Teachers who are no longer Grader/Tutors. (Tr. 1405 [Shen].) And Graduate Teachers in one course “will . . . check each other’s grading to make sure that like we don’t go too harsh on a particular problem and [thereby] try to maintain some consistency.” (Tr. 1411 [Shen].) When assigned to Grader/Tutor positions in non-calculus courses, a Graduate Teacher in the Math Department grades on the order of 150 homework assignments per week. (Tr. 1338 [Shen].) Graduate Teachers in the Math Department have frequent contact within the Department about non-operational aspects of their graduate teaching; for example, they provide each other with “psychological support” when the workload is intense. (Tr. 1372 [Shen].)

Graduate Teachers in the Math Department discuss their teaching around the Math Department. (Tr. 1362-1363 [Shen].) For example, they have these discussions in and around offices they share on the fourth floor, and in the Math Department lounge. (Tr. 1362, 1372 [Shen].) They gather in the Math Department lounge for departmental events several times a year, for “colloquium” once a week, and for “tea” at 3:45 p.m. every day. (Tr. 1362-1365 [Shen].) They often discuss with each other new developments in the Department’s instructional methods; for example, the Math Department has a new course format—the “flipped course”—which is a common subject of discussion. (Tr. 1362 [Shen: “everybody’s pretty excited about this”].) The “Math Department is like a family,” and Graduate Teachers discuss with each other their teaching every day. (Tr. 1365 [Shen].)

Graduate Teachers in the Math Department arrange to cover for one another (*e.g.*, if one is sick or absent); the substitute teacher may be a current teacher in the same course or a Graduate Teacher for a different Math Department course altogether. (Tr. 1368-1369 [Shen].) Indeed, it is “common knowledge in the department” that Graduate Teachers should arrange substitute teaching with one another if necessary. (Tr. 1400 [Shen].)

Math Department PTAs in calculus courses “sometimes have cross-section review sessions” organized by multiple Graduate Teachers for students from different sections of the

course. (Tr. 1402-1403 [Shen].) They share lesson plans and teaching advice with other calculus teachers—even those not teaching the same calculus course. (Tr. 1371-1372 [Shen].) And, when holding office hours simultaneously in the Math Department lounge, they assist in each others' meetings with students in order to help solve problems. (Tr. 1396 [Shen].)

The Graduate Teachers “craft the midterm and final” questions for the calculus course together with non-ladder-faculty Lecturers and the faculty supervisors. (Tr. 1407 [Shen].) The faculty supervisor assigns different Graduate Teachers to write different parts of exams. (Tr. 1408-1409 [Shen].)

Graduate Teachers in the Math Department generally do not discuss their teaching with Graduate Teachers in other departments at Yale because they “won’t understand [] anything” about teaching math. (Tr. 1371 [Shen].) There is virtually no evidence on the record regarding any contact about teaching or functional integration between Graduate Teachers in the Math Department and Graduate Teachers in other Yale departments and programs.

The Math Department’s faculty supervisors make additional decisions about what work needs to be done in exchange for pay in the courses they supervise. (*E.g.*, Tr. 1400 [Shen instructed to substitute for his faculty supervisor].) Faculty supervisors and groups of Lecturers for the courses to which Graduate Teachers are assigned design the course assignments and protocols—for example, how much homework is to be taught, how exams will be designed, what sort of office hours to hold, and when and how meetings with lecturers will be held. (Tr. 1406, 1363 [Shen]; Pet. 38.) The Department also prescribes these Graduate Teacher working conditions through the various trainings held in the Department, which both Lecturers and Graduate Teachers attend. (Tr. 1338, 1367 [Shen].)

Through its distribution process, the Math Department is free to determine which courses in each semester will receive TF Resources, whether the TF position will be a TF10 or TF20, and what type it will be (i.e., Grader/Tutor, PTAI, etc.). (Tr. 778, 781 [Schirmeister].) It thus assigns a level and type to each of the first year Math Graduate Teachers with the departmental title “Teaching Fellow I: Calculus Tutor/Leader for Problem Solving Sessions”, and the second year

students with the departmental title “Teaching Fellow II: Linear Algebra TA”; and the third-year students who are titled as calculus PTAs. (Pet. 38, p. 1; see also Pet. 19.) The first two tend to be TF10 Grader/Tutors; the latter tend to be TF20 PTAs. (Pet. 38; Pet. 19; Er. 25, p. 7) The Department also decides how large each Graduate Teacher’s class size will be (up to the section-size maximum). 781-782 [Schirmeister].)

By using the Project Assistant Form, the DUS can also hire Graders without Contact who grade and have contact with the faculty supervisor but do not have contact with students. (Er. 25, p. 4; Pet. 8, p. 2.) But this semester the Math Department had not hired any Graders without Contact on or before September 15, 2016. (See Bd. Ex. 6, p. 8.)

Graduate Teachers in the Math Department typically hold office hours. (Tr. 1338, 1363 [Shen].) These are generally held twice a week in the Math Department lounge or in a classroom in the Department. (Tr. 1363 [Shen].) Graduate Teachers make arrangements for office hours through the Department’s administration reservation system. (Tr. 1363 [Shen].) And every Graduate Teacher in the Math Department has free access to the Department’s printing equipment. (Tr. 1370 [Shen].)

Graduate Teachers in the Math Department have unique departmental job titles. They also benefit from a strong history of teacher training and frequent interaction at departmental events and teaching activities.

B. The History of Art Department.

The History of Art Department differs from other departments in several respects. The History of Art Department is located in the Loria Center for the History of Art, including the Department offices, “almost all of our classes,” “many of the faculty member department offices,” “the student lounge” for History of Art students “where we spend most of our time,” “TF rooms,” “offices for students if they need one,” and “the Haas art library.” (Pet. 13a, p. 2-3; Tr. 1430 [Sessions].) The Yale University Art Gallery, where History of Art discussion sections often meet, is across the street from the Loria Center. (Tr. 1441 [Sessions].) If History of Art TFs need to use projector equipment for discussion section, they email a departmental administrative

staff member to reserve a properly equipped room in the Loria Center. (Tr. 1582 [Sessions].) The TF rooms in the Loria Center are used by History of Art Graduate Teachers for meeting to discuss teaching work, grading, and office hours. (Tr. 1499 [Sessions].)

The History of Art Department has its own graduate handbook (a.k.a. the “Redbook”), which states, “Departmental policy is set by the faculty, led by the Chair, within the general framework of Graduate School and University procedures.” (Pet. 13a, p. 2). It contains department-specific policies about teaching that the P&P does not contain at all. (Tr. 759 [Schirmeister].)

The History of Art registrar estimates the supply of available teaching fellows, and demand for TFs generated by courses to be taught, and provides these numbers to the Graduate School administration, which then makes an allocation of TF Resources to the History of Art Department. (Er. 20, pp.8-9.) Graduate students in the History of Art Department receive an email from the Registrar inviting them to apply for TF positions, although ultimate responsibility for graduate teaching in the Department resides with the DGS. (Tr. 1434-1437 [Sessions]; Er. 20, pp. 6-7 [Schirmeister: “Perhaps before I do your allocation, we should meet or speak on the phone”].)

Graduate Teachers in the History of Art Department have a shared purpose and functional integration with each other: they all teach the history of art to undergraduates. The subject matter defines the skills required to be a Graduate Teacher for the Department and the unique duties performed by Graduate Teachers working in the Department. Graduate Teachers in the Department teach “people not just to look at an object and appreciate its visual qualities, but understand how those visual qualities can be marshaled as evidence to make a specific argument about the history or period of time or the person who made it.” (Tr. 1444-1445 [Sessions].)

Graduate Teachers in the History of Art Department are able to carry out this task because they have skills and training in History of Art classes, professional experience in art galleries, and forms of prior engagement with art objects. (Tr. 1415-1416, 1445 [Sessions: “In addition to my training about historical periods, about art historical figures and shifts of style of

art over time you also need the knowledge of how to marshal this visual evidence in an academic paper.”) To work as a Graduate Teacher in History of Art “require[s] training in how to marshal visual evidence” as well as “general museological skills.” (Tr. 1567 [Sessions].) People in different historical contexts viewed art objects differently; History of Art TFs thus must convey the “specificity” of cultural contexts within which art objects were produced and received to teach effectively. This task requires both the general skill of teaching students how to interact with objects from other times and cultures, and the specific substantive knowledge of those precise cultural contexts. (Tr. 1588-1590 [Sessions].)

Prior to teaching for a course in the History of Art, Graduate Teachers review “notes from other courses that touched on the subjects that we would be covering.” (Tr. 1442 [Sessions].) Over the course of a term of teaching, TFs for a History of Art course also meet for weekly training sessions with the supervising professor “to discuss what we should talk about in section that week . . . the professor would bring any additional reading that we should be doing to prepare for teaching section that week. We would talk about what objects in the gallery we would want to look at together with the section, what to pay attention to in the book.” (Tr. 1444 [Sessions].) History of Art discussion sections commonly meet in art galleries, which requires the “museological” skills of “knowing how to interact with a work of art in a museum.” (Tr. 1567 [Sessions].) “The galleries . . . are visually stimulating and you have to kind of guide students to the object they want to look at, the information that you’re hoping they’ll get from it.” (Tr. 1453-1454 [Sessions].) Assessment of student work in History of Art also requires special skills, such that TFs in History of Art courses who are homed in outside departments seek advice of History of Art-based TFs about how to properly grade History of Art assignments. (Tr. 1461 [Sessions].)

History of Art Department Graduate Teachers coordinate to rotate responsibility for creating and sharing discussion section lesson plan. (Tr. 1587-1588 [Sessions: “We [the TFs] would divide up the weeks and one or two TFs would prepare the lesson plan, a quite detailed lesson plan including questions to ask the students, what works of art to look at, and would

distribute that lesson plan to the rest of the TFs teaching the course.”].) History of Art Graduate Teachers discuss and share among themselves visual materials prepared for section, including PowerPoint slideshows. (Tr. 1449-1450, 1462 [Sessions].) TFs meet in lecture halls after exams to plan assessment. (Tr. 1456 [Sessions].) They also regularly gather to grade together in so-called “grading parties,” often using the Department’s designated “TF Rooms.” (Tr. 1455-1456 [Sessions].) Graduate students homed in other departments but working as TFs in History of Art participated in these parties. (Tr. 1456-1461) [Sessions].) TFs divide up exams to grade so they have an even number. (Tr. 1542 [Sessions].)

There is virtually no evidence on the record regarding any contact about teaching or functional integration between Graduate Teachers in the History of Art Department and Graduate Teachers in other Yale departments and programs. In one case, a History of Art graduate student was assigned to work as a TF in a course “owned” by the Slavic Languages and Literatures Department, alongside a TF homed in the Slavic Department. In this case, the History of Art graduate student was very clearly functionally integrated into Slavic. When attempting to hire the History of Art graduate student, the Slavic Department DGS first attempted to do so by use of a History of Art allocation. The History of Art Department Graduate Registrar refused, informing the Slavic Department DGS, “Unfortunately, we don’t have any allocations to spare. Like you, we were allotted exactly enough for our own required teaching grad student [*sic*]. If you need a TF for Brunson’s course, you should request an additional TF20 from the Teaching Fellows office.” (Er. 20, p. 17.) To allow the appointment of the History of Art graduate student to the Slavic Department course, the Teaching Fellows Program thus added “two ten-hour blocks to the Slavic allocation.” (Er. 20, p. 15.)

History of Art TFs are appointed, with only one exception, as Discussion Section Leaders. (Board 6, p. 6.) In this capacity, they lead one or two discussion sections weekly, often in the art galleries of Yale University. In a typical section meeting at the gallery, the TF takes attendance, discusses upcoming deadlines and assignments, and then leads the section of undergraduates through the gallery to talk through the selected art objects. (Tr. 1449 [Sessions].)

If a section does not meet in the galleries, TFs prepare visual materials and other exercises for work in the classroom. (Tr. 1449-1451 [Sessions].) TFs are required to attend the course lectures for the History of Art course they are assigned to, and to attend the weekly meetings with the supervisory professor and the other TFs, often including meetings in the sections of the gallery that the TFs would be using to teach their sections. (Tr. 1445, 1448 [Sessions].) They hold office hours to meet with students in their courses. (Tr. 1529 [Sessions].) They grade papers and exams for the History of Art courses they teach. (Tr. 1455, 1542 [Sessions].)

History of Art has a unique structure of job assignments. Until recently, all History of Art Discussion Section Leaders taught only one section at the TF20 level. Today, some Discussion Section Leaders lead one section at the TF20 level, and some lead two. In 2014, Dean Cooley and Associate Dean Schirmeister first met with the History of Art Department to ask them “to reconsider how many sections the history of art students should teach” (Tr. 584 [Schirmeister].) They held “conversations across over a year and a half between the graduate school administration and the leadership in the History of Art department” (Tr. 748 [Schirmeister]), and reached an agreement that would “accommodate the special structure of their program.” (Tr. 584 [Schirmeister].) The final departmental policy appears in the most recent department handbook as follows:

“With an agreement of Graduate School, third years and above will be expected to teach two sections of the same class. This may not always be necessary, but it is an expectation.”

(Pet13A p.10.) The Department does not apply this policy consistently. (Tr. 1469-1470 [Sessions: “There was a fourth person who was also a third year in the department, who was a male who was not asked to teach two sections”].) This led to complaints from Graduate Teachers, and an Op-Ed column in the Yale Daily News. (Pet. 22, p. 3.)

In response to these complaints, the History of Art Chair, Tim Barringer, insisted that the addition of a second section was not a “unilateral move” by the Graduate School administration. (Pet. 22, p. 1 [Barringer: “It is a matter of record that an agreement was negotiated with the previous Chair of our department before the change was instituted”]; *cf.* Tr. 1490-1491

[Sessions].) The History of Art Department faculty agreed to this new policy. (Pet. 23: “The changes were agreed by our faculty, and you knew that because they were included in the Red book” [Barringer].) Finally, Barringer acknowledges that this is a difference between teaching in the History of Art Department and other departments. (Pet. 22, p. 1 [Barringer: “History of Art second year students still only teach a maximum of one section rather than a maximum of two. It would have been helpful if you had mentioned this in your text: in some ways I think it supports your argument, by implicitly acknowledging that there is a difference between the demands made by TAing for History of Art and that of other disciplines.”])

While Yale generally caps discussion section enrollment at 18, many History of Art discussion sections have a lower maximum enrollment of 15 students, because they meet in art galleries. (Tr. 1463 [Sessions].) Schirmeister recommends consideration of an even smaller section size for History of Art. (Er. 20, p.10 [Schirmeister: “They’d be teaching two sections, but instead of having sections of 15, they could have sections smaller than 15 ... it makes the idea of two sections rather than one a little easier to swallow.”])

History of Art Graduate Teachers, including those homed outside the Department, are instructed to “bring any copying requests to the office to be printed by the administrative assistants.” (Tr. 1500-1501 [Sessions].)

In the case of a grievance of a Graduate Teacher regarding perceived unequal work assignments, the supervisory professor involves the Department DGS, copying the DGS by email and proposing that the DGS be present at any in-person meeting. (Tr. 1487-1488 [Pet. 22]; Tr. 1497 [Pet. 24].) The Department Chair has offered apology for lack of clear communication of Department policies “on behalf of the department.” (Pet. 23.) The Graduate Teacher did not at any point contact the Graduate School administration about her grievance. (Tr. 1578-1579 [Sessions].) The Graduate Teacher was not aware of the existence of the Graduate School Programs and Policies, had never seen the book (the “P&P”) before, and did not know that the P&P ostensibly overrides any departmental policies. (Tr. 1574-1575 [Sessions].)

The History of Art Department has clear departmental policies governing Graduate Teaching. These policies were negotiated by the Department officers and published in the Department Handbook.

C. The History Department.

The History Department differs from other departments in several respects. The History Department is located on the second floor of the Hall of Graduate Studies, at 320 York St. in New Haven. The offices of the History Department Chair, DGS, Associate DGS (ADGS), DUS, Graduate Registrar, and Undergraduate Registrar, and other administrative staff are at that location. (Tr. 1201, 1224-1225 [Lamoreaux]; Tr. 534 [Schirmeister, testifying that Graduate Registrar Marcy Kaufman “works for the History Department”].) The History Department has a business office, an Executive Committee, ad hoc personnel committees for purposes of faculty hiring, a Graduate Affairs Committee, an Undergraduate Studies Committee, a Diversity Committee, a Mentoring Committee, and a TF Committee. (Tr. 1203, 1239-1240 [Lamoreaux].) The Department receives some GA funds for general operations purposes, and has some gifts and endowments that it spends according to their indentures. It also receives some income from the tuition that Master's degree students pay. (Tr. 1204-1205 [Lamoreaux].)

The History Department enfoldes the Graduate Program in the History of Science and Medicine, described by the Graduate School of Arts and Sciences Programs and Policies (“P&P”) as a “semi-autonomous graduate track within the Department of History. The program’s students are awarded degrees in History, with a concentration in the History of Science and Medicine.” (Er. 4.) The History of Science and Medicine (HSHM) does not appear in either Board 6 or Board 7 as a separate Assigning Department.

The History Department publishes its own Graduate Handbook on its website. (Pet. 17.) The Department also issues a book of Guidelines for New Instructors; this Guidebook “primarily contains information specific to the history department.” (Pet. 32e, p. 1.) In the History Department, primary supervision of a course is carried out by Department faculty. A professor instructs TFs about the “skills that she wanted to see the students try to produce.” (Tr. 2404-2405

[Rosenblum].) Beyond the supervisory faculty, it is primarily the ADGS and Graduate Registrar who communicate with Graduate Teachers about their teaching. History Graduate Teachers must meet with the ADGS in their first two semesters of teaching. (Tr. 1666 [Kaufman: “Just anything that’s really related to their teaching they come and talk to me about”]); Tr. 1210-1211 [Lamoreaux]; Tr. 2320 [Winant].)

The History Department has a complex internal process for hiring Graduate Teachers. The Department faculty decide what courses they will offer in a given academic year. (Tr. 1211-1212 [Lamoreaux].) The Department encourages faculty members to coordinate their course offerings with one another and with the DUS. (Pet. 32e, p. 6.) A “large majority” of courses, have been taught before, and thus require no review outside the History Department to be offered again. (Tr. 1614 [Kaufman]; Bd. Ex. 11 [Kaufman’s material testimony applies to other petitioned-for Departments].) The DUS and Undergraduate Registrar survey the faculty to learn what courses they intend to teach. (Tr. 1271-1272 [Lamoreaux].)

The History Department Graduate Registrar then makes an independent calculation of the likely enrollment of each course to be offered, based on previous enrollments in that specific course, and estimates the number of Graduate Teachers likely to be needed for each course. (Tr. 1613-1614 [Kaufman].) The Registrar circulates TF applications to History graduate students. (Tr. 1612 [Kaufman].) Applicants rank preferences for teaching positions, as well as listing their general areas of expertise. (Pet. 26; Tr. 1647 [Kaufman].)

The Registrar then receives from the Graduate School administration the numerical allocation of graduate teaching resources. (Er. 18.) The official allocation is calculated on a different basis from the Registrar’s own. “The initial process whereby I determine which courses will get teaching fellow allocation spots is based on undergraduate enrollment history. It’s not based on the number I get from the graduate school. It’s based on what we think we will need to use to staff those courses.” (Tr. 1684 [Kaufman].) The Registrar does not take into consideration the data analysis conveyed to the History Department by the Graduate School upon which the Graduate School’s allocation calculations are based. (Tr. 1643 [Kaufman].) In every semester

that the current TFP allocation system has operated, the History Department has required additional allocations from the Graduate School, and has never been rejected. (Tr. 1685 [Kaufman].) The Department, according to the Graduate School, is “free to redistribute these resources in whatever manner you think best.” (Tr. 1641-1642 [Er. 18, p. 1].)

With official allocation resources in hand, the Registrar apportions TF positions to courses according to the policies voted on by the History Department faculty or decided by Department officers. These policies require a minimum enrollment of 20 students for a course to be eligible for a TF position. (Tr. 1612 [Kaufman: “In history we decided that courses with 20 students or more are eligible to have teaching fellows . . . That was what was decided at the graduate advisory committee meeting and then voted on by the faculty”].) Department policies determined by the DGS and ADGS also set criteria for a course to have a lower maximum enrollment in its sections, based on considerations of student workload. (Tr. 1656-1657 [Kaufman]; Er. 18, p. 27.)

Once she has distributed TF positions to courses, the Registrar then convenes the TF Committee to hire individual Graduate Teachers for these positions. The TF Committee consists of Kaufman (the Graduate Registrar), the History Department ADGS, the DGS and Registrar for the History of Science and Medicine track, and a group of History and History of Science and Medicine graduate students recommended by the Registrar and appointed to the committee by the ADGS. (Tr. 1621-1625 [Kaufman].) The TF Committee weighs the preferences of applicants for teaching and assigns them to TF slots already apportioned to History courses by the Registrar. (Tr. 1637-1639 [Kaufman].) In this procedure the TF Committee follows policies determined by a vote of the History Department faculty. For example, the History Department faculty voted that each graduate student in History ought to have an opportunity to work as a TF in a course offered by his or her advisor. In its hiring function, the TF Committee administers this policy enacted by the full History Department faculty, even when the policy contradicts the expressed desires of individual members of the faculty. (Tr. 1649-1650 [Kaufman].) Whatever further marginal hiring and rearrangement must be undertaken due to additional demand or

fluctuating enrollments during “shopping period” is decided by the Graduate Registrar in consultation with the ADGS and course instructors. (Tr. 1633, 1664-1665 [Kaufman]; Pet. 32e, p. 8.) The History Department also decides how many PTAI positions to create, depending on the strength of applications for PTAI positions and the Department’s curricular needs. (Tr. 1616-1617 [Kaufman].) The History DUS informs successful applicants about the Department’s curricular needs in each semester, and recommends that they offer their seminars in the semester when it will usefully fill a curricular gap. (Tr. 1984 [Winant].)

History Department TFs are also disciplined within the Department. A course supervisor can ask a TF to apologize for an inappropriate grade, for example, and restrict that TF’s autonomy going forward. (Tr. 1989-1990, 2220 [Winant].) The Department Chair may also step in to mediate disputes between TFs, and may inform the academic advisors of those TFs about the dispute. (Tr. 2250 [Winant].)

Graduate Teachers teaching for the History Department have a shared purpose and functional integration with each other: they all teach History to undergraduates. Graduate Teachers teaching for the History Department have skills and training in academic historiography. (Tr. 2139-2140 [Winant].) This training is necessary to teach History courses, since these courses require sophistication in the use of primary sources and teaching students “to read [primary sources] critically to understand how to approach it and to bring to bear on it secondary scholarships . . . so that they can contextualize the document that they are looking at and use it to understand the broader historical background.” (Tr. 1966 [Winant].)

The nature of the subject matter dictates the knowledge and skills required to teach History and the nature of the work performed by Graduate Teachers. The method for teaching primary sources in the History Department is “unique”: It involves training students to understand and write about material within a discipline that is “at once argumentative and narrative, which is, as far as I know, unique in academic writing.” (Tr. 2195, 2206 [Winant].) Undergraduates often “struggle” with the use of primary sources in a manner appropriate to the discipline of History. (Tr. 2349-2350 [Rosenblum].) Similarly, History courses are unique in that

they involve a “master narrative” in the lectures, against which the Graduate Teachers must pose a counter-narrative in discussion section. (Tr. 2351-2352 [Rosenblum: “It’s a distinctively historical question”].)

These skills strongly differentiate History classes from classes in other Departments, even those covering superficially similar ground through different disciplinary approaches. For example, a Political Science course on American politics would use “mathematical models to develop predictive measurements of American political behavior,” where historians “would treat the same subject . . . narratively, which relies on an entirely different base of evidence.” (Tr. 1974 [Winant].) Similarly, a course taking a historical approach to economic issues would use, for example, a memoir of the Treasury Secretary as a primary source, where an economics course on the same issues would never involve teaching the use of such forms of narrative evidence or narrative argument. (Tr. 2173 [Winant].) There are many courses in other “Humanities”—such as East Asian Literature, History of Art, Ancient Philosophy, or Dante, Shakespeare, Logic, or Drama – which Graduate Teachers in the History Department would not be qualified to teach, even with the chance to pre-review the material for the course. (Tr. 2313-2315 [Winant].)

Graduate Teachers applying for positions must list their areas of training on their application forms. (Pet. 26.) The TF Committee that performs the hiring function includes graduate students representing all the subfields of the History Department, so that there are participants in the Committee who understand the needs of each course and the qualifications of the applicants. (Tr. 1625-1626 [Kaufman].)

The History Department Chair testified that when she teaches her own course, she looks for Graduate Teachers with “appropriate knowledge” and “relevant background.” (Tr. 1306-1307 [Lamoreaux].) When the Department must hire Graduate Teachers from outside its own Graduate Program, it screens their qualifications, looking for those with an academic background in History. (Tr. 1634-1635 [Kaufman]; Tr. 2392-2393 [Rosenblum: “It looks like you might be a good fit.”]) To serve as a PTAI, History graduate students must apply to the DUS with a CV

listing their qualifications and a letter of recommendation from a previous supervising member of the History faculty. (Tr. 1983-1984 [Winant].)

Professors provide ongoing training in weekly meetings to the Graduate Teachers in their course. “We would discuss the week’s lectures and readings, and the main theme to make sure that we covered in section . . . the right way to approach grading exams and papers, approaches in terms of methods for leading discussion section, calibrating our grading and response to students.” (Tr. 1957-1958 [Winant].) Graduate Teachers review relevant materials before the beginning of the course (Tr. 2191-2192 [Winant].) In their first two semesters of teaching, Graduate Teachers are required to meet with the History Department ADGS. (Tr. 2320 [Winant].)

Graduate Teachers in the History Department arrange to cover for one another (*e.g.*, if one is sick or absent). History TFs typically seek a substitute teacher who is a current Graduate Teacher in the same course, but may also find a substitute who is teaching a different History course. (Tr. 2239 [Winant]; Tr. 2437 [Rosenblum].)

History Department TFs coordinate shared office hours or review sessions for students from across their sections. (Tr. 2237 [Winant].) They share lesson plans, teaching material, and teaching advice with other History Department TFs—even those not teaching the same course. (Tr. 1961, 1965, 2164-2165 [Winant].) History Department TFs schedule meetings with other TFs in the Department, teaching for other courses, to discuss “how you would plan out a history syllabus, how you would run a history discussion section, how to contextualize primary sources . . . How do you combine teaching students a dominant narrative with also teaching them counter narratives . . . We were definitely all interested in cultivating those skills.” (Tr. 2421 [Rosenblum].)

History Department Graduate Teachers also discuss their work with one another with great frequency, both operationally and otherwise. TFs within a course History course meet to compare grades and make sure they were grading evenly across sections. (Tr. 2406-2407 [Rosenblum].) They see one another in the hallway in the History Department or at Department

events: “At those events, I spoke with other graduate students, other Graduate Teacher assistants in history, but who were not graduate students in history in the course I was the history TA for . . . A lot of the time was spent talking about challenges that came up in the context of teaching these history courses.” (Tr. 2347-2348 [Rosenblum].) TFs commonly share “strategies” for teaching effectively. “Part of the ordinary pattern of being a teach[ing] fellow in the department of history that you would talk to other teaching fellows in the department of history about what they’re doing and their courses and how they’re teaching them and what’s working and what’s not.” (Tr. 2165-2166 [Winant].)

Graduate Teachers in the History Department generally do not discuss their teaching with Graduate Teachers in other departments at Yale. “The bulk of my interactions with . . . other people who I knew had teaching appointments all also had their appointments in the history department.” (Tr. 2353 [Rosenblum].) Even a TF homed in the Law School but teaching for a History course testifies that he did not discuss his History TF work with other law students: “We were at the law school, you talk about law.” (Tr. 2439 [Rosenblum].) There is scant evidence on the record regarding *any* contact about teaching or functional integration between Graduate Teachers in the History Department and Graduate Teachers in other Yale departments and programs.

In the History Department, the normal assignment of Graduate Teachers is to serve as Discussion Section Leaders. Most Discussion Section Leaders lead two discussion sections attached to a lecture course. Some teach sections that satisfy undergraduate requirements in writing proficiency or, occasionally, language proficiency; these Graduate Teachers lead only one section. (Tr. 1617 [Kaufman].) Teaching a writing-intensive course to undergraduates requires “really walk[ing] them through the process of learning to write academic historiography which involves meeting with students often repeatedly about drafts, often going back and forth a number of times as they were trying to figure out how they wanted to formulate a paper, and like I said guiding them through that process.” (Tr. 1964 [Winant].)

In addition to leading discussion sections, which meet once per week, Discussion Section

Leaders are required to attend the lectures of their courses (typically twice a week) and the regular meetings with the other TFs and the lead instructor (typically once a week). They are required to prepare for discussion section, to hold office hours, and to grade assignments, exams, and essays. (Tr. 2394-2399 [Rosenblum]; Tr. 2161 [Winant].) Graduate Teachers in History also produce rubrics for grading exams and papers. (Tr. 2203 [Winant].)

The History Department also employs a handful of Graduate Teachers in other capacities. The Department hires approximately four Graduate Teachers per year to serve as PTAIs, which involves the Graduate Teacher planning and leading his or her own independent seminar. (Tr. 1617 [Kaufman].) At present there is also one Graduate Teacher attached to a seminar in a Grader/Tutor capacity. (Er. 18, p. 35.) Another Graduate Teacher is assigned as a Digital Humanities Fellow to a History course; her classification is at the PTAI level, although her hiring for this position worked differently. (Tr. 1675 [Kaufman].) Digital Humanities Fellows are examples of a professional development opportunity. (Tr. 563, 564 [Schirmeister].)

The History Department received the largest allocation of TF positions. (Bd. Ex. 6; Pet. 33a.) Its Graduate Registrar coordinates the allocation, distribution, and assignment of TF positions with a high degree of autonomy, consistent with Department Graduate Teacher policies that have been drafted by a Department committee and approved by vote of the Department faculty. (*See also* Bd. Ex. 11 [Stip. 36: material testimony from History applies elsewhere].)

D. The Physics Department.

The Physics Department differs from other departments in several respects. The Physics Department has a Chair, Associate Chair, DGS, DUS, Department Registrar, full-time Chair's assistant, and Business Manager, and administrative staff. (Tr. 1022-1023, 1027 [Tipton]) The staff of the Physics Department, including the Chair's assistant, all report to the Physics Department Business Manager. (Tr. 1062 [Tipton].) The Physics Department autonomously distributes, hires, and supervises Graduate Teachers. (*See supra* pp. 6-15 [Part I.A.]; *accord* Tr. 1037-1038 [Tipton].)

The Physics Department is in the Sloane Physics Laboratory (Tr. 1709-1710 [Hoeller].) The department allocates physical spaces and their uses within the building. (Tr. 1039 [Tipton].) First year physics students, who generally are expected to teach, have their offices in one room together in Sloane. (Tr. 1073 [Tipton]; Tr. 1711 [Hoeller]). The Chair of the department says that members of the department “have a lot of comradery by class.” (Tr. 1052 [Tipton].)

The Physics Department DGS and department Graduate Registrar maintain and update the Department handbook, which includes things that the department “can and do[es] impose that are specific to” the department. (Tr. 1026-1027 [Tipton].) The Physics Department handbook directs questions about the handbook and its explanations of requirements to the department DGS or registrar. (Er. 44, p. 1: “If you encounter any errors or have any questions, please do not hesitate to contact the Physics Registrar and/or the DGS.”) The handbook also instructs Graduate Teachers to contact the DGS if they are working more than their designation permits. (Er. 44, pp. 13-14: “If you are routinely required to spend more than 10 hours per week on your teaching duties, you should contact the DGS.”)

According to the Physics handbook, Graduate Teachers’ teaching responsibilities do not begin and end based on the University’s semester calendar, but instead begin when the instructor holds a “staff meeting” and “only end when you are released by the course instructor.” (Er. 44, p. 14). The Physics Department has its own vacation policy which was created after a student and a professor brought concerns to the DGS. (Tr. 1060-1062 [Tipton]; Er. 44, p. 16 [Physics Department Handbook].)

The Chair described the TF allocation that the Physics Department receives from the central administration as a “budget line.” (Tr. 1030 [Tipton].) The DGS assigns Graduate Teachers to teaching positions. (Tr. 1705 [Hoeller]; *see* Pet. 32.) The Department Registrar informs Graduate Teachers about their teaching assignments. (Tr. 1719 [Hoeller].) Once, Hoeller arranged to trade teaching assignments with another Graduate Teacher in the Department, but the Physics DGS refused to allow the trade. (Tr. 1731-1732 [Hoeller].)

The Department Registrar is responsible for recruiting people who are not in their teaching years in the Physics Department to hold TF positions, and uses her connections and keeps a list of candidates. (Tr. 1046 [Tipton].) When the Department had a shortage of teachers, it urged newly arrived international Graduate Teachers to take the spoken English test right away to become eligible for teaching assignments. (Tr. 1703 [Hoeller].) The Department's Graduate Registrar is in charge of enforcing and monitoring rules and regulations, including the SPEAK test. (Tr. 1046 [Tipton].)

Though Physics sometimes assigns a Graduate Teacher to a course with few students, which Dean Schirmeister's office "[doesn't] like," Dr. Tipton says that the Department has never had its allocation reduced because of it. (Tr. 1048 [Tipton: "I have never experienced any punitive consequences where the next year they give us less because they disapproved of how we ran our show"].)

The Physics Department determines what courses it will offer to undergraduates every year, based on the courses required for undergraduate majors and the amount of teaching resources they have. (Tr. 1038 [Tipton: "We have a certain core of courses that we have to mount for our majors, required courses for them to finish their degrees So we mount those courses as we have person power to do so."].)

The Chair of the Physics Department described his role as the "complaints department" for "the teaching fellow's performance", and said that he may become involved in resolving problems at the discretion of the DGS of the department. (Tr. 1036 [Tipton].) In the Physics Department the Chair does not teach while serving as chair, though in other departments the chair continues to teach. (Tr. 1286 [Lamoreaux], Tr. 1050 [Tipton]).

Graduate Teachers teaching for the Physics Department have a shared purpose and functional integration with each other: they all teach physics to undergraduates. In order to teach Physics courses, Graduate Teachers require "knowledge of undergraduate material in physics" for some classes (Tr. 1724 [Hoeller]) and more specific training for others, such as "knowledge of electromagnetism, acoustics, and optics." (Tr. 1717-1718 [Hoeller].) A biologist would not be

qualified to teach the course “Life Science” that Hoeller taught, since it requires knowledge of Physics specifically. (Tr. 1749 [Hoeller].)

The nature of the subject matter dictates the knowledge and skills required to teach Physics and the nature of the work performed by Graduate Teachers. To teach experiments as a lab leader, Hoeller had to “try the experiments before” the class on her own. (Tr. 1727 [Hoeller].) When the Physics Department “had a real crisis and needed people” to work as Graduate Teachers, it solicited information from applicants about their experience and training in Physics. (Tr. 1080-1081 [Tipton: “What Physics courses have you taken, where did you major in Physics, that sort of thing, just to try to get a sense of what they know.”].)

Physics TFs often have weekly meetings with the professor that serve as ongoing “trainings for teaching and giving us the opportunity to raise issues that we had teaching certain concepts” (Tr. 1707-1708 [Hoeller].) Prior to teaching for a lecture course with multiple TFs, professors will hold a “course meeting” with the TFs to prepare for the class, before which TFs receive the lecture notes and syllabus. (Tr. 1708 [Hoeller])

The Physics Department decides whether to hold teaching workshops for its TFs. (Tr. 1036 [Tipton: “Yes. We do that”].) In her first semester teaching, Hoeller attended a teacher training held in the Physics Department, taught by upper year Physics graduate students, with no non-physicists in attendance. (Tr. 1729-1730 [Hoeller].)

Physics TFs often have a meeting with the professor and the other TFs for their course once per week. (Tr. 1707, 1718-1719 [Hoeller]) The TFs coordinate job duties like staffing study halls, exchanging assignments for grading, and rotating grading duties between TFs. (*Id.*)

During one teaching assignment, Graduate Teachers invited a more senior Graduate Teacher in the Department to come advise them on how to effectively lead discussion sections. (Tr. 1759 [Hoeller].) Graduate Teachers held office hours together (multiple Graduate Teachers waited in the same room for students, and sometimes met together with a student or students); they also switched who would grade homework each week. (Tr. 1765-1766 [Hoeller].) Graduate

Teachers arranged in one course for another Graduate Teacher teaching the same course to serve as a substitute Graduate Teacher. (Tr. 1769 [Hoeller].)

The Department encourages Physics Graduate Teachers to use the third floor physics lounge for their office hours, or to use another space by agreement with the professor for their course. (Tr. 1073-1074 [Tipton: “They are encouraged to have office hours there”].) Many Graduate Teachers do hold their office hours in that lounge, which is outside their shared office. (Tr. 1713 [Hoeller].) One course had a TF who was enrolled in another department, Applied Physics; he held his office hours in Sloane, and he shared advice with other TFs based on his past experience teaching in the Physics Department. (Tr. 1714 [Hoeller].) Graduate Teachers discuss their teaching work in the graduate student lounge with Graduate Teachers from other courses. (Tr. 1735-1736 [Hoeller].) Current Physics TFs also sometimes discuss their teaching responsibilities and requirements with admitted graduate students before those students begin their programs. (Tr. 1701 [Hoeller].)

Graduate Teachers who are teaching for the same course may grade exams together. (Tr. 1053 [Tipton]; Tr. 1756 [Hoeller].) Graduate Teachers also grade work in their shared office and discuss with other TFs there how many points to give to student answers, as well as complaining about grading on the weekend. (Tr. 1720-1721 [Hoeller].)

In the Physics Department, unlike other Departments, it is common practice for undergraduate students to attend sections other than the one they are enrolled in, to find a Graduate Teacher whom they like. (Tr. 1733 [Hoeller].) This results in some TFs having sections that are larger or smaller than their official enrollment numbers indicate, and some consequently teach sections that have more students than the graduate school’s cap of 18. (*Id.*)

Lab leaders may be required to run test experiments independently to prepare for their teaching duties. (Tr. 1727 [Hoeller].) In some courses, TFs rotate homework grading, so each week one will grade all the homework, and each TF would only have grading responsibilities every six weeks or so. (Tr. 1762 [Hoeller].) Some TFs switch final exams so they will not grade their own students. (Tr. 1764 [Hoeller].) In some courses, TFs may have different responsibilities

such that some TFs grade and others do not. (Tr. 1723, 1758 [Hoeller].) In at least one course, the TFs lead “study halls” on Sunday nights, rotating so there will be at least two there for each given study hall. (Tr. 1773-1774 [Hoeller].)

The Physics Department has some endowed funds, some of which are earmarked for specific purposes and some of which it can use as it sees fit. (Tr. 1030 [Tipton].) The Physics Department buys a laptop for every Graduate Teacher. (Tr. 1040 [Tipton].) A departmental policy in the handbook states that “The copy machine located in 37 SPL is for your use to copy teaching materials if you are assigned a TA position.” (Er. 44, Tr. 1059-1060 [Tipton].)

Physics Graduate Teachers do a lot of “extra teaching”. Someone in Physics could teach more than 6 of 12 semesters (Tr. 368-369 [Cooley]) “The Physics Department decides when its Graduate Teachers will be expected to teach, based on its departmental tradition and the standard in Physics departments in other universities. (Tr. 1036 [Tipton].)

Physics graduate students start teaching during their first year. (Tr. 1073 [Tipton]; Tr. 1705 [Hoeller]; Er. 44, p. 13.) These laptops have “preinstalled printers that we can use to print out other teaching material or research.” Graduate students believe they get the laptop “as compensation for the obligation of teaching two years.” (Tr. 1729-1730 [Hoeller].) The “technical person in physics who gives us the laptop” believes that the department supplies the equipment “because we have to teach longer.” (Tr. 1742 [Hoeller].)

The Physics Department receives the second largest allocation of TF positions. (Bd. Ex. 6.) It hires its Graduate Teachers almost exclusively from graduate students in Physics. (Pet. 33a.) The department maintains unique departmental policies, such as a vacation and paycheck policy published in its Department Handbook. Graduate Teachers receive a free laptop and do significant amounts of “extra teaching.”

E. The East Asian Languages and Literatures Department.

The East Asian Languages and Literatures Department differs from other departments in several respects. East Asian Languages and Literatures has a “primary location” on the third floor of the Hall of Graduate Studies at 320 York St. in New Haven. The Hall of Graduate

Studies is the site of “virtually all of the tenured track faculty” offices, administrative offices, a seminar room, mailboxes for faculty and graduate students, and a graduate student lounge. (Tr. 1818-1819 [Niedermaier].) The Japanese and Chinese language programs are located at a secondary location on Temple St. That location hosts the offices of the language lectors, mailboxes for all teachers in the language programs, a break room, and an administrative assistant’s office. (Tr. 1819-1820 [Niedermaier].) At the entrance to both sites there is a plaque that says, “Department of East Asian Languages and Literatures.” (Tr. 1821 [Niedermaier].) The East Asian Languages and Literatures Department publishes its own online Graduate Handbook, a page titled “Graduate Program.” (Pet. 40.)

The allocation and assignment process for East Asian Language and Literature is, by the admission of Dean Schirmeister, “byzantine” and “different from other departments.” (Tr. 601 [Schirmeister]; Er. 21, p. 8). The Graduate School administration simply allocates the Department the number of TF Resources it requires for its priority-year graduate students. (Tr. 1796 [Schirmeister].) The Department may use its allocation from the Graduate School for either language or literature assignments for Graduate Teachers. (Er. 21, p. 9.) Separately, the Faculty of Arts and Sciences determines the number of sections of each language course that are required, and makes its own allocation to the Department to staff those requirements. (Tr. 600-601 [Schirmeister]; Tr. 1819 [Niedermaier].)

East Asian Languages and Literatures employs a tripartite workforce of Graduate Teachers. It employs exclusively its own graduate students to teach literature courses, in the capacity of Discussion Section Leaders. It employs exclusively its own students as PTAs to teach, grade, and tutor in language courses, as described below, with faculty lectors. And it employs a workforce of Grader/Tutors, many of whom are students in other departments and are hired at the beginning of the semester to meet student demand. Such Graduate Teachers doing “extra teaching” do not fulfill a teaching requirement by working as teachers in East Asian Languages and Literatures. (Pet. 33a; Pet. 34a, p. 4; Board 6, p. 2; Tr. 2045, 2062-2063 [Winant].) Graduate Teachers working as Grader/Tutors in the East Asian Languages and

Literatures Department have voluntarily sought extra teaching work, based on their language skill and their desire for extra income. “They can voluntarily decide to do extra teaching and extra teaching means they will be paid in addition to the stipend.” (Tr. 470 [Schirmeister]; Tr. 1929-1930; Tr. 1793 [Schirmeister: “They could be from anywhere”].)

Discussion Section Leaders appointed to literature classes construct syllabuses, scan readings material, manage the course website, attend class, facilitate discussions, hold office hours, and grade assignments. (Tr. 1824-1826 [Niedermaier].) PTAIs appointed to language classes work along with a rotating team of short-term contract faculty (lectors) to lead daily language discussions; this group meets daily to discuss the day’s lesson. (Tr. 1836-1840 [Niedermaier].) PTAIs run review sessions and engage in one-on-one tutoring in the language clinic. 1836 [Niedermaier].) In East Asian languages, the meaning of words changes with intonation, “So in order to get students to understand that, you have to have them record things, listen to their own recordings, you have to show them with specific hand gestures that have to be taught about how intonation is learned, because if they [use] American intonation to ask a question it won’t even sound the same to a Japanese person.” (Tr. 1851 [Niedermaier].) PTAIs grade assignments “virtually every day”; for some grading, “we will audio record [students] and write corrections.” (Tr. 1847, 1852-1853 [Niedermaier].) For purposes of grading examinations, each member of the teaching team is responsible for grading a different page of the test. (Tr. 1847-1848 [Niedermaier].)

In the East Asian Languages and Literatures Department, “all of the Asian languages” also “use grader tutor positions.” (Tr. 1799 [Schirmeister].) These Grader/Tutors in East Asian Languages and Literatures exclusively work in tutoring in the language clinics, alongside the PTAIs. They do not “do any grading aside from marking attendance or completion of the clinic which would just be a little check.” (Tr. 1938 [Niedermaier].) Because East Asian languages require training in intonation, “the East Asian language faculty likes the undergraduate students to have multiple opportunities to hear different people speak. So a single course, like a single

language course. Let's say Chinese 110 might take five people . . . So that the students in a given section have the opportunity to hear five different speakers.” (Tr. 1798 [Schirmeister].)

Language programs also have unique internal structures of supervision, with ranked hierarchy of coordinating lectors and a “very clear and palpable chain of command” replicating the institutional structure of the national culture under study. “I have a specific coordinator and I’m supposed to really – who is the most junior ranking Japanese lecturer and I am supposed to do all my dealings through her, and she has to ask other people in the hierarchy, you know, if I can do favors for them, or if I can do work for them . . . she has to speak for me” regarding work as a Japanese language teacher. (Tr. 1835 [Niedermaier].)

In a case when a Graduate Teacher “expressed concern” about his excessive teaching workload, the Department DGS intervened, writing that the excessive workload “is of concern to me.” (Pet. 28.) The DGS communicated with the Graduate Teacher’s direct supervisor to say that “20 hours means 20 hours.” (Tr. 1864-1865 [Niedermaier].) and then promised to enforce his supervisory authority over Niedermaier’s direct supervisor: “I will talk to the language coordinator and make sure that does not happen. It is against the rules.” (Pet. 28; see Tr. 1856, 1865 [Niedermaier].)

Graduate Teachers teaching for the East Asian Languages and Literatures Department have a shared purpose and functional integration with each other: they all teach East Asian language and culture to undergraduates. Thus, a fundamental requirement of any teaching position in the department is fluency in the language being taught or of the literature being taught. To work as a Graduate Teacher in East Asian Languages and Literatures require mastery of linguistic and literary skills. (Tr. 1811 [Niedermaier].) Graduate Teachers in the Department have acquired linguistic mastery natively, through self-study, or through prior secondary-level and college-level training. (Tr. 1881-1882, 1929-1931, 1933-1934 [Niedermaier].)

The nature of the subject matter dictates the knowledge and skills required to teach Math and the nature of the work performed by Graduate Teachers. Working as a Graduate Teacher in an East Asian language class (*e.g.* “Elementary Japanese”) requires a distinct set of skills beyond

simple fluency in the language. East Asian languages use intonations unlike European languages. (Tr. 1850-1851 [Niedermaier].) Teaching intonation is a “separate skill, you know, to learn aside from actually just speaking Japanese.” (Tr. 1851 [Niedermaier: “It’s actually a very specific and important aspect of [Japanese] language teaching”].) Graduate Teachers in language courses are instructed to take a training course in language teaching. (Tr. 1853-1854 [Niedermaier].)

Further, “There’s been an incredible amount of on the job training to learn the skills of teaching Japanese language . . . It’s beyond speaking the language, it also involves getting people who know nothing to produce the language, which is a completely new skill set to me, and has required a lot of sessions with my coordinator in the Japan program.” (Tr. 1872 [Niedermaier]; Tr. 1837-1838 [Niedermaier: “I’m receiving a lot of on the job training which means that . . . I’m doing a lot of observing”].) The joint team of language teachers rotates responsibility for producing and disseminating the daily lesson plan: “We all meet together and are taught how to teach a section unless it’s your day to write the lesson plan, in which case you prepare it and then you teach the teachers.” (Tr. 1837-1838 [Niedermaier].)

Teaching literary classes in the East Asian Languages and Literatures Department requires linguistic fluency as well as training in relevant forms of cultural interpretation. To work as a Graduate Teacher in a class on ancient Japanese literature, for example, would require “mastery of Kobuntai and to have a familiarity with the text,” as well as “hermeneutics” (“the commentarial tradition . . . how it was read over the millenniums”) and “literary analysis.” (Tr. 1828-1829 [Niedermaier: “A student comes up to you and asks, what does this mean, is this actually in the original, you need to be able to string together a coherent answer about that.”]) Graduate Teachers working in literature classes may be involved in the construction of the syllabus in advance of the class. “I specifically asked for and received instruction on constructing syllabuses, and that’s why I was able to co-construct the syllabus for the Tale of Genji for that course.” (Tr. 1872 [Niedermaier].)

Graduate Teachers in the East Asian Languages and Literatures Department are functionally integrated through their administrative and pedagogical coordination. Language

PTAIs rotate responsibility for designing lesson plans and leading sessions of class with all other leaders of that class, whether they are PTAIs or lectors; the Department decides what portion of the language teachers will be Graduate Teachers and what portion will be lectors. (Tr. 1836-1838 [Niedermaier]; Tr. 603 [Schirmeister: “I don’t care where they put them . . . you can put them wherever you want”].)

“Dan Kawaguchi, who is in the Japanese language program of the department and he is often in the Japanese program breakroom at the same time as I am, and sometimes I’ll be talking to a student and we’ll discuss kind of the -- since I’m teaching elementary Japanese, we’ll discuss kind of the difficulties of communicating sort of these difficult initial concepts to these students who are starting from a basis of zero knowledge of the language whatsoever.” (Tr. 1941 [Niedermaier].) Questions discussed with other language teachers include “how maybe best to understand a specific pitch that maybe I don’t have the perfect ear for, for example. But also questions of technology and how most efficiently to sort of use the systems to aggregate and alphabetize the students’ audio files before we grade them so it’s easier to enter them in the grade book, so wide-ranging kinds of advice from all different kinds of [Graduate Teachers] teaching in the Japanese language courses.” (Tr. 1938 [Niedermaier].)

Language PTAIs also work as tutors alongside the Grader/Tutor workforce in the language clinic, and the PTAIs and Grader/Tutors regularly have contact about their functional responsibilities. (Tr. 1845 [Niedermaier: “The people who are working this clinic when I’d help out, I need to get information from them, so I’ll sort of have a meeting with them, I’ll talk to them.”].) The language PTAI attends the weekly meetings not only of the lectors teaching the course, but also of the Grader/Tutors serving the course. (Tr. 1845 [Niedermaier].) PTAIs in East Asian Languages and Literatures have workloads that often exceed the official standard of 20 hours per week. (Tr. 1856 [Niedermaier]; Pet. 27.)

Unlike Graduate Teachers appointed as Grader/Tutors elsewhere, Grader/Tutors working in East Asian language clinics do no grading, working exclusively as “clinicians.” (Tr. 1938 [Niedermaier].) PTAIs for language courses in East Asian Languages and Literatures are also

unique in team-teaching their courses (together with lectors). (Tr. 1853 [Niedermaier: “The system of team teaching I don’t think is practiced in other national language departments. In fact, they, as far as I understand, graduate students in those departments get to design their own class, they just teach however they want”].)

The East Asian Languages and Literatures Department requires unique language skills for all of its Graduate Teachers. The Department has a unique structure for distributing Graduate Teacher positions and hiring Grader/Tutors. Its courses feature significant oversight and collaboration between language lectors, PTAs, and Grader/Tutors.

F. The Geology and Geophysics Department.

The Geology and Geophysics Department differs from other departments in several respects. The Geology and Geophysics Department is located in the Kline Geology Laboratory (Pet. 32c, pp. 5-6; (Bd. Ex. 11 [Stip. 6].) “Many Ph.D. Students in the Geology & Geophysics Department years 1-5 have their offices in one hallway of the Kline Geology Laboratory, known as ‘the Grad Wing’. Many TFs in the Geology & Geophysics Department typically hold office hours in these offices for the students they are teaching.” (Bd. Ex. 11 [Stip. 6].) The day-to-day use of Geology and Geophysics Department space is administered by the Geology and Geophysics Department. (Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies]; Tr. 799 [Schirmeister] Tr. 1039 [Tipton].) Graduate students “have a lounge room where they may socialize and, when serving as TFs, conduct office hours.” (Bd. Ex. 11 [Stip. 7].)

The Geology and Geophysics Department has its own Handbook (Pet. 32c). The Handbook states that the Department’s DGS is responsible for placing students in specific TF positions. (Pet. 32c, p. 28.) The DGS will: “(1) estimate the number of teaching fellows (TF) needed for each course, (2) determine an appropriate appointment level (*e.g.*, TF10 or TF20) relative to the work involved, and (3) select specific students to fill the available positions.” (Pet. 32c pp. 7-8: [Geology and Geophysics Handbook: “The DGS is authorized to make a limited number of changes in teaching assignments to account for changes in enrollment or the revised

plans of the instructor or student involved. Please try to make any requests for changes as soon as possible in order to avoid problems with the teaching assistant's wages"].)

Through its distribution process, the Geology and Geophysics Department is also free to determine which courses in each semester will receive Graduate Teacher resources and which classification designation each TF resource will receive (i.e., Grader/Tutor, PTAI, etc.) (Tr. 357 [Cooley]; Tr. 471, 493, 496 [Schirmeister].) The Geology and Geophysics Department also decides how large each Graduate Teacher's class size will be (up to the section size maximum). (Tr. 781-782 [Schirmeister].)

The parties have stipulated that "The DGS of the Geology and Geophysics Department has informed graduate students to raise any complaints about Graduate Teaching work with the DGS." (Bd. Ex. 11 [Stip. 4]), and that Graduate Teachers in the Geology and Geophysics department "can change their teaching assignment by speaking with the DGS." (Bd. Ex. 11 [Stip.5].) Graduate Teachers can also make requests for additional wages to the DGS. (Pet. 32c p. 28 [Handbook: "A student can claim additional wages in exceptional cases where the work done significantly exceeds the amount of time specified for their appointment. Such requests should be made to the DGS office by the instructor before the student exceeds the specified limit. The actual claim for additional wages needs to be documented by a report from the students of hours worked and tasks performed during the term"]); cf. Tr. 860 [Brinley: "there are departments that have access to the financial aid system and they can administer financial aid"].)

The Geology and Geophysics Department has seven committees, including a Curriculum Committee and a Committee on Teaching Fellows. (Pet. 32c, pp. 7-8.)

Graduate Teachers teaching for the Geology and Geophysics Department have a shared purpose and functional integration with each other: they all teach geology to undergraduates. Graduate Teachers "teaching in the Geology & Geophysics Department typically have field skills in and knowledge of earth sciences." (Bd. Ex. 11 [Stip. 9].) The nature of the subject matter dictates the knowledge and skills required to teach Geology and Geophysics, and the nature of the work performed by Graduate Teachers. Graduate Teachers "in the Geology &

Geophysics Department lead field trips with faculty members to teach undergraduate students, both in the area and around the world.” (Bd. Ex. 11 [Stip. 3].) Geology and Geophysics Graduate Teachers grade exams and/or assignments (Tr. 446 [Schirmeister]).

Graduate Teachers teaching in the Geology and Geophysics Department “discuss with one another teaching work and issues that arise in the course of teaching” (Bd. Ex. 11 [Stip. 8]; Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].) The Geology and Geophysics Department hosts a daily “coffee break” and weekly colloquium for faculty, graduate students, undergraduate majors, and guests. (Pet. 32c, pp. 4-5)

Graduate Teachers in the Geology and Geophysics Department share common interests in University policy that teachers in other departments do not share: Sixth years in the physical sciences did not receive the guarantee of sixth year funding with the justification that their advisors generally can provide them with funding from external sources, but some departments, like Geology and Geophysics, frequently cannot provide that funding (Bd. Ex. 11 [Stip. 1]). As a result, Geology and Geophysics sixth year Graduate Teachers now make less money for teaching than they did before the changes to sixth year funding. (Tr. 2001-2005 [Winant: In Geology and Geophysics, “they’re teaching more than they had to teach before and making less.”])

A postal meter, stationery, envelopes, mailers, paper tablets, pencils, and transparencies are all available for no cost for use in “official Departmental teaching and research activities.” (Pet. 32c pp. 30-32.) The Geology and Geophysics Department can rent vehicles for use on field trips and licensed Graduate Teachers who pass a certification can be permitted to drive them. (Pet. 32c, p. 30.)

The Geology and Geophysics Department Graduate Handbook outlines clearly the DGS’s dominant role in handling Graduate Teacher complaints and grievances, including a process for grieving unpaid work. Geology Graduate Teachers lead students on far-flung field trips.

G. The English Department.

The English Department differs from other departments in several respects. (*See generally* Pet. 14, pp. 38-39). The English Department has a Chair, DGS, DUS, Associate DUS

(ADUS), Graduate Registrar, and administrative staff. (Tr. 68-74, 85 [Gendler]; Pet. 14, pp. 38-39). The English Department has its office at Linsly-Chittenden Hall at 63 High Street in New Haven. (Bd. Ex. 11 [Stip. 16].) The day-to-day use of English Department space is administered by the English Department. ([Stip. 36: material testimony from previous witnesses applies]; Tr. 799 [Schirmeister]; Tr. 1039 [Tipton].)

The English Department has various committees, including the Graduate Student Advisory Committee which serves an advisory function to the graduate program leadership in the English department, and which wrote the English Department Graduate School handbook. (Tr. 820 [Schirmeister]; Pet. 14).

In the English Department, the Associate DUS “supervises the TF program in the department.” (Pet. 14, p. 50.) A committee with the DGS, DUS, several faculty members, and elected graduate students advises on Graduate Teacher hiring. (Tr. 2074 [Winant]; Pet. 14, p. 50). The DUS is primarily responsible for overseeing Graduate Teacher assignments, and sends “provisional assignments to students” before the Department receives the official allocation memo from the Graduate School. (Er. 19, p. 8; Pet. 14, p. 28.) The English Handbook directs questions about Department policy to the DGS of the Department. (Pet. 14, p. 1.)

The English Department Handbook tells Graduate Teachers in the Department that “both the DUS and ADUS can help you handle any problematic issues you face as a teacher.” (Pet. 14, p. 39.) It also instructs them, “If you feel overwhelmed or underserved by the professor’s level of involvement, talk to the professor or the ADUS. You should feel supported and guided by the course lecturer and by fellow TFs when you have questions or concerns.” (Pet. 14, p. 29.)

The English handbook invites Graduate Teachers to arrange changes in their teaching assignment by coordinating with other Graduate Teachers in the Department and taking the resultant inter-employee agreement to the ADUS, saying: “If you receive a truly baffling assignment, by all means contact the ADUS and negotiate. It’s also a good idea to ask around and find out who’s been assigned to which course: if you wanted Milton but got Shakespeare and someone else wanted Shakespeare but got Milton, talk to the ADUS.” (Pet. 14, p. 28.)

Graduate Teachers teaching for the English Department have a shared purpose and functional integration with each other: they all teach English literature to undergraduates. Graduate Teachers “teaching in the English Department typically have the following skills: (a) close reading of literary texts and modalities of making various arguments based on those texts; (b) knowledge of literature style, form, genre, and literary history; and (c) knowledge of literary theory and critical scholarship.” (Bd. Ex. 11 [Stip. 17].) The nature of the subject matter dictates the knowledge and skills required to teach in the English Department, and the nature of the work performed by Graduate Teachers in the Department.

The English Department handbook reassures Graduate Teachers: “Although you may doubt your qualification to teach, especially if much of the syllabus is new to you, remember that you have a base of general literary skills of interpretation, writing, and argument, as well as a broad base of knowledge that your students do not have.” (Pet. 14, p. 28).

English Graduate Teachers have to take a “practicum” before they teach. (Tr. 818 [Schirmeister]) This course is a “teacher-specific training” run by English Department faculty, with course number ENG 990. (Bd. Ex. 11 [Stip. 12].) The Practicum entails reading “articles on pedagogy and literary works to be discussed in terms of teachability. Discussion topics include strategies for teaching different genres, generating and sustaining discussion, lecturing and TF’ing, and responding to student writing. Assignments commonly range from group presentations on teaching strategies to the delivery of a mock lecture and the development of a complete syllabus.” (Pet. 14, p. 27.) This practicum is not offered in other departments. (Tr. 819 [Schirmeister].) For all Graduate Teachers who are PTAs with standalone sections of ENGL 114, the Department provides “extensive training provided to new instructors of ENGL 114 beginning in May and continuing through the summer.” (Er. 27, p. 7).

The parties stipulated that Graduate Teacher assignments in the English Department “are typically broken down by year between introductory ‘writing and literature’ classes (PTAI positions), on the one hand, and intermediate lecture courses (Discussion Section Leader positions), on the other, as follows: third and fourth year graduate students typically teach one

English Department ‘writing course’ as a PTAI and serve as a Discussion Section Leader in three different English Department lecture courses; sixth years (and non-priority students) typically teach as English Department PTAIs.” (Bd. Ex. 11 [Stip. 18].) The PTAIs for those introductory classes “teach freestanding sections in multi-section introductory courses as do ladder and non-ladder faculty teaching other separate sections. One or two lecturers or members of the ladder faculty supervise all of the TFs.” (Bd. Ex. 11 [Stip. 19].)

For courses structured as multi-section PTAI writing courses, where the sections are standalone instead of attached to a shared lecture, the “course coordinator or the instructor of record meet[s] in the May prior to the next academic year with the PTAIs and non-ladder faculty who will teach introductory courses.” Once those courses begin, they will have “group meetings including faculty members designated as the course coordinator or instructor of record and all PTAIs from within and without the English Department together.” (Bd. Ex. 11 [Stip. 14])

The Department handbook encourages Graduate Teachers to discuss their teaching with one another: “It’s a good idea to make opportunities throughout your teaching at Yale to talk with fellow TFs and professors whose teaching you admire—you can learn all kinds of approaches, strategies, and gimmicks.” (Pet. 14, p. 29.)

Through its distribution process, the English Department is free to determine which courses in each semester will receive Graduate Teacher resources, how many they will receive, whether those resources will be TF10 or TF20 positions, and which classification designation each TF resource will receive (i.e., Grader/Tutor, PTAI, etc.) (Tr. 357 [Cooley]; Tr. 471, 493, 496 [Schirmeister].) The English Department also decides how large each Graduate Teacher’s class size will be (up to the section size maximum). (Tr. 781-782 [Schirmeister].) Many TF positions in English are designated “WR” because they satisfy the University’s Writing Requirement. Courses designated WR have a lower maximum section size of 15 (Pet. 14, p. 52.)

The English Department also sets a minimum number of pages that an undergraduate student has to write in each course. (Tr. 785 [Schirmeister].) which also sets the minimum number of pages that a Graduate Teacher must grade as part of a teaching assignment.

Per stipulation: “Office space in the English Department is prioritized for graduate students who are teaching.” (Bd. Ex. 11 [Stip. 11]). Furthermore, “the English Department makes mailboxes available to all TFs teaching in the English Department.” (Bd. Ex. 11 [Stip. 10]). All Graduate Teachers for English Department classes are instructed to have their students turn in assignments to a locked dropbox located in the English Department. (Pet. 14, p. 29)

The English Department Handbook states outright that a Department officer “supervises the TF program in the department.” The Department provides benefits, such as a mailbox and office, to all Graduate Teachers in the Department, regardless of their student department. Graduate Teachers in English share a community of interest.

H. The Political Science Department.

The Political Science Department differs from other departments in several respects. The Political Science Department has a Chair, DGS, DUS, Graduate Registrar, Assistant to the Chair, Business Manager, and administrative staff. (Tr. 1088-1090 [Wilkinson].) According to the Political Science Department website, “The Department is located in Rosenkranz Hall, which adjoins both the MacMillan Center and the Institution for Policy and Studies. Most faculty have offices either in Rosenkranz or those allied research centers.” (Pet. 16, p. 8.) The Political Science department office, “many of the faculty,” the Chair’s office, the department staff, and graduate student offices are located at Rosenkranz Hall. (Tr. 1085 [Wilkinson]; (Tr. 1088-1090 [Wilkinson, naming the Department officers].)

There are certain rooms in Rosenkranz Hall that can be used by all Graduate Teachers teaching in the Political Science Department to hold office hours. An administrator in the Department coordinates a booking system for those rooms. (Tr. 1086 [Wilkinson]; Bd. Ex. 11 [Stip. 20].) The physical space of the Department is owned by the University, but the Department has the authority to determine how to use that space. (Tr. 1113-1114 [Wilkinson]; ([Stip. 36: material testimony from previous witnesses applies]; Tr. 799 [Schirmeister]; Tr. 1039 [Tipton].)

The Political Science Department publishes Graduate Teacher policies on its website rather than issuing an official Department Handbook, which is a decision that is within the

Department's purview to make. (*See* Pet. 16; Tr. 1095 [Wilkinson]; Tr. 762 [Schirmeister].) The Department does publish information and policies about teaching on its website. (Tr. 1136 [Wilkinson]; Pet. 16.)

The parties have stipulated that the Political Science DGS "works with the Political Science Department's Graduate Registrar to distribute Teaching Fellow slots to courses and assign Teaching Fellows to those courses. (Bd. Ex. 11 [Stip. 22].) Input to the Department Registrar and DGS is used to "inform the Department's distribution of Teaching Fellow slots to courses and assignment of Teaching Fellows to those courses" (Bd. Ex. 11 [Stip. 23].)

For TF positions in Political Science Department classes, "the DGS, in cooperation with the program registrar, assigns graduate students to available TF slots." (Pet. 16, p. 2; *see also* Tr. 1105 [Wilkinson]) The DGS in Political Science presents to the department faculty on how the TF allocation and assignment process is going. (Tr. 1102 [Wilkinson].) The Political Science Department has the authority to "distribute" its TF allocations to courses. (Tr. 1111 [Wilkinson])

"Occasionally, before allocations have been to the Political Science Department, some professors ask the DGS to reserve a TF slot of their upcoming course in order to assign a certain graduate student to serve as a TF in that course. The Political Science Department asks its Faculty to provide such input to the Department's Registrar and DGS to inform the Department's distribution of Teaching Fellow slots to courses and assignment of Teaching Fellows to those courses." (Bd. Ex. 11 [Stip. 23].)

If a Graduate Teacher and his or her supervising professor have a dispute or a problem to resolve, they typically take the problem to the DGS or sometimes the department's Graduate Registrar. (Tr. 1107 [Wilkinson].) The Chair of the Political Science Department sometimes gets involved in TF-professor disputes, and only after the departmental level of intervention is unsuccessful is the problem sent to the Graduate School for escalation. (Tr. 1108 [Wilkinson].)

Graduate Teachers teaching for the Political Science Department have a shared purpose and functional integration with each other: they all teach Political Science to undergraduates. The nature of the subject matter dictates the knowledge and skills required to teach Political Science

courses, and the nature of the work performed by Graduate Teachers. Graduate Teachers in the Political Science Department “typically have knowledge of political theory; specialized quantitative analysis tools that apply statistical or economic analysis to political science methodologies; relevant history or other content; and current academic debates.” (Bd. Ex. 11 [Stip. 26].) Winant, based on his experience as a Graduate Teacher in History and an undergraduate student in Political Science, described the skills necessary for teaching writing in political science versus teaching writing in history as very different:

The standards of evidence are different, the standards of argument are different, the approaches are different. Accordingly, the lessons that one has to teach students in teaching them how to do that writing is different. The process of drafting is different, the process of research is different, it requires different forms of engagement from a teacher.

(Tr. 2148 [Winant].) The Political Science DGS has instituted workshop series for the department’s new teaching fellows. (Er. 8, p. 21.)

In order to be considered for a TF position, anyone who is not enrolled in the Political Science Ph.D. program is instructed to send a CV with their experience and qualifications to the Department’s Graduate Registrar. The Department’s website reads:

Graduate and professional students not enrolled in the Ph.D. Program may also, in limited circumstances, apply to serve as Teaching Fellows . . . If you are interested in serving as a Teaching Fellow and are NOT a Ph.D. Student in Political Science, please email the Acting Graduate Program Registrar Colleen Amaro an electronic copy of your Vita.

(Pet. 16, p. 1; Tr. 1137-1138 [Wilkinson])

Through its distribution process, the Political Science Department is free to determine which courses in each semester will receive Graduate Teacher resources, how many they will receive, whether those resources will be TF10 or TF20 positions, and which classification designation each TF resource will receive (i.e., Grader/Tutor, PTAI, etc.) (Tr. 357 [Cooley]; Tr. 471, 493, 496 [Schirmeister]). The Political Science Department also decides how large each Graduate Teacher’s class size will be (up to the maximum). (Tr. 781-782 [Schirmeister].)

All Political Science Graduate Teachers grade exams and/or assignments (Tr. 446 [Schirmeister].) “Some TFs teaching in the Political Science Department are assigned to a Quantitative Methods course, where the TF is designated as a Lab Leader.” (Bd. Ex. 11 [Stip. 25].) The number of students a Graduate Teacher teaches will depend on how the Political Science Department allocates Graduate Teachers to courses based on enrollment.

The Political Science Department has its own budget of “GA funds” to run the department, plus some endowed funds that it manages for specific purposes. (Tr. 1096-1097 [Wilkinson].) The Political Science Department provides Teaching Fellows with some copying privileges and access to the locked stationery cupboard, and with the ability to book the Department’s rooms for office hours. (Tr. 1086 [Wilkinson]; Bd. Ex. 11 [Stip. 20]; Tr. 1114 [Wilkinson].)

The Employer has stipulated that the Political Science Department DGS distributes TF Resources to courses and assigns Graduate Teachers to those positions. The Chair admits that he gets involved in Graduate Teacher disputes.

I. The Sociology Department.

The Sociology Department differs from other departments in several respects. “The Sociology Department is primarily located at 493 College St., where its faculty, Director of Undergraduate Studies, Director of Graduate Studies, Chair, and Business Manager have their offices. Some graduate students and the Graduate Registrar of the Sociology Department have their offices in two adjacent buildings: 204 and 210 Prospect St. Sociology Department graduate student mailboxes are located at 493 College. Some Sociology classes are held in other buildings.” (Bd. Ex. 11 [Stip. 27; Bd. Ex. 11 [Stip. 27: Sociology Department has a Chair, DGS, DUS, Department Registrar, and administrative staff].) The day-to-day use of Sociology Department space is administered by the Sociology Department. ([Stip. 36: material testimony from previous witnesses applies]; Tr. 799 [Schirmeister] Tr. 1039 [Tipton].)

The “DUS of the Sociology Department is primarily responsible for the distribution of TF Resources to Sociology courses and for making Teaching Fellow assignments to courses in

the Sociology Department” (Bd. Ex. 11 [Stip. 28]; Pet. 32a, p. 2). “Faculty in the Sociology Department give input to the DUS if they have preferences about who is assigned to their classes.” (Bd. Ex. 11 [Stip. 29].)

Graduate Teachers teaching for the Sociology Department have a shared purpose and functional integration with each other: they all teach sociology to undergraduates. Graduate Teachers in the Sociology Department “typically understand sociological theory and qualitative or quantitative methods, including methods like ethnography and sociology-specific analysis techniques and theories.” (Bd. Ex. 11 [Stip. 32].) Almost all Sociology Graduate Teachers train by taking a specific Sociology courses including “Theory,” which teaches “a synthetic overview of conceptual issues and ways of thinking that mark the sociological imagination,” and “Logic of Empirical Social Research,” which trains them on “broad strategies and issues in empirical research.” (Pet. 39, p. 1 [Sociology Department Graduate Handbook].)

The nature of the subject matter dictates the knowledge and skills required to teach Sociology, and the nature of the work performed by Graduate Teachers in the Department. A Graduate Teacher in the Sociology Department meets “with other TFs in the course he or she is teaching separately from meeting with the faculty supervisor of the course.” (Bd. Ex. 11 [Stip. 31].) Graduate Teachers in the Department “email each other about grading and comparing notes for section, and may collaborate on a document that they pass out to the students in the first section about expectations for the course.” (Bd. Ex. 11 [Stip. 31].) A Graduate Teacher who has previously taught a course in the Sociology Department typically gives Graduate Teachers “teaching that course for the first time advice about teaching the subject matter.” (Bd. Ex. 11 [Stip. 31]; Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].)

Graduate Teachers “teaching in the Sociology Department may discuss the logistics of teaching assignments and what different courses are like.” They also “compare how much time” Graduate Teachers “teaching in the Sociology Department spend working in different courses and with different Sociology subject matters and Sociology modalities.” (Bd. Ex. 11 [Stip. 33]; Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].)

Graduate Teachers in the Sociology Department work together to teach in the Department. For example, they “on occasion arrange to cover each other’s sections” (Bd. Ex. 11 [Stip. 34]; Bd. Ex. 11 [Stip. 36: material testimony from previous witnesses applies].)

Through its distribution process, the Sociology Department is free to determine which courses in each semester will receive Graduate Teacher resources, how many they will receive, whether those resources will be TF10 or TF20 positions, and which classification designation each TF resource will receive (i.e., Grader/Tutor, PTAI, etc.) (Tr. 357 [Cooley]; Tr. 471, 493, 496 [Schirmeister].) The Sociology Department also decides how large each Graduate Teacher’s class size will be (up to the section size maximum). (Tr. 781-782 [Schirmeister])

“TFs in Sociology lecture courses typically attend lectures, lead sections, grade, meet with other TFs in the course, and meet with students in office hours.” (Bd. Ex. 11 [Stip. 30]) When Sociology assigns TF positions, it usually gives Graduate Teachers only one section to teach, which means their teaching assignments are “out of alignment in terms of all the other social science programs.” (Er. 26, p. 25.)

The Employer has stipulated that the Sociology Department DUS is responsible for distribution of TF Resources to courses and assignment of Graduate Teachers to those positions.

ARGUMENT

The petitioned-for Units are “appropriate.” *Specialty Healthcare*, 357 NLRB 934 (2011). The Supreme Court has explained that “employees may seek to organize ‘a unit’ that is ‘appropriate’—not necessarily the single most appropriate unit.” *Am. Hosp. Ass’n*, 499 U.S. 606, 610 (1991); *see Macy’s v. NLRB*, 824 F.3d 557, 564 (5th Cir. 2016). The Board agrees: “[t]here is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act only requires that the unit be ‘appropriate.’” *DTG Operations*, 357 NLRB 2122, 2125 (2011); *J.C. Penney Co., Inc.*, 196 NLRB 708, 709 (1972); *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950). Thus, “[m]ore than one appropriate bargaining unit logically can be defined in any particular factual setting.”

Columbia, 364 NLRB No. 90, p. 18 (Aug. 23, 2016) (quoting *Country Ford Trucks v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000)); accord *Specialty Healthcare*, 357 NLRB at 942 (same).

The Board engages in a two-part inquiry. *First*, the Board determines whether the petitioned-for unit is readily identifiable as a group that shares a community of interest. *Second*, if it is, “the Board will find the petitioned-for unit to be an appropriate unit despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.” *Specialty Healthcare*, 357 NLRB at 945. “Procedurally, the Board examines the petitioned-for unit first. If that unit is an appropriate unit, the Board proceeds no further.” *Id.* at 941.

Under the first inquiry, a unit is appropriate if it is “readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)” and “the employees in the group share a community of interest after considering the traditional criteria.” *Specialty Healthcare*, 357 NLRB at 945. These are the traditional criteria for consideration:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Columbia, 364 NLRB No. 90, pp. 18-19 (Aug. 23, 2016) (quoting *Specialty Healthcare*, 357 NLRB at 942 and *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). Consistent with these criteria, the Board has frequently found departmental units to be appropriate. *E.g.*, *Macy’s*, 361 NLRB No. 4 (2014) (cosmetics-and-fragrance-department employees); *United Operations, Inc.*, 338 NLRB 1 (2002) (HVAC-department employees); *Sheraton-Anaheim Hotel*, 252 NLRB 959 (1980) (engineering-department employees); *Cone Mills Corp.*, 187 NLRB 759 (1971) (screen-print-department employees); *see, e.g., Lianco Container Corp.*, 177 NLRB 907, 908 (1969) (litho-coater department employees may be appropriate if these employees desire to be represented separately.”); *see also, e.g., Huntington Ingalls Inc.*, 361 NLRB No. 64 (2014)

(reaffirming earlier finding of departmental unit at shipyard); *Loyola University Chicago*, 13-RC-168082, D&DE, slip op. at pp. 1-2 (March 4, 2016), *available at* <https://www.nlr.gov/case/13-RC-168082> (directing election in one department of University: the ESL program), *review denied* (July 20, 2016).

In *Macy's*, the Employer worried that department units would “wreak havoc in the retail industry.” *Macy's*, 824 F.3d at 566. The Fifth Circuit rejected that argument, noting “the Board’s history of approving multiple units in the retail and other industries.” *Id.* (citing *Teledyne Economic Dev. v. NLRB*, 108 F.3d 56, 57 (4th Cir. 1997), *Banknote Corp. of Am. v. NLRB*, 84 F.3d 637, 647 (2d Cir. 1996), and *Stern's Paramus*, 150 NLRB 799, 802-806 (1965)). The Fifth Circuit rejected *Macy's* unfounded fears as irrelevant to the appropriate-unit standard:

[T]he Board may certify “a unit” that is “appropriate”—not necessarily the single most appropriate unit. Although the unit composition argued for by *Macy's* may have also been “an appropriate bargaining unit,” we cannot say that the one approved by the NLRB was “clearly not appropriate” based on the employees’ “community of interests.”

Macy's, 824 F.3d at 566 (internal quotation marks and citations omitted). The same is true here.

The Employer may argue that it is somehow improper for the Union to file petitions for multiple department units. That argument was squarely confronted and rejected by the Board in *Stern's Paramus*, 150 NLRB at 802-803. There, a Board majority rejected the dissent’s view that the RWDSU should not be permitted to seek three separate units in a department store:

The dissenting member is largely influenced in his position by the fact that one union has petitioned for three units. But his position is neither supported by precedent or founded in reason. . . . We would not depart from precedent permitting a single union to compete for representational rights in several units if the units requested are otherwise appropriate.

150 NLRB at 806;⁴ *accord Teledyne*, 108 F.3d at 57 (enforcing Board's decision certifying two units at employer represented by one union). Indeed, on July 13, 2016, the Acting Regional Director for Region Six directed elections in petitioned-for units at the same employer based on

⁴ *Stern's Paramus* was cited with approval by both the Board and the Fifth Circuit in *Macy's*.

two election petitions filed by the same union on the same date: July 3, 2016. *Rivers Casino*, 06-RC-178310, D&DE (July 13, 2016), *available at* <http://apps.nlr.gov/link/document.aspx/09031d458214e626>; *Rivers Casino*, 06-RC-178320, D&DE (July 13, 2016), *available at* <http://apps.nlr.gov/link/document.aspx/09031d458214dcbd>.

As emphasized by the Supreme Court, an additional factor is always relevant to the analysis: The extent of organizational interest as shown by the scope of the petition. *Specialty Healthcare*, 357 NLRB at 942 (quoting *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442 (1965)) (extent of organization may be “consider [ed] . . . as one factor” in determining unit appropriateness). As the Board has explained, the “petitioner’s desire concerning the unit ‘is always a relevant consideration.’” *Specialty Healthcare*, 357 NLRB at 941 (citing, *inter alia*, *Marks Oxygen Co.*, 147 NLRB 228, 229 (1964)). Deference to the petitioned-for unit is necessary because “[u]nionism and collective bargaining are dynamic institutions capable of adjusting to new and changing work contexts and demands in every sector of our evolving economy.” *NYU*, 332 NLRB 1205, 1208 (2000). This is recognized in the Act itself: “Section 9(b) of the Act directs the Board to make appropriate unit determinations which will ‘assure to employees *the fullest freedom* in exercising rights guaranteed by this Act.’ i.e., *the rights of self-organization and collective bargaining*.” *Macy’s*, 361 NLRB No. 4 (2014) (emphasis added) (citing *Federal Electric Corp.*, 157 NLRB 1130, 1132 (1966)).

Under the second inquiry, the Employer bears the burden of proof to show an “overwhelming community of interest” between the petitioned-for Unit and some other group of Yale employees. *Specialty Healthcare* 357 NLRB 934, 944 and n. 28 (2011) (citing, *inter alia*, *Laneco Construction Systems*, 339 NLRB 1048, 1050 (2003); *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008); and *Lundy Packing Co.*, 314 NLRB 1042, 1043 (1994), *enf. denied* 68 F.3d 1577 (4th Cir. 1995)). The Employer must prove that there is “*no legitimate basis* upon which to exclude certain employees from” its proposed larger unit because the traditional community-of-interest factors would “overlap *almost completely*” in “a Venn diagram.” *Specialty Healthcare*, 357 NLRB at 944.

The petitioned-for Units' community-of-interest factors, and those of other Graduate Teachers at Yale, barely overlap. The Employer claims that each petitioned-for Unit is "fractured," but to support that claim the Employer must demonstrate that the Unit in question is an "*arbitrary segment*" of an appropriate unit, or is a combination of employees for which there is "*no rational basis*." *Macy's*, 361 NLRB No. 4 (July 22, 2014).

The Employer cannot meet this heavy burden. The Employer argued in its Revised Statement of Position and Opening Statement that the petitioned-for departmental units constitute arbitrary collections of employees, do not constitute readily identifiable groups of employees, and do not share a community of interest among themselves. (*See* Er. Rev. Posn. Para. 3; Er. Op. Stat., pp. 6-7.) This contention cannot be supported: the Yale Corporation—the highest governing body of the Employer—has designated each petitioned-for Department as an organizational subdivision of the Employer. (*See supra* pp. 6-15 [Facts, Part I].) The Employer characterizes these as "academic departments" (Er. Op. Stat., pp. 5-6), in an apparent attempt to minimize the significance of this designation by the Corporation. But the designation of "academic departments" goes to the very heart of the Employer's operations. Yale is an academic institution, and it fulfills its academic mission through Departments organized to teach students. (*See* Pet. 3, p. 8 [Yale Corporation By-Law 33: Department is a formal designation of distinct "teaching and research staff"].)⁵ Thus, nothing could be more significant to the Employer's business than to divide into "academic Departments" the authority to hire and supervise Graduate Teachers.

The Yale Corporation itself has designated each petitioned-for Department as an

⁵ "Application for admission may be made to *one department only* in the Graduate School." (Er. 8, p. 2; *see id.*, p. 3; *see, e.g.*, Tr. 1808 [Niedermaier].) Admissions letters all state, "you have been selected for admission as a full-time doctoral student to *the Department of* [Department Name] starting in the 2016 fall term." (*See, e.g.*, Er. 10.) "Applications for admission to the department's graduate program are reviewed by a departmental faculty committee of which the DGS is chair." (Pet. 13, p. 8.) The Graduate school usually follows the Department's recommendations of who to admit (Tr. 375 [Cooley]), and the Department's DGS must sign off on the admission. (*See, e.g.*, Pet. 11.)

organizational division with substantial autonomy in Graduate Teacher distribution, hiring and supervision. Thus, no such Department could possibly be construed an “arbitrary” division with “no rational basis.” *Macy’s*, 361 NLRB No. 4 (2014). (“The fact that the petitioned-for unit tracks a dividing line drawn by the Employer is particularly significant.”) Under these circumstances, the Employer cannot hope to show “*no legitimate basis*” for the petitioned-for Units. The Units are, in fact, based on the way the Employer has structured its own Graduate Teacher operations: by Department.

I. Each Petitioned-For Unit has a Community of Interest within itself.

As shown by the facts in this case, *see supra* pp. 6-61, each of the petitioned-for Units is readily identifiable as a group that shares a community of interest within itself. In fact, the Departments have been identified for us as operational subdivisions by the Yale Corporation. (*See also* Pet. 3, p. 8 [Yale Corporation By-Law 33: Department is a designation of distinct teaching staff].) Board Exhibit 6 readily identifies the employees in each petitioned-for Unit. (Bd. Ex. 6.) It contains a Fall 2016 “List of Employees” who are in each petitioned-for Unit of Graduate Teachers. (*Id.*) Each list is limited to one “Assigning Department”—i.e., the unique Department that hired and is supervising each petitioned-for Unit. (*Id.*)

All of the community-of-interest factors demonstrate a community of interest within each of the petitioned-for Units. The Employer itself organized each of them into a separate Department of faculty. Each such petitioned-for Department had the authority to choose which of the courses proposed through the Department by its appointed faculty would receive TF positions for Fall 2016, and what level and type of TF positions (*e.g.*, TF20 Lab Leader) the course would receive. (*See supra* pp. 8-15.)

Each petitioned-for Department had the autonomous authority to hire Graduate Teachers for those positions in the Department, and to administer and supervise those Graduate Teachers’ work. (*See supra* pp. 8-15.) Through these choices, each petitioned-for Department imposed on its Graduate Teachers terms and working conditions different from those of other Graduate

Teachers on campus. (*See supra* pp. 21-61 [Facts, Part II.A-II.I.])

Graduate Teachers in each petitioned-for Unit have distinct skills and training in the discipline and subfields of the Department in which they have been hired to teach. (*See supra* pp. 16-61.) This is by design: The application process that led each petitioned-for Department to hire Graduate Students sought qualifications necessary to teach the subject matters taught in Fall 2016 courses by Graduate Teachers in the Department. (*Id.*) Graduate Teachers in each petitioned-for Department have distinct job functions and work duties, as required by those subject matters and traditions within the Department. (*See supra* pp. 21-61.)

Graduate Teachers in each petitioned-for Department are vastly more functionally integrated, and have much more contact about their work, with other employees in that Department than with other employees. (*See supra* pp. 17-61.) There is no evidence that the Employer transferred any employee working as a Graduate Teacher in any petitioned-for Department into any position outside of that Department, or vice versa, and thus there is no evidence of interchange here. (*See supra* pp. 20-21.)

The only community-of-interest factors here that overlap are *within* each petitioned-for Unit. *Specialty Healthcare* 357 NLRB at 944. Within each petitioned-for Unit, the employees were hired and are being supervised within the same Assigning Department, and share skills, training, working conditions, job functions, functional integration, and contact about their teaching. Each petitioned-for Unit is appropriate.

II. The Employer Has Failed to Show any “Overwhelming Community of Interest” Between Any Petitioned-for Unit and Any Other Group of Graduate Teachers.

The Employer has the burden of establishing that the employees it wants to add to any petitioned-for Unit share such an “overwhelming community of interest” with the petitioned-for employees that there “is no legitimate basis upon which to exclude” them from the petitioned-for Unit because the traditional community-of-interest factors “overlap almost completely.” *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 11 (2011). It cannot do so.

Several cases before and since *Specialty Healthcare* guide the analysis here—especially

Macy's, 361 NLRB No. 4 (2014). In *Macy's*, the Board found the proposed unit of salespeople in *Macy's* cosmetics and fragrances department to be an appropriate bargaining unit. The unit was appropriate despite the fact that, as Board Member Miscimarra stated, the “Employer’s singular focus, [is] to ensure that all salespeople . . . maximize sales across the store.” *Id.* Similarly here, while the Employer may have, with relation to Graduate Teachers, the “singular focus” of effective teaching at the University, a department unit is appropriate.

In *Macy's*, the unit was found appropriate despite many community-of-interest factors that cosmetics-and-fragrance department employees shared in common with salespeople in various other departments in the store. Board Member Miscimarra gave the following examples:

- Within and outside the C&F area, some salespeople participated in a hiring process that involved outside vendors, and other salespeople were hired without input from outside vendors.
- All salespeople across the store--within and outside the C&F area--are covered by the same policies expressed in the same employee handbook.
- All salespeople storewide participate in the same benefits plans that are administered by the same human resources representatives and plan administrators.
- All salespeople storewide receive the same types of performance evaluations, based on the same criteria, and the same “sales scorecard” is used for rating purposes.³¹
- All salespeople storewide are subject to the same in-store dispute resolution procedure.
- All salespeople share other important matters associated with their day-to-day existence at work, including the time periods they work, the timeclock system, the breakroom(s), and participation in the same “daily” rallies regarding sales-related totals and special events.

Id. (Miscimarra, dissenting).

But the department of cosmetics and fragrances also had some community-of-interest factors distinguishing it from other departments in the store. Most notably, these were that the department was a separate administrative distinction created by the employer, the department decided which employees to hire for beauty sales, and there was little interchange or functional integration—i.e., the petitioned-for employees all sold the unique products of their department. *Id.* Thus, the Board (later upheld by the Fifth Circuit) found that there was no “overwhelming”

community of interest between the cosmetics and fragrances department and other departments.

The same is true here: each petitioned-for Department is separately constituted by Yale. The Department decides which courses will receive TF positions; the Department decides which Graduate Teachers to hire for each course; and there is no significant interchange or functional integration with employees outside the Department. The skills and training required for Graduate Teachers to teach in a petitioned-for Department, and the nature of the work performed, are determined by the Department and dictated by the Department's subject matter.

A. Structure: Each petitioned-for Unit tracks a separate organizational dividing line drawn by the Employer; the Employer has failed to show that any petitioned-for Department overwhelmingly overlaps with any other program or department.

Each petitioned-for Unit consists of employees that the Employer itself has “organized into a separate department.” *Specialty Healthcare*, 357 NLRB 934, 942 (2011) (citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). Thus, the Employer cannot show that community-of-interest factors between any petitioned-for Unit and any other group of Graduate Teachers “overlap *almost completely*” here. *Specialty Healthcare*, 357 NLRB at 944.

The most important question in any “appropriate unit” analysis is whether the petitioned-for unit tracks a separate organizational dividing line drawn by the Employer. *Macy’s*, 361 NLRB No. 4 (2014) (“The fact that the petitioned-for unit tracks a dividing line drawn by the Employer is particularly significant.”) (citing, *inter alia*, *Fraser Engineering Co.*, 359 NLRB No. 80 (2013) and *International Paper Co.*, 96 NLRB 295, 298, fn. 7 (1951)). Indeed, “except in situations where there is prior bargaining history, the community-of-interest test focuses *almost exclusively* on how the employer has chosen to structure its workplace.” *Id.* at 948 (emphasis added); see, e.g., *Macy’s*, 361 NLRB No. 4 (July 22, 2014) (same); *United Operations, Inc.*, 338 NLRB 123 (2002) (finding appropriate unit where “the Employer organizes the [petitioned-for unit] into a separate department and treats them accordingly”).

All known cases to have applied *Specialty Healthcare* to reject a petitioned-for unit did so on the grounds that the unit did not follow departmental lines drawn by the employer. See,

e.g., *The Neiman Marcus Group, Inc. (Bergdorf Goodman)*, 361 NLRB No. 11 (July 28, 2014); *Odwalla, Inc.*, 357 NLRB 1608, 1612 (2011). As the Board explained in *Macy's*:

In *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 4-6 (2011), the Board applied *Specialty Healthcare* and found the petitioned-for unit was fractured because it did not track any lines drawn by the employer, such as classification, departmental, or functional lines, and also was not drawn according to any other community of interest factor. Here, by contrast, the petitioned-for unit tracks a departmental line drawn by the Employer itself.

361 NLRB No. 4 (2014). Here, Local 33 has followed those Employer-drawn department lines.

The Employer admits that it divides its Graduate Teachers into Departments. Each petitioned-for Department is a separate unit of “teaching . . . staff”:

Yale Corporation By-Law 33: Members of the teaching and research staff of the University . . . may be designated as a Department by the Corporation It is the function of the Departments and Academic Programs to provide the instruction necessary to meet the requirements of the course of study as formulated by each faculty.

(Pet. 3, p. 8; Tr. 86 [Gendler].) Moreover, Yale admitted it is “composed of” Departments in Yale Corporation By-Law 34: “The Faculty of Arts and Sciences shall be *composed of* the Departments and Academic Programs serving Yale College and the Graduate School.” (Pet. 3, p. 8.) These Departments of which Yale is composed have “direct oversight over day-to-day departmental operations.” (Tr. 40-41 [Gendler]; Pet. 5, p. 14 [“One of Yale’s great institutional strengths is that it allows departments considerable freedom to govern themselves.”])

Dean Gendler provided a very different description of the role of departments at Yale, however, testifying that “departments are arbitrary ways of dividing a multidimensional intellectual space” (Tr. 50 [Gendler]), and that departments were “not only permeable, the spatial relations that you might use to represent them are multidimensional” and “avenues of intersection, constellations of innovation.” (Tr. 55; *see also* Tr. 50, 52 [Gendler]). The Yale Corporation might be concerned to learn that Dean Gendler considers their designations “arbitrary” and “permeable.” In fact, there is no decision at the University that can be more deliberate, more permanent, or more solid, than a designation by the University’s highest decision-making body, the Yale Corporation, pursuant to its own By-Laws. The various decanal

staff reorganizations lack this degree of permanence or authority. (*See* Tr. 100 [Gendler]; Tr. 380 [Cooley].) Ironically, Dean Gendler’s own authority itself rests on the foundation of Yale’s Department structure, because the Faculty of Arts and Sciences itself is “composed of” Departments. (Pet. 3, p. 8 [Yale Bylaw 34].)

The Employer’s highest governing body—the Yale Corporation—has designated each petitioned-for Department as an operational subdivision of Yale University “teaching and research staff.” (Pet. Ex. 3, p. 8 [By-Law 33]; Tr. 86 [Gendler].) These official administrative units are charged with hiring, training, managing, and supervising Graduate Teachers to educate undergraduates. And they are integral to Yale: the Corporation’s By-Laws state that the Faculty of Arts and Sciences (“FAS”) is “*composed of the Departments.*” (Pet. 3, p. 8 [By-Law 34].)

Moreover, the petitioned-for Departments here are a particularly stable part of that composition. They have all been Departments for well over half a century—and most over a century. (Tr. 68-74 [Gendler]). And the Employer has no plans to change any of the petitioned-for Departments. (TR79 [Gendler].)

Each petitioned-for Department has a clear authority structure. The Employer’s Faculty Handbook states that “[t]he Faculty of Arts and Sciences is divided into departments, each with the capacity to propose its own appointments and with its own chair.” (Pet. 12, p. 28.) Department chairs are presented by the President and voted by Yale Corporation. (Tr. 97 [Gendler].) And each petitioned-for Department also has a DGS, DUS, Registrar, and other officers (*e.g.*, Business Manager, Chair’s Assistant, etc.). (*See, e.g.*, Tr. 81-85 [Gendler].)

These officers play different roles from department to department. The DGS Handbook states expressly that “the duties of a DGS differ from department to department, depending on the size of the program and its own administrative traditions.” (Er. 8, p. 1; Tr. 691 [Schirmeister admits she wrote the DGS Handbook].)].) That is, each Department has autonomy to establish its own organizational hierarchy and its own rules and policies, including the policies applicable to Graduate Teachers. When a petitioned-for Department hires a Graduate Teacher to teach a course, it is a faculty supervisor appointed in that Assigning Department who is the Graduate

Teacher's direct supervisor: the faculty members that are assigned to teach the class are the supervisors of the Teaching Fellows working in that class." (Tr. 1531-1532 [Stipulation].)

Where a department has such "day-to-day management" of employees in the unit—even where it *does not* hire the employees as the Departments do here—the Board has found a petitioned-for department unit appropriate notwithstanding some overarching central structure that the department might engage. *J. Ray Mcdermott & Co., Inc.* 240 NLRB 864, 867 (1979). Dean Cooley testified that "The Graduate School has a structure that all the departments have to work within." (Tr. 287 [Cooley].) But that is irrelevant. *All* departments, at any employer, are necessarily subdivisions of some central structure. What matters is that the Departments here have considerable autonomy, particularly when it comes to the distribution, hiring and supervision of petitioned-for employees.

The pertinent question is whether the department or the central administration has *day-to-day management* of employees in the unit. *J. Ray Mcdermott & Co., Inc.* 240 NLRB at 867. Where the department has day-to-day management of a petitioned-for unit, every known Board decision finds that unit appropriate. Here, in fact, hiring and day-to-day management of the petitioned-for Units is performed by the Assigning Department and its faculty supervisors. Yale further admits each petitioned-for Department has a limited budget to manage and can spend the money as it sees fit. (Tr. 798 [Schirmeister.]; *see, e.g.*, Tr. 45 [Gendler]; Tr. 1030 [Tipton].)

Each petitioned-for Department has freedom to create the workplace for Graduate Teachers (faculty decide which courses will be taught), distribute Graduate Teacher positions ("TF slots") to the places it wants in that workplace, and hire ("assign" or "appoint") Graduate Teachers to fill those positions. (*See supra* pp. 6-15 [Facts, Part I]; Tr. 1212 [Lamoreaux: "We basically create sections to meet the undergraduate demand"]; Pet. 8, p. 1 ["Departments and programs are responsible for allocating teaching fellows to courses and determining the level of the assignment and its type, as described below."]; Tr. 358-359 [Cooley]; Tr. 530 [Schirmeister: "The instructions are I do not care how you distribute your [TF] resources"].). This freedom is limited by very few, broad parameters set by the central administration (Tr. 755 [Schirmeister:

“Departmental policy is set by the faculty insofar it’s within the general framework of the graduate school and university procedures”].) As the FAS Senate recognized, Graduate Teacher needs are met “on a department-by-department basis.” (Pet. 4, p. 14; *see also* Er. 8, p. 22 [DGS Handbook: “Graduate programs then allocate these resources to specific courses and assign students according to a variety of procedures”].)

Departments are structured differently in *the way* they carry out their hiring, administration, and supervision of Graduate Teachers. For example, the History Department has within it a track known as the History of Science History of Medicine (HSHM), which resides within the History Department, but nevertheless has its own Chair, DGS, DUS, and Department Registrar (*e.g.*, History has an Associate DGS). (Tr. 1623-1624 [Kaufman]; Tr. 1210 [Lamoreaux].) The History Department TF Committee includes officers from HSHM. *Macy’s*, 361 NLRB No. 4 (July 22, 2014) (to the extent a “department is structured differently than other [] departments,” this is an additional factor in favor of a department unit). And supervisory structures—for example, which officer or committee hires Graduate Teachers for each semester’s courses—present further structural differences. (*See, e.g.*, Pet. 32; Tr. 1832-1835 [Niedermaier on internal supervisory substructures of East Asian Languages and Literatures].)

At the hearing, the Employer argued that the separate identity of the petitioned-for Department Units is somehow diluted because courses are cross-listed in multiple departments. (*See* Tr. 955-959.) But cross-listing is irrelevant here. Cross-listing relates to the undergraduate students who can receive credits toward a major by taking a particular course. Regardless of whether a course is cross-listed to undergraduates, only one department “owns” the course: The department through which the course was proposed. [*See, e.g.*, Tr. 522 [Schirmeister]; Er. 22, p. 10.] A faculty member appointed to that department proposed the course and determined its subject-matter content, in some cases under the “command” of Department-level authorities such as the DUS or faculty committees (Tr. 58 [Gendler]; Tr. 771-776 [Schirmeister]); and the Department, in cooperation with that faculty member, decided to distribute TF positions to the course and what Graduate Teachers to hire into those positions (Tr. 639-40 [Schirmeister].)

It is irrelevant to community-of-interest analysis here whether the undergraduate students who take a cross-listed course were drawn from more than one major. Under Board law, the separate identity of each petitioned-for Department is not grounded in any distinction regarding the undergraduates who take the class—i.e., the consumers of the teaching services offered by bargaining unit employees. *See Macy's*, 361 NLRB No. 4 (2014) (irrelevant the extent to which customers were buying products in departments other than the petitioned-for department). Each petitioned-for Department Unit is appropriate because each was established by the Yale Corporation and organized by the Employer to hire and set most of the key terms and working conditions of the Graduate Teachers who teach classes offered by that Department.

A cross-listed course is similar to a flight code-share. The flight has a flight number on each of two airlines (*e.g.*, American Airlines and British Airways), and a passenger can earn miles on either airline's frequent-flyer program (like units toward a major), but the flight crew is employed by only one of the airlines: the one in charge of piloting the plane and attending to the passengers. The terms and conditions of employment are those in the labor agreement between the flight crew and the airline that hired it to operate the flight.

B. Supervision: Each petitioned-for Unit is separately supervised on Department lines.

The Employer has failed to meet its burden to show, and cannot show, any supervisory overlap between Departments. Each petitioned-for Department separately hires and supervises Graduate Teachers teaching for that Department during the semester term of employment. The employees the Employer would add to the proposed unit are Graduate Teachers hired and separately supervised by other departments and programs with separate administrative structures devoted to managing Graduate Teachers. Thus, each petitioned-for Unit has separate interests, and the Employer cannot show a “complete lack of separate interests,” with respect to supervision. *Macy's*, 824 F.3d at 564.

The Employer has admitted that “[t]he day-to-day operations of the department are under the supervi[sion] of the department chair.” (Tr. 45 [Gendler].) In *Red Lobster*, 300 NLRB 908,

911 (1990), the Board found the petitioned-for unit appropriate even though supervisors of the unit had “limitations on their authority, some imposed by corporate policy and some based on their relationship to the area supervisor.” It reached this conclusion because the supervisors nevertheless are “responsible for the day-to-day management of the restaurants.” Here, Yale *admits* that the Departments are responsible for day-to-day operation of the Department, including hiring and supervision, and stipulated that Department faculty teaching a course with a Graduate Teacher are the Graduate Teacher’s immediate supervisors. (Tr. 1531-1532.)

There is no overlap in hiring or supervision between Departments. *Specialty Healthcare* 357 NLRB at 944 (employer must prove departments overlap “almost completely”). The employees the Employer would add to the proposed unit are Graduate Teachers hired by other departments that the Employer has designated with separate faculty, i.e., separate supervision.

The Chair, DGS, and DUS in each petitioned-for Department have important authority relative to Graduate Teachers working for that Department. Each of the petitioned-for Departments has the power to make any teaching policies it chooses within broad parameters. (Pet. 13, p. 2 [“Departmental policy is set by the faculty, led by the Chair, within the general framework of Graduate School and University procedures.”]; Tr. 754-755 [Schirmeister: Department can set policy within the general framework of the P&P].) For example, the central administration sets maximum section size, an approval process for new courses (but courses previously taught may be retaught without central-administration approval), and an “average” number of hours per week for Graduate Teachers. (Tr. 1289-1290 [Lamoreaux]; Tr. 771-772 [Schirmeister]; Tr. 2462 [Schirmeister]; Tr. 1614-1616 [Kaufman].) Although the Departments must comply with these guidelines, the Department leadership is empowered to negotiate compromises with the administration. (*See, e.g.*, Tr. 262, 264 [Cooley: central administration and History of Art Department “negotiated a change to the teaching structure”; “negotiated directly with the Department”]; Tr. 584 [Schirmeister: same]; Pet. 21 [History of Art Department reached an “agreement with the graduate school” as a result of these negotiations]; Tr. 1490-1491 [describing compromise, where neither central administration nor Department got their starting

position]; Pet. 22; Pet. 23.)

Departments have numerous Department-specific teaching policies and procedures. (*See supra* pp. 21-61 [Part II.A-II.I.]) Each petitioned-for Department implements its own departmental teaching policies; Department officers serve as a resource for Graduate Teachers about them, and communicate with Graduate Teachers about them “on behalf of the department.” (*E.g.*, Er. 4 [History TFs in their first term of teaching must “work with the associate director of graduate studies to address any matters of concern”]; Er. 44, pp. 13-14 [speak with Physics DGS if overworked]; Pet. 23 [Art History communication].)

Each petitioned-for Department has published Graduate Teacher policies, sometimes in an online guide and sometimes in an official Department Handbook. (Er. 44; Pet. 13A; Pet. 14; Pet. 16; Pet. 17; Pet. 32C; Pet. 38; Pet. 39; Pet. 40; *see* Er. 8, p. 25; Tr. 1026-1027 [Tipton: “there are additional things that we can and do impose that are specific to our disciplines and that sort of thing”]; *see, e.g.*, Tr. 1060-1062 [Tipton]; Er. 44, p. 16 [vacation policy], p. 17 [paycheck should be collected in the Department Chair’s office].) Yale admits the P&P leaves room for departments to develop their own policies. (Tr. 394 [Cooley].) In fact, the Graduate School encourages the departments to write a handbook, and requires the DGS for the department to keep the handbook up to date. (Er. 8, p. 25; Tr. 762 [Schirmeister].)

Each petitioned-for Department also has department-specific policies, procedures, and administrative traditions that are not in the department handbooks. (Er. 8, p. 1 [DGS Handbook: recognizing that each department has “its own administrative traditions”]; *see supra* pp. 21-61 [Facts section: setting forth some of these policies and practices by department].) Departments are free to develop these without dealing with the central administration, so long as they do so within the P&P “framework.” (Tr. 301 [Cooley]; Tr. 754 [Schirmeister]; Tr. 1026 [Tipton].) And they have developed them. For example, each petitioned-for Department has its own grading policies. (Pet. 36 [email from Dean Gendler referencing disparate department grading policies]; *see, e.g.*, Tr. 2277 [Winant has been instructed regarding grading policies specific to teaching undergraduates in the History Department].) Grading policies have a significant impact on

Graduate Teachers in their capacity as employees, since often falls to them to carry out those policies. (*See* Pet. 36.) Although a former Yale College dean sponsored an “ad hoc committee on grading,” Dean Gendler had no power to instruct departments to take any action regarding grading; instead, she merely informed them of the “committee’s recommendation” that departments autonomously act to “categorize their classes and devise uniform grading strategies for each category.” (*Id.*) In short, policies like these are not subject only to the whim of course professors, but rather decided by an officer or committee of the Department itself.

Although the P&P “supersedes” department policies when the two conflict, policies and practices regarding Graduate Teachers are broadly managed at the Department level. Each petitioned-for Department has its own policies and practices regarding hiring, training, supervision, and Graduate Student interaction within the Department. (*See supra* pp. 21-61 [Facts, Part II.A.-II.I.]) With regard to these matters—i.e., the matters at issue in this case—the Employer has failed to present examples of conflict between the P&P and the policies set by the petitioned-for Departments. The P&P merely provides a general framework within which the Departments have substantial freedom. (Tr. 301 [Cooley]; Tr. 1026 [Tipton].)

Even where, unlike here, departments are “closely supervised” by a more central administration, the Board has rejected the employer’s proposed unit delimited by the more central administration’s reach. *See, e.g., Dean Witter & Co., Inc.*, 189 NLRB 785, 786 (1971) (rejecting the employer’s proposed unit of the entire Northern Division administrative unit even though “[b]ranch operations are closely supervised and controlled by [Northern Division] headquarters”); *id.*, n. 2 (“We make no determination with respect to the appropriateness of a unit comprised of all office clericals in the Employer’s Northern Division.”). Instead, the Board found three San Francisco branch offices that were a subset of the Northern Division to be an appropriate “identifiable unit with common working interests and direct supervision.” *Id.* The Board found this unit of less than the whole Northern Division to be appropriate even though “[a]ny expenditure in excess of \$300 must be approved by the Northern Division management. The number of employees assigned to work at each branch and their classification are decided by

Northern Division management. . . . Personnel policies relating to the hiring . . . of all branch personnel are issued and revised at the Northern Division office in San Francisco.” *Id.* Thus, even if such decisions are made at a level above the petitioned-for unit, the petitioned-for unit will be appropriate if it has a distinct community of interest regarding other factors.

But two of the key decisions that took place at a higher level than the petitioned-for unit in *Dean Witter* take place at the Department level here. *First*, in *Dean Witter*, the petitioned-for unit of three San Francisco branches did not determine the “number of employees assigned to work at each branch”; rather, that distribution of positions was determined by the Northern Division as a whole (whose headquarters was in a San Francisco office but whose reach spanned beyond that). 189 NLRB 785, 786 (1971). Here—as Yale *admits*—the Department whose faculty supervises each petitioned-for unit determines the “number of employees assigned to work” in each course in that Department (i.e., the “distribution” process). (*E.g.* Tr. 2515 [Schirmeister].)

Second, in *Dean Witter*, the petitioned-for unit of three San Francisco branches did not determine the hiring of clerical employees; rather, that hiring was decided at the level of the Northern Division as a whole. 189 NLRB 785, 786 (1971). Here—as Yale *admits*—the Department whose faculty supervises each petitioned-for unit determines “the hiring” of all Graduate Teachers in that Department (i.e., the “assignment” process). (*E.g.*, Tr. 58 [Gendler].)

The existence of a central-administration “framework” does nothing to undermine the appropriateness of a department unit. “While it is true that human resources and other personnel forms used by supervisors are uniform throughout the Facility, this likewise does not in and of itself create an overlap of supervision, but rather reflects only a certain consistency in the Employer’s corporate structure.” *Woodbridge Winery*, 32-RC-135779, D&DE, slip op. at p. 38, n. 18 (Jan. 8, 2015), *review denied* (Feb. 26, 2015), *available at* <https://www.nlr.gov/case/32-RC-135779> (finding petitioned-for unit appropriate where “the evidence fails to establish any overlap of supervision other than at the uppermost levels of the Employer’s hierarchy”); *Swissport USA, Inc.*, 29-RC-144512, D&DE, slip op. at p. 19 (Feb. 27, 2015), *available at* <https://www.nlr.gov/case/29-RC-144512> (finding petitioned-for unit appropriate because unit

employees “share common management only at the third level up” and “employees’ immediate supervisors — who give them direction on a day-to-day basis, and would likely address their immediate grievances — have greater bearing on their interests than upper-level management”).

The petitioned-for Departments also exercise supervisory authority to hear Graduate Teacher grievances. Associate Dean Schirmeister testified that nobody at the department level has responsibility for handling grievances a Graduate Teacher may have:

HEARING OFFICER: Is there anyone within the academic department that has the responsibility for handling say grievances a teaching fellow might have within the department?

[SCHIRMEISTER]: “No. Absolutely not. They would all come to me centrally.”
(Tr. 458:20-25.) This testimony conflicts with that of numerous witnesses, including an Employer’s witness and even one of the Employer’s stipulations. (Bd. Ex. 11 [Stip. 4].)

Many Departments regularly communicate with teachers regarding their grievances. Some even specifically request that Graduate Teachers speak with a Departmental officer. Here are just a few examples (more are above, *see supra* pp. 21-61 [Facts, Part II.A.-II.I.]):

- “The DGS of the Geology and Geophysics Department has informed graduate students to raise any complaints about Graduate Teaching work with the DGS” (Bd. Ex. 11 [Stip. 4].)
- In the Geology and Geophysics Department, a Graduate Teacher who believes his or her teaching “work done significantly exceeds the amount of time specified for their [teaching] appointment” can “claim additional wages” by grieving directly to his or her faculty supervisor. (Pet. 32c, p. 28.) The Graduate Teacher’s grievance for additional wages is then to be made “to the DGS office by the instructor.” (Pet. 32c, p. 28.)
- The Chair of the Physics Department described his role as the department’s “complaints department.” (Tr. 1036 [Tipton: “I’m sort of the complaint department”].)
- In the English Department, the Handbook states: “If you feel overwhelmed or underserved by the professor’s level of involvement, talk to the professor or the ADUS. You should feel supported and guided by the course lecturer and by fellow TFs when you have questions or concerns.” (Pet. 14, p. 29.) It also states: “Both the DUS and ADUS can help you handle any problematic issues you face as a teacher.” (Pet. 14, p. 39.)
- The East Asian Languages and Literatures Department, the DGS wrote to Niedermaier that he had heard Niedermaier was working more than the appropriate number of hours, and explained as DGS: “That is of concern to me.” The DGS then promised to enforce his supervisory authority over Niedermaier’s direct supervisor (i.e., “coordinator”): “I will talk

to the language coordinator and make sure that does not happen. It is against the rules.” (Pet. 28; *see* Tr. 1856, 1865 [Niedermaier].)

- In the History of Art Department, Sessions would bring her grievances to “the department registrar first, and then probably to the department chair, and the director of graduate studies in the department.” (Tr. 1599 [Sessions].) Sessions discussed her complaint about her teaching assignment with her professor and her fellow TFs (Tr. 1470 [Sessions]), then with the Department Chair and supervising professor (who involved the Department DGS in the discussion) (Tr. 1487-1488, 1497; Pet. 22 [emails]). When attempting to resolve the grievance about her extra section assignment, at no point did Sessions contact the central administration. (Tr. 1578-1579 [Sessions].)
- In the History Department, a Graduate Teacher complained to a faculty supervisor and to the Chair of the Department about Winant. The chair called Winant to her office “urgently” and counseled him to limit his contact with the other Graduate Teacher to necessary work-related interactions only. (Tr. 1989, 2248-2249 [Winant].)

The Departments also engage in the supervisory function of day-to-day discipline for Graduate Teachers. (Tr. 1864 [Niedermaier: supervisor instructed him to “prepare more efficiently” when he worked more than 20 hours per week].) The Employer presented no evidence of the central administration disciplining any Graduate Teacher. In fact, Dean Schirmeister admitted that “[i]t’s just something that never happens.” (Tr. 459.) But the Employer’s witnesses asked about discipline were thinking of serious academic misconduct, such as plagiarism, under the Graduate School Code of Conduct or violation of university-wide sexual misconduct rules. (*See* Tr. 705-706.) The Employer’s decades-long unwillingness to accept an employment relationship with its Graduate Teachers has created the circumstance where all meaningful employment-related grievances and discipline are practically addressed and resolved at the departmental level.

This is especially true of progressive discipline to guide or correct (rather than punish) behavior: it is handled within departments. This includes Graduate Teacher “counselings,” admonitions, and verbal and other warnings. (*See, e.g.*, Tr. 1989, 2248, 2250 [Winant]; *see also, e.g.*, Tr. 1036 [Physics Chair Tipton: “I’m sort of the complaint department, you know, if undergraduate are unhappy with some aspect of the teaching fellow’s performance, I sometimes hear about it. And I get involved in problem situations as the DGS sees fit.”])

But even with respect to the most serious discipline—“dismissal” (of which the Employer proffered no concrete example)—the Department faculty has ultimate authority to dismiss a Graduate Teacher from a course. The Department merely needs to “consult[] with” the Graduate School. (Tr. 332.) Dean Cooley admitted that a Department could make the decision to “dismiss” a student based on the Department’s own documentation of poor performance. (Tr. 332-333.) Although Cooley testified that the central administration could get involved, she admitted that the Graduate School has no power to prevent the faculty supervisor from “decid[ing] unilaterally that they no longer wish to have the student in their lab or working with them.” (Tr. 332.)

Associate Dean Schirmeister testified to the same effect. When a Graduate Teacher failed to show up to three or four meetings, the faculty supervisor and Chair of the department in question conducted an investigation and decided to terminate the Graduate Teacher. (Tr. 460-62 [Schirmeister].) Although Schirmeister asserts that she “authorized what the faculty member wanted to do,” she had no actual role in any practical sense in instituting the termination. (*Id.*) Schirmeister admits that she did not conduct any independent investigation, did not talk to the faculty member, and did not talk to the Graduate Teacher. (*Id.*) Instead, “[t]he Chair of the department just conveyed to [Schirmeister] the information from the faculty member because he was afraid the decision had to be made in some formal way. . . . I said no . . . You can tell the faculty member that what she did is fine.” (*Id.*)

Further, the Employer admitted that Departments “have oversight over curriculum.” (Tr. 40-41 [Gendler]; Tr. 1616 [Kaufman].) Departments decide what course offerings will be taught each semester; the Department’s DUS approves new undergraduate courses and in some departments even “command[s]” faculty to teach specific courses. (Tr. 771, 773-774 [Schirmeister]; *see, e.g.*, Pet. 32e, p. 6 [“New faculty members should develop their course in consultation with the DUS.”]; *id.*, p. 1 [“This document primarily contains information specific to the history department.”].) The requirements of those course offerings become the Graduate Teachers’ job duties. And the people creating these job duties, by creating the courses and

distributing to them TF positions, are none other than the Graduate Teachers' direct supervisors: the Department faculty.

Indeed, a department recommends faculty for appointment to the department. (Tr. 741 [Schirmeister].) These are the same faculty who will become the immediate supervisors of Graduate Teachers in the department. (Tr. 1531.)

The Employer failed to present even one example of any professor teaching a course with Graduate Teachers where the instructor did not have an appointment in the Assigning Department. Every relevant example in the record shows it is a faculty supervisor with an appointment in the Assigning Department who supervises the Graduate Teachers teaching the course. (*E.g.*, Tr. 2236-2237 [Winant]; Tr. 1531, 1570 [Sessions]; Tr. 1745 [Hoeller]; Tr. 1835 [Niedermaier]; Tr. 1350 [Shen]; *see also, e.g.*, Tr. 771 [Schirmeister: admitting that undergraduate courses within a department must be proposed by a faculty member appointed in that department who will supervise the course] ; Pet. 12, p. 148 [Faculty Handbook: "The department chair . . . is charged with assigning faculty members' classroom responsibilities].)

Each petitioned-for Department has complete freedom to choose whom to hire for a TF position in a particular class. The DGS Handbook (which was written by Schirmeister [*see* Tr. 691]) states that: "DGSs are master approvers of assignments." (Er. 8, p. 22; Tr. 360-61 [Cooley]. The DGS, as a matter of deliberate design or department tradition, can delegate this responsibility to another officer or a committee in the department. (*See* Pet. 32; [Tr. 2070, 2317-2318 [Winant].) And the Employer admitted that "The graduate registrars [in the departments] play a big role" in Graduate Teacher hiring. (Tr. 2484 [Schirmeister].)

When a petitioned-for Department wants more TF Resources during Shopping Period, the Department has agency to either shift unused TF Resources from other courses or negotiate with the central administration for those resources. (*See, e.g.*, Er. 28, p. 2 ["What you need to know" memo: "our goal is to meet all demonstrated need for teaching resources but to reduce the amount of negotiation over individual courses and assignments"].) The Department will sometimes reassign a Graduate Teacher from one course to another within the petitioned-for

Department. (Er. 14, p. 3 [“What you need to know” memorandum: department may “modify assignments” for Graduate Teachers within the department].)

Where Departments make additional hires during Shopping Period, involvement from the central administration is limited to facilitation; the Departments still hire. (Tr. 1665-1666 [Kaufman]; *see also* Tr. 525 [Schirmeister].) Associate Dean Schirmeister admitted that some petitioned-for Departments’ significant Shopping Period hiring spree is controlled by the Departments themselves (the Department has discretion to consult with the Graduate School or not), and differs Department by Department. [Tr. 2481-2482 [Schirmeister: “Once shopping opens and there is a lot of churn around the enrollments, TFs need to be assigned to courses, that, you know, so the [Department TF] committee didn’t anticipate that these three courses would require teaching fellows. Somebody has to assign them. They don’t reconvene the committee. I think that [Department Registrar] Marcy Kaufman and [Associate DGS Noel Lenski confer.”]; Tr. 1665-1666 [Kaufman].)

With respect to direct faculty supervision, the Department’s decision regarding which Graduate Teacher to hire to which course also decides which Graduate Teacher will work for which faculty supervisor. The Employer has stipulated that immediate supervision of petitioned-for Employees is provided by the faculty supervisor for the course being taught. *Cf. Macy’s*, 361 NLRB No. 4 (2014) (cosmetics-and-fragrance department salespeople were appropriate unit even though they sold at separate counters, alone with separate supervision at each counter).

Not a single employee the Employer wishes to add to any petitioned-for Unit (Board Exhibit 7) shares the same immediate supervisor as a single employee in any petitioned-for Unit. But even common immediate supervision between petitioned-for group and some group of non-petitioned-for employees does not establish any “overwhelming community of interest.” *United Operations, Inc.*, 338 NLRB 123, 125 (2002) (finding HVAC techs to be an appropriate unit—and no overwhelming community of interest between petitioned-for HVAC techs and non-petitioned-for BSEs and Policers—even though “HVAC techs share common immediate supervision with the policers”).

Contrary to the Employer's contention, the Employer has failed to show that any professor's supervision of Graduate Teachers during any semester was ever affected by a joint or secondary appointment. *Cf. J. Ray Mcdermott & Co., Inc.*, 240 NLRB 864, 867 (1979) (finding petitioned-for division unit appropriate despite construction "projects obtained as a result of joint bids" between the petitioned-for division and another division). The Employer did not even present any evidence of any professor supervising Graduate Teachers in more than one course in a single semester, much less in separate departments, much much less in any manner that could be construed to affect—let alone "overlap almost completely"—the community of interest of any Graduate Teacher within. *Specialty Healthcare*, 357 NLRB at 944;

C. Skills and Qualifications: Graduate Teachers must have knowledge skills and training in the subject matter of the petitioned-for Department in which they teach.

The Employer has failed to meet its burden to show an "overwhelming community of interest" between the skills and training possessed by Graduate Teachers teaching for any of the petitioned-for Departments and those possessed by Graduate Teachers elsewhere. It cannot be said that such skills and training "overlap *almost completely*" in "a Venn diagram." *Specialty Healthcare* 357 NLRB at 944. In fact, the evidence shows unequivocally that Graduate Teachers in each petitioned-for Department have distinct skills and training. (*See supra* pp. 21-61 [Facts, showing distinct qualifications and training in each petitioned-for Department].)

Indeed, the Employer admits Graduate Teachers need distinct qualifications in each petitioned-for Department. Schirmeister explained that "departments were given" the authority to autonomously hire Graduate Teachers (Tr. 639) precisely because the departments are "[t]he owners of the content knowledge (Tr. 640 [Schirmeister: "The owners of the content knowledge are the people in the best position to" hire Graduate Teachers]; Tr. 58 [Gendler]). Indeed, when selecting Graduate Teachers as a member of the English Department, Schirmeister would "look for students with deep subject knowledge." (Tr. 699 [Schirmeister].)

The Employer admits Graduate Teachers in each petitioned-for Department must have qualifications and skills unique to the Department. "Different disciplines work with different

materials. That’s part of what defines their disciplinary nature.” (Tr. 791 [Schirmeister].) And the Employer admits that some petitioned-for Departments have Department-specific training. (Tr. 402 [Cooley]; Tr. 745 [Schirmeister].) The Department-by-Department evidence bears out these admissions. (*See supra* pp. 21-61 [Facts, Part II.A-II.I.]; *see, e.g.*, Tr. 1366, 1566-1567, 1729-1730, 1828-1829, 1851, 1972-1974, 2148, 2195-2196, 2313-2314, 2343, 2460; Bd. Ex. 11 [Stips 9, 17, 26, & 32].) *United Operations, Inc.*, 338 NLRB 123 (2002) (finding appropriate unit where there were skills particular to the field). Part of what makes Yale one of the top Universities in the country is a strong tradition of encouraging disciplinary differentiation between these long-standing disciplines by allowing the petitioned-for Departments institutional autonomy. (Pet. 5, p. 14 [“One of Yale’s great institutional strengths is that it allows departments considerable freedom to govern themselves.”]; *see also* Pet. 3, p. 8 [Yale Corporation By-Law 33: Department is a designation of distinct teaching staff].)

It is unsurprising, then, that Departments hire Graduate Teachers—even those getting degrees in other departments—who have knowledge, skills and training in the subject area of the Assigning Department’s course. (Tr. 1928-1930 [Niedermaier]; Tr. 2343-2344 [Rosenblum]; Tr. 1634, 1647 [Kaufman].) The Graduate Teachers are teaching students the knowledge and skills associated with special training and materials, and from their knowledge of particularized “deep subject matter.” The knowledge undergrads gain in courses is determined by the curriculum of the course—which is proposed by the faculty supervisor in the Department to whom the course has been allocated.

Of course, Associate Dean Schirmeister is right when she says that “I don’t care if they’re talking about photosynthesis or photography, they have to be able to take the material and make it available to somebody unfamiliar with it. That’s at the heart of teaching.” (Tr. 455.) Yes—all teachers must teach. But the Graduate Teachers teaching for each petitioned-for Department must have specialized knowledge in the subject matter of *that* Department, whether or not the Graduate Teacher is a Ph.D. student there. Dean Cooley herself admitted that Graduate Teachers require specific skills and expertise in order to teach in a department. (*See, e.g.*, Tr. 390

[Cooley].) The Employer has not presented any evidence—nor could it—that any department at Yale (much less a petitioned-for Department) would hire a notable photographer like Henri Cartier-Bresson to teach a course on photosynthetic thylakoid membranes.

The Employer’s expected argument that all Graduate Teachers, regardless of Teaching Department, require the same skills and qualifications simply because they all “take the material and make it available to somebody unfamiliar with it” misunderstands Board law. *Macy’s*, 361 NLRB No. 4 (2014) is a case in point.

In *Macy’s*, all salespeople throughout the store take material and make it available for purchase to somebody who has not yet bought it. Yet the Board found appropriate a unit of salespeople limited to only the cosmetics-and-fragrances department at Macy’s. In doing so, the Board found it important that they all receive a quick pre-hire training in the particular product being sold and they “all sell cosmetics and fragrances products.” *Id.*

Their distinction from other salespeople—with respect to skills and training—was simply that they sold a different product. *Id.* Similarly here, Graduate Teachers in each petitioned-for Unit have pre-hire training and teach in a distinct long-standing discipline. Yet, here, the disciplinary skills and training of Graduate Teachers is much more in-depth than the equivalent at Macy’s beauty counters, who the Board found had no requirement of past experience: Graduate Teachers have in-depth knowledge in, receive pre-hire training in, receive ongoing training in, need skills with distinct materials to teach in, *and* teach the distinct subject matter. They are required to have extensive and deep knowledge of the subject matter that makes the Department unique. On the other hand, they are not required to have any past experience as teachers, the function that they have in common. Clearly, knowledge of the particular field is the most important skill required for these positions.

Whereas in Macy’s “prior experience in selling relevant products” was “desirable, but not required,” *id.* (Miscimarra, dissenting), here a mountain of evidence shows that the typical Graduate Teacher has an immense underpinning of knowledge, skills, and training in the Assigning Department where they teach. *Cf. Pierce-Williams Co.*, 76 NLRB 1002, 1003 (1948)

(finding appropriate unit even “no particular skill is required” for a position in the unit). Without minimizing the skills of a cosmetics salesperson, it plainly requires more training and knowledge to teach a class on Invertebrate Paleontology, Tale of Genji, or Vector Calculus.

The Employer attempted to conflate the qualifications required to be a Graduate Teacher in various departments by suggesting that the knowledge needed is really based on the “Division” rather than the department in question. The weight of evidence demonstrates that to be untrue. For example, Winant—who served for four semesters as a Graduate Teacher in the History Department—testified that he would not be able to teach courses in other departments also sometimes categorized as part of a “Humanities” division:

Q Are you qualified to teach a course in the History of Art, Premodern to Renaissance?

A Certainly not.

Q Are you qualified to teach a course in Introduction to Ancient Philosophy?

A No.

Q Are you qualified to teach a course on Dante?

A No.

Q Are you qualified to teach a course on Shakespeare?

A No.

Q Are you qualified to teach a course on Introductory Logic?

A No.

....

Q Are you qualified to teach a course on Survey of Drama?

A No.

....

Q So why couldn't you a discussion section in any of the courses we just went through?

A Well, all require particular skills that I do not have.

(Tr. 2313-2315 [Winant].) If Winant did have qualifications to teach one of the aforementioned courses, it would be those qualifications that made him eligible to teach there. (*See, e.g.*, Tr. 699 [Schirmeister: petitioned-for Departments “look for students with deep subject knowledge.”].)

This is true even with respect to cross-listed courses: the evidence reflects that it is the Assigning Department—the Department through which the course was proposed (*see* Tr. 771)—

whose special qualifications and training are required to teach a course in one of the petitioned-for Departments. Professor Lamoreaux's testimony illustrates this point. She testified that, when she taught U.S. Economic History (a course cross-listed in History and Economics) the Graduate Teachers who worked with her were selected and assigned by the Department of Economics. Accordingly, she sought Graduate Teachers with skills and qualifications *in Economics, the Assigning Department*. (Tr. 1300-1301.) She hired "zero" History doctoral students to teach the course, even though it was cross-listed in that department and even though she has an appointment in that department as well, because the course required expertise obtained through the advanced study of economics. (Tr. 1307.) Although the Petitioner does not bear the burden of proof, and Economics is not a petitioned-for department, Professor Lamoreaux's testimony corroborates the evidence that skills and training in the Assigning Department's discipline are indeed required to serve as a Graduate Teacher in that Assigning Department—whether or not the course was cross-listed in another department's discipline.

The only evidence of a course that did not require specialized knowledge in the discipline of the Assigning Department was a course taught in the Computer Science Department; it required Law Students as Graduate Teachers. (Tr. 2344, 2356 [Rosenblum].) That course is distinguishable, however, and actually helps Petitioner's case for two reasons. *First*, the Computer Science Department is not one of the petitioned-for Departments. Evidence regarding a *petitioned-for* Department—History—shows that Law Students hired to teach in History had to have skills and qualifications in History to teach there. [(Tr. 1634 [Kaufman]; Tr. 2390-2393 [Rosenblum].) *Second*, even if the Computer Science Department were a petitioned-for Department, the skills and training needed to teach in that Department would be unique in requiring among them legal knowledge of intellectual property for one of that departments courses—i.e., it was the department's unique decision to seek those qualifications.

The Employer gave no example of any cross-listed course where a petitioned-for Department was the Assigning Department and the skills and qualifications sought in Graduate Teacher applicants those of some discipline outside the Assigning Department. Thus, it is not

seriously disputed that the Graduate Teachers in each petitioned-for Department have specialized qualifications and training to teach a course in that Department. (Tr. 385 [Cooley]; Tr. 699 [Schirmeister]; Tr. 1080 [Tipton]; Tr.1306-1207 [Lamoreaux].)

D. Functional Integration: The Graduate Teachers in each petitioned-for Department are functionally integrated within the Department, and not with any other group of Graduate Teachers.

The Employer has failed to adduce any facts to show that the Graduate Teachers in any petitioned-for Department are functionally integrated with Graduate Teachers elsewhere at the Employer. Graduate Teachers teaching for each petitioned-for Department have a shared purpose and functional integration with within the Department: they all teach the subject matter of the Department to undergraduates. *See Macy's*, 361 NLRB No. 4 (2014) (beauty-department salespeople had a “shared purpose and functional integration, as they all sell cosmetics and fragrances products to customers”—even though the salespeople sold beauty products alone at separate counters that were surrounded by other departments that sold other products to customers); *Guide Dogs for the Blind, Inc.*, 359 NLRB No. 151 (2013) (finding the petitioned-for unit appropriate even where employees in it had “separate immediate supervisors” because their work “has a shared purpose and . . . is functionally integrated” and “work in the same . . . department”). The weight of evidence in this case demonstrates that a Graduate Teacher’s functional integration as an employee is primarily, if not wholly, within the petitioned-for Department in which he or she teaches. (*See supra* pp. 16-61 [Facts, Part II].)

Each petitioned-for Department has its own location. Sometimes, this location consists of one building; sometimes two. (*See supra* pp. 21-61 [Facts, Part II.A.-II.I].) The Board has recognized that a petitioned-for unit is not rendered inappropriate simply because the petitioned-for employees work in slightly different locations. *See Macy's*, 361 NLRB No. 4 (2014) (approving a proposed unit of salespersons in Macy’s cosmetics and fragrance department even though the department was located in two separate places, with salespeople located at separate counters in the two locations, and where each of the two locations was surrounded by other

Macy’s departments); *see also Guide Dogs for the Blind, Inc.*, 359 NLRB No. 151 (2013) (finding petitioned-for unit appropriate even where employees in the petitioned-for unit “work[ed] different hours and at times in different physical spaces”).

The fact that the Employer has designated each petitioned-for Department as a separate managerial entity for hiring and supervising Graduate Teachers is itself paramount evidence of functional integration. (*See* Tr. 86 [Gendler]; Pet. Ex. 3, p. 8 [Yale Corporation By-Laws 33-34]; *supra* pp. 66-84 [Argument, Parts I & II.A.-II.B].) As a result, each petitioned-for Department encourages Graduate Teachers teaching in it to approach Department officers if they have any question, request, or grievance. (*See, e.g.*, Bd. Ex. 11, p. 1 [Stip. 4]; Pet. 28; Er. 8, p. 8; Pet. 14, pp. 1, 28; Pet. 32c, p. 28.) The Departments themselves then handle the issue, or sometimes negotiate with the central administration. (*See, e.g.*, Er. 20, p. 10; Tr. 1036 [Tipton].)

Each petitioned-for Department and its officers serve as a liaison between Graduate Teachers in the Department and the central administration. (Tr. 370 [Cooley]; Er. 8, p. 1.) Although Schirmeister testified that Graduate Teachers supposedly come to speak with her directly (*e.g.*, Tr. 651 [Schirmeister: “They might come to me”]), the Employer presented no example of this. The weight of evidence in this proceeding shows Graduate Teachers do not communicate with the central administration. (*See, e.g.*, Tr. 1399-1400 [Shen]; Tr. 1470-1472, 1490 [Sessions]; Tr. 1731 [Hoeller].) The petitioned-for Department negotiates and “reaches “agreement[s]” with the central administration on behalf of Graduate Teachers in the Department. (Pet. 21; Tr. 1472 [Sessions]; Pet. 22, p. 1 [“agreement was negotiated”].)

A Graduate Teacher teaching in a petitioned-for Department is functionally integrated in that Department’s development of, adherence to, and implementation of policies and practices. As just one example, Department officials, committees, and faculty develop and discuss grading policies with Graduate Teachers working in the Department. (*See* Pet. 36 [email from Dean Gendler “recommending” to departments that they discuss grading policies for undergraduates and that they involve “graduate students” in those discussions]; Tr. 2322-2323 [Winant]; Tr. 2349, 2404-2405 [Rosenblum].) Graduate Teachers develop and follow traditions and practices

within the Department, even when they are not official policies. (*See supra* pp. 21-61 [Facts, Part II.A.-II.I.]; Er. 8, p. 1 [DGS Handbook: recognizing that each department has “its own administrative traditions”].)

Graduate Teachers teaching in each petitioned-for Department are also functionally integrated with the Department’s administration. (*See, e.g.*, Tr. 1666 [Kaufman: Graduate Teachers often ask the registrar “how often are they expected to meet with the faculty member, how do they get their desk copies, where is their discussion section meeting, how do they found out; when it comes to midterms, where do they get the blue books from, just anything that’s really related to their teaching they come and ask me about”]; Bd. Ex. 11 [Stip. 36: applying Kaufman assignment testimony to other Departments].) They book office hours through administrators in the Department. (Bd. 11, p. 2-3 [Stip. 20]; Tr. 1086 [Wilkinson]; Tr. 1430 [Sessions].) They get teaching supplies from the Department. (Tr. 1114 [Wilkinson]; Tr. 1582 [Sessions]; Pet. 32C, p. 30.) They copy and print through the Department. (Er. 44; Tr. 1059-1060 [Tipton]; Tr. 1500-1501 [Sessions].) Graduate Teachers who are looking for faculty in the Department, or for contact information, check with the administration of the Department. (Tr. 1599 [Sessions]; Er. 44.) The Employer has presented no evidence of any Graduate Teacher being functionally integrated regarding his or her teaching issues with any department in which he or she was not serving as a Graduate Teacher.

The Employer suggested it would argue that Graduate Teachers teaching for each petitioned-for Department are not functionally integrated within the petitioned-for Unit because of the relative amount of time they spend working alone—by themselves, alone with students, or alone with a faculty supervisor—rather than with other Graduate Teacher in the Department. (*But see, e.g.*, Tr. 1400 [Shen instructed to substitute for his faculty supervisor].) The Board has rejected that argument.

In *Macy’s*, for example, the Board directed an election for a petitioned-for unit of cosmetics-and-fragrance department workers each of which sells product at a *separate counter* from the others in the group. *Macy’s*, 361 NLRB No. 4 (July 22, 2014) (cosmetics-and-fragrance

department salespeople were functionally integrated within the department even though they sold beauty products alone at separate counters from one another). Moreover, some of these counters had supervising “counter managers” who directly supervised the salesperson alone, separately from supervision of other workers in the department. *Id.* Thus, the fact that each petitioned-for Department has courses taught by individual faculty supervisors, or that Graduate Teachers sometimes teach or are supervised alone, does not undermine their extensive functional integration. *See, e.g., Kol-Master Corp.*, 75 NLRB 1229, 1230 (1948) (finding petitioned-for unit appropriate even where different employees in the proposed unit had different “direct supervision” from one another); *Pierce-Williams Co.*, 76 NLRB 1002, 1004 (1948) (same). Rather, it describes *the way* they are in fact functionally integrated. *Guide Dogs for the Blind, Inc.*, 359 NLRB No. 151 (N.L.R.B. July 3, 2013) (finding an appropriate unit even where employees in the proposed unit had “separate immediate supervisors” because their work “has a shared purpose and . . . is functionally integrated” and “work in the same . . . department”).

E. Frequent Contact: The Graduate Teachers in each petitioned-for Department have frequent contact within the Department, but very little with any other group of Graduate Teachers.

Graduate Teachers in the petitioned-for Departments rarely if ever discuss their teaching with Graduate Teachers teaching for an Assigning Department other than the one in which they are working. (*See, e.g.,* Tr. 2351, 2353, 2439 [Rosenblum, when back at the Law School, did not even speak with Graduate Teachers teaching the same History course as he was teaching]; Tr. 1371 [Shen]; Tr. 2171 [Winant].) Although the Employer presented some evidence of events, places (like the McDougall Center), or training to which all graduate students are invited, Graduate Teachers testified that these were not valuable to their teaching, and were merely social meetings. (Tr. 2170 [Winant]; Tr. 1371 [Shen].) *United Operations, Inc.*, 338 NLRB 123, 125

(2002) (no overwhelming community of interest where “contact between [petitioned-for unit] and [other employees the Employer wishes to add to the unit] is limited to pleasantries”).⁶

Graduate Teachers in each petitioned-for Department speak with other Graduate Teachers teaching for the Department, regardless of whether the other Graduate Teachers are teaching the same course as they are, and regardless of the “assignment type” of the other teachers. (*See, e.g.*, Tr. 1870-1871 [Niedermaier]; Tr. 1362, 1405 [Shen]; Tr. 1526 [Sessions]; Tr. 1720, 1735, 1759 [Hoeller]; Tr. 1961, 1990 [Winant]; Tr. 2347-2348, 2350, 2417 [Rosenblum].) For example, Niedermaier, who is a PTAI in Elementary Japanese, regularly speaks about his teaching in the Department with other PTAIs and Grader/Tutors who teach in both Japanese and Chinese courses. (Tr. 1870-1871 [Niedermaier].) The Employer may argue that a student employee teaching in a department other than where he or she is a student could have more “contact” with members of his cohort in the student department than with other Graduate Teachers teaching in the department where he is employed. Such contact related to his studies, however, is not relevant to the community-of-interest analysis. It is well-established that, for the community-of-interest factor of “contact,” that only work-related contact is relevant. *Macy 's, Inc.*, 361 NLRB No. 4, slip op. at 10 (even *daily* meetings with employees outside the unit are irrelevant where they “do not involve the employees performing the main selling function”); *Mitchellace, Inc.*, 314 NLRB 536, 537 (1994); *Blue Grass Industries, Inc.*, 287 NLRB 274, 299 (cafeteria employees).⁷

⁶ The Board has approved appropriate units even where—unlike here—the petitioned-for unit had regular work-related contact with employees outside the unit. In *Associated Milk Producers, Inc.*, 251 NLRB 1407, 1408 (N.L.R.B. 1980), for example, employees both inside and outside the petitioned-for unit had “some group meetings and a Christmas party, as well as the opportunity of drivers meeting each other at processing plants when the milk is being delivered. . . at Houston, San Antonio, and Dallas.” Employees in the petitioned-for unit apparently had less or comparable contact in places where there were mostly petitioned-for employees (*e.g.*, on deliveries “to Waco, Texas”). Nevertheless, despite significant work-related contact with employees outside the unit, the Board found the petitioned-for unit was appropriate.

⁷ *See also, e.g., Constellation Brands d/b/a/ Woodbridge Winery*, 32-RC-135779, D&DE, slip op. at 35 (Jan. 8, 2015), *review denied* (NLRB Feb. 26, 2015) *available at* <https://www.nlr.gov/case/32-RC-135779> (contact irrelevant when “not a regular part of the employees’ functions”) (citing *Macy 's*, 361 NLRB No. 4, slip op. at 10); *URS Federal Support*

Graduate Teachers in the petitioned-for Units do not have regular work-related contact with Graduate Teachers teaching for other Departments. Whatever contact they have with Graduate Teachers outside of the Department where they teach is minimal, and virtually never involves interaction about their graduate teaching. (Tr. 1371 [Shen]; Tr. 2171 [Winant]; Tr. 2351, 2353, 2439 [Rosenblum, back at the Law School, did not even speak about his teaching with other law-student Graduate Teachers teaching the same History course he was teaching].)

Graduate Teachers meet regularly when they are teaching a petitioned-for Department's course together—both with each other and with the faculty supervisor for the course. They meet for the pre-course and weekly trainings described above. (*See supra* pp. 16-61 [Facts, Part II].) Graduate Teachers also meet informally with each other to discuss the material they are teaching together (*e.g.*, the plan for the class; the substantive material; how to cover for each other; what the faculty supervisor wants; what the Department provides for Graduate Teachers; etc.) Graduate Teachers sometimes substitute-teach for each other or cover for each others' office hours. (Tr. 1368-1369, 1400 [Shen]; Tr. 1769 [Hoeller]; Tr. 2437 [Rosenblum].) In many of the petitioned-for Departments, Graduate Teachers generally have office hours in the Department building and around other Graduate Teachers. (Tr. 1073-1074 [Tipton]; Tr. 1086 [Wilkinson]; Tr. 1362 [Shen]; Tr. 1430 [Sessions]; Tr. 1713 [Hoeller]) Sometimes, they jointly hold these office hours with other Graduate Teachers teaching in the same petitioned-for Department, and seek advice from each other while doing so. (Tr. 1765 [Hoeller]; Tr. 1396 [Shen].)

The Employer suggested that some Graduate Teachers in petitioned-for Units have insufficiently frequent contact within the Unit because of the relative amount of time they spend working alone. But the Board rejected the same argument even before *Specialty Healthcare*. In *United Operations, Inc.*, for example, the Board rejected the employer's argument that "the HVAC techs generally work alone, and thus they also have limited contact with each other." 338

Services, Inc., 31-RC-147597, D&DE, slip op. at 25-26 (Mar. 30, 2015), *available at* <https://www.nlrb.gov/case/31-RC-147597> (relevant "contact" with other employees is contact "in the performance of work").

NLRB 123, 126 (2002) (dissent). Despite the fact that they “generally work alone,” The Board found the petitioned-for HVAC-only unit to be appropriate. *Id.* at 124-125.

F. Job Functions: Each petitioned-for Unit has distinct work duties.

The Employer cannot show significant overlap between the job duties of Graduate Teachers across petitioned-for Departments. Graduate Teachers’ work duties are dictated by the subject matter they are teaching. Just as the Department searches for certain skills and qualifications necessary to the subject matter in deciding whether to hire candidates (*see supra* pp. 84-89 [Argument, Part II.C.]), when it hires them, the Department also imposes on them the job functions dictated by that same subject matter.

But the Department’s function in deciding a Graduate Teacher’s work duties begins even before the assignment stage—at time of distribution. The Department has discretion in deciding to which courses it will distribute TF positions, and that choice ultimately defines, for each petitioned-for Unit, what work it will need to do in the coming year. Some courses require the Graduate Teachers to design exams (Tr. 1408-1409 [Shen]); others impose a tradition of group grading (Tr. 1455-1456 [Sessions]; Tr. 1758 [Hoeller]) or of talking immediately after most lectures in the class. (*See, e.g.*, Tr. 1960 [Winant]; Bd. Ex. 11 [Stip. 21].)

As shown above, each petitioned-for Department has a unique mix of job functions required of its Graduate Teachers. (*See supra* pp. 21-61.) For example, Graduate Teachers in the East Asian Languages and Literatures Department engage in closely supervised instruction—whether “team teaching” a small literature seminar with a professor or working closely with Lecturers in language classes. (Tr. 1824-1825 [Niedermaier].) By contrast, Graduate Teachers in the History of Art Department regularly tour art galleries with no supervision. (Tr. 1441, 1445 [Sessions]). As shown in the Department-by-Department facts above, the nature of the duties performed by the Graduate Teachers is determined to a large part by the subject matter being taught in that department. (*See supra* pp. 21-61 [Facts, Part II.A.-II.I.].)

Work duties associated with grading differ substantially from department to department. (*See, e.g.*, Pet. 36 [Gendler email]; Tr. 2277 [Winant has been instructed regarding grading policies specific to teaching undergraduates in the History Department]; *cf.* Bd. Ex. 11[Stip. 36: History testimony applies to other Departments].) For example, Graduate Teachers in the Math Department either grade 150 homework assignments per week as Grader/Tutors or work through a complex system of trainings and faculty meetings with Lecturers to teach calculus. (Tr. 1338, 1353-1358 [Shen].) In the Physics Department, Graduate Teachers will often rotate grading responsibilities so that a given Graduate Teacher will grade the entire class’s homework for specific weeks and do no grading in other weeks. (Tr. 1762, 1765-1766 [Hoeller].) For language courses in the East Asian Languages and Literatures Department, however, Graduate Teachers will grade a smaller volume of homework every day. (Tr. 1924 [Niedermaier].)

Depending on their petitioned-for Department, Graduate Teachers are also exposed to distinct risks. A Geology Department field trip does not expose someone to the same hazards as a Physics laboratory. (Tr.788 [Schirmeister].) Graduate Teachers “in the Geology & Geophysics Department lead field trips . . . both in the area and around the world.” (Bd. Ex. 11 [Stip. 3]. *Compare* <http://earth.yale.edu/gg-undergraduate-courses> with Er. 41 [at least two courses taught in Fall 2016 by Graduate Teachers—“Dynamic Earth Lab & Field Methods” and “Fossil Fuels & Energy Transitions”—have field trips].)

The fact that two Graduate Teachers receive the same “assignment type” does not mean that they do the same things. For example, not all Departments mean the same thing when they give a TF position the title of “Grader/Tutor” or “PTAI.” For example, a PTAI in the East Asian Languages and Literatures Department is subject to an intensive schedule determined by norms and practices within the Department, including a five-days-per-week “team teaching” model with frequent group trainings and rotating lecturing responsibilities. (*See supra* pp. 44-50; Tr. 1853 [Niedermaier: “The system of team teaching I don’t think is practiced in other national language departments. In fact, they, as far as I understand, graduate students in those departments get to design their own class, they just teach however they want.”]) By contrast, a PTAI in the History

Department is hired by proposing the course to the Department through a competitive bidding process and has full responsibility for teaching a seminar independently. (*See supra* pp. 34-37; Tr. 1617 [Kaufman: History PTAI designs seminar course independently, and teaches it independently.]) Although both of these Departments have dubbed these Graduate Teachers “PTAIs,” and both are paid \$8,000 as TF20s for the semester, they have very different terms and working conditions. For example, they work different hours, are subject to different authority structures, face different stressors, and have different scheduling flexibility.

G. Terms and Conditions: Each petitioned-for Department has different Graduate Teacher terms and working conditions.

The Employer has failed to show significant, let alone “almost complete[],” overlap in terms and working conditions between any petitioned-for Unit and any other group of employees. Each of the petitioned-for Departments subjects its Graduate Teachers to distinct terms and conditions of employment. Each decides not only how much each Graduate Teacher it hires will be paid and what official title he or she will receive, but—more importantly—the value of that pay in effective hourly wage and the nature of the work associated with that title.

First, each petitioned-for Department determines the “assignment level” for each TF position it distributes to courses. These “assignment levels” are either \$4,000 as a TF10 or \$8,000 as a TF20. (Pet. 8, p. 1 [“Departments and programs are responsible for allocating teaching fellows to courses and determining the level of the assignment and its type.”])

And each petitioned-for Department has the freedom to determine which of the “assignment types” it wishes to use (out of Lab Leader, PTAI, Discussion Section, Grader/Tutor, and Grader without Contact) for each distributed TF position. (*Id.*, pp. 1-3; *see also* Pet. 8, p. 3 [“In the rare cases where professional school students assist in FAS courses, they are appointed at the levels and stipends equivalent to a teaching fellow with the title Teaching Assistant.”].) With the exception of the Physics Department, each petitioned-for Department has chosen to use only two or three of the five “assignment type” designations. (*See* Bd. Ex. 6 [Attachment B].)

Second, and more importantly, each petitioned-for Department decides what the assignment types and levels mean in practical terms. Although there are currently only two salary levels from which a Department may choose—\$4,000 or \$8,000—the Department determines the value of services that must be provided by the Graduate Teacher in exchange for that money. This is true both in a quantitative sense (*e.g.*, dollars per hour) and a qualitative (*e.g.*, how repetitive or stressful the work is). This deeply affects Graduate Teacher working conditions. (*See supra* pp. 20, 96-97 [comparing the distinct meaning of “PTAI” in separate petitioned-for Departments].)

For example, these decisions affect a Graduate Teacher’s effective hourly wage. “TF10” is meant to convey an “average” of six to ten hours of Graduate Teacher work per week, and “TF20” is meant to convey an “average” of 16-20. (Tr. 2461-2462 [Schirmeister: the Graduate School does not “have any parameters for week to week hours”].) But a Department’s Graduate Teacher distribution, hiring, and supervision ultimately play an enormous role in deciding the number of hours actually worked.

When teaching East Asian language, Graduate Teachers regularly work more than 20 hours per week, therefore earn less per hour. (*See also, e.g.*, Tr. 1856 [Niedermaier: “I would say it was closer to 25 reaching 30 if I was going to be realistic about the prep time I was giving”]; Tr. 1841 [Niedermaier: [“Noriko Morisue who is also – is in her fourth year of study in our department, and she taught elementary Japanese last year, and had a – it was a big time commitment for her, so I did talk to her on several occasions to seek advice”].) The East Asian Languages and Literatures Department, unlike any other known department, requires a timesheet; a language supervisor said she wanted the timesheet to make sure Graduate Teachers “prepare more efficiently” and therefore “can work more.” (Tr. 1864 [Niedermaier].) Because of this, Niedermaier “erred on the side of being conservative in filling out my timesheet because I would be—it would be very closely audited if I was getting close to going over, so I didn’t want to go over until the end of the week. It was just too much.” (Tr. 1862 [Niedermaier: “I think it was a little bit higher than that to be honest, like two or three hours higher.”].) Having to keep a

timesheet on top of teaching five days per week as a PTAI or Grader/Tutor, is a source of significant stress in that Department. Graduate Teachers are nervous because the East Asian Languages and Literatures Department is considering cutting the number of language faculty even further, which would “entail more graduate student work.” (Tr. 1866 [Niedermaier].)

Third, by committee and otherwise, Departments develop terms and conditions regarding which courses are eligible for TF positions and the application criteria the Department will look for in potential hires. For example, the History Department Graduate Advisory Committee recommended such policies for the distribution of TF positions and assignment of Graduate Teachers to courses. (*See, e.g.*, Tr. 1609 [Kaufman].) Other Departments have formed similar committees to establish similar policies—and all are free to do so independently of the central administration. (*See, e.g.*, Bd. Ex. 11 [Stip. 36: applying Kaufman assignment testimony to other Departments]; Pet. 14, p. 50; Pet. 32c, pp. 7-8 [Geology and Geophysics Handbook: Department Committee on Teaching Fellows].)

Because these sorts of policy go to the core Department function of hiring Graduate Teachers, they are ultimately instituted under the express authority of the DGS in any Department. (Er. 8, p. 22 [“DGSs are master approvers of assignments.”].) For example, the History Department DGS and associate DGS set criteria by which professors may request to have reduced maximum section sizes in their courses (lower than the GSAS-wide maximum of 18); the central administration was not substantively involved in the History Department’s decision to lower class sizes. (Tr. 1655-1657 [Kaufman]; *see, e.g.*, Er. 18, p. 27 [Bottom email: History Department agrees to section-size reduction without consulting with GSAS].)

Furthermore, each petitioned-for Department has freedom to set other terms and conditions of employment (like the timesheet requirement). The Employer admits this: “The department can set policy so long as it does not conflict with the general framework ... Departmental policy is set by the faculty insofar as it’s within the general framework of graduate school and university procedures.” (Tr. 755 [Schirmeister].) But “there are additional things that

[Departments] can and do impose that are specific to our disciplines and that sort of thing.” (Tr. 1026-1027 [Tipton].)

Each petitioned-for Department can autonomously establish term-length, vacation, and paycheck-related policies for Graduate Teachers. In the Physics Department, for example, Graduate Teachers’ teaching responsibilities do not begin and end based on the University’s semester calendar, but instead begin when the instructor holds a “staff meeting” and “only end when you are released by the course instructor.” (Er. 44, p. 14). The Physics Department also has its own vacation and paycheck-pickup policies for Graduate Teachers, the former of which was created after a student and a professor brought concerns to the DGS. (Tr. 1060-1062 [Tipton]; Er. 44, p. 16 [Physics Department Handbook]; Er. 44, p. 17 [paycheck should be collected in the Department Chair’s office]).)

Each petitioned-for Department also decides whether to provide supplies and resources to Graduate Teachers in the Department. For example, the Physics Department buys a free laptop for every incoming graduate student, which is facilitated by the Chair. (Tr. 1040-1041 [Tipton].) Graduate Teachers in the History of Art Department, on the other hand, must supply their own computers in order to properly teach sections involving art projections. (Tr. 1450 [Sessions].)

Several Departments allow Graduate Teachers to directly access copying and printing resources in the Department for teaching purposes at the Graduate Teacher’s discretion. (Er. 44; Tr. 1059-1060 [Tipton: Physics]; Tr. 1935 [Niedermaier].) Graduate Teachers in other departments, like the History of Art Department, instead must bring copying requests to the department’s administrative staff. (Tr. 1500-1501 [Sessions].)

Departments are free to provide Graduate Teachers with a shared workspace. (Tr. 799 [Schirmeister].) Many of them do. (Tr. 1073 [Tipton]; Tr. 1086 [Wilkinson]; Tr. 1362-1363 [Shen]; Tr. 1456 [Sessions].) The Physics Department allocates physical spaces and their uses. (Tr. 1039 [Tipton: “Office space, in practice office space is usually left to the discretion of the Department to allocate as we see fit.”]) The English Department provides every Graduate Teacher teaching for the Department a mailbox and office space in the Department. (Bd. Ex. 11

[Stip. 10-11].) Some Departments, however—like the History Department—do not have any shared workspace or place to hold office hours for Graduate Teachers. (Tr. 1967 [Winant].)

Departments also freely set their own terms and conditions regarding grading policies for Graduate Teachers. (*See* Pet. 36.) As shown above, grading is different from department to department. In some petitioned-for Departments it is done alone (Tr. 1884 [Niedermaier]; Tr. 2217 [Winant]; in others, it is done in groups of Graduate Teachers (Tr. 1455, 1550 [Sessions]; Tr. 1053 [Tipton]); and in still others the Graduate Teachers and faculty grade together (Tr. 1756 [Hoeller]; Tr. 1825, 1846 [Niedermaier]). As shown by the central administration’s email at Petitioner’s Exhibit 36, Departments have been encouraged to form faculty-and-Graduate-Teacher committees to develop this important Department-specific policy. (*See also, e.g.*, Tr. 2277 [Winant: History faculty have guidelines about the standards or distribution of grades]; Tr. 2404 [Rosenblum].)

Many petitioned-for Departments prescribe conditions for addressing grievances at the Department level. For example, the English handbook instructs Graduate Teacher to contact the Associate DUS “If you feel overwhelmed or underserved by the professor’s level of involvement” (Pet. 14, p. 29), and advises that “[b]oth the DUS and ADUS can help you handle any problematic issues you face as a teacher” (Pet. 14, p. 39). In the Physics Department, these responsibilities are left to the DGS. (Er. 44, pp. 13-14; *see also* Pet. 28 [East Asian Languages and Literatures DGS states that when a Graduate Teacher is overworked, “That is of concern to me.”].) In the Political Science Department, if a Graduate Teacher and his or her supervising faculty member have a dispute or a problem to resolve, they normally take the problem to the DGS or the Department’s Graduate Registrar. (Tr. 1107 [Wilkinson].)

In the face of these kinds of distinct terms and conditions in the petitioned-for Departments—freely permitted by department autonomy every semester to decide Graduate Teachers pay levels, assignment types, working conditions, and effective hourly pay, among other variables—the Employer has failed to establish any “overwhelming community of interest” between any petitioned-for Department and any other subdivision of Yale.

H. Interchange: Graduate Teachers teaching for each petitioned-for Department have virtually no interchange with Graduate Teachers in other Departments.

The Employer has failed to meet its burden to show any interchange between Graduate Teachers in the petitioned-for Units and Graduate Teachers in other departments—much less an “overwhelming community of interest” or “almost complete[.]” overlap between any petitioned-for Unit and any other group of Graduate Teachers.⁸ There is no evidence that the Employer ever moved any Graduate Teacher from a teaching position outside of a petitioned-for Department into that petitioned-for Department. And, as noted above, the Employer could not recall even one instance *after* Shopping Period of transferring anyone one department to another. (Tr.765-766 [Schirmeister]; *see* Tr. 2319 [Winant: no known example of any Graduate Teacher transferring between teaching departments after shopping period].)

Associate Dean Schirmeister did testify, as noted above, that she thought movement between Graduate Teacher assignments “happens all the time” *during* Shopping Period (Tr. 525). But the Employer presented no evidence that it ever moved a Graduate Teacher from one TF position to another in a separate department, let alone any petitioned-for Department.

Moreover, the Employer would have to show that Graduate Teachers commonly are transferred *by the Employer* from one Graduate Teacher assignment to another. It would *not* have been enough to show that a person in a Graduate Teacher position sought, applied to, and accepted another position on his or her own initiative. *Red Lobster*, 300 NLRB 908, 911 (1990). That sort of “voluntary interchange” is entitled to insignificant weight—even when such

⁸ *Cf. Grace Industries, LLC*, 358 NLRB No. 62, slip op. at 4 (2012) (although the evidence showed “some degree of overlap between the asphalt pavers and other employees, this alone does not render a separate unit of asphalt pavers inappropriate.”) *DTG Operations, Inc.*, 357 NLRB 2122, 2128 (2011) (“[I]nfrequent and limited interchange does not preclude a finding that the petitioned-for unit had a distinct community of interest.”); *Home Depot USA*, 331 NLRB 1289 (2000) (finding separate unit of delivery drivers appropriate despite drivers’ performance of “puller” work— i.e., pulling merchandise off of store shelves in preparation for delivery— when pullers were not on duty); *Budget*, 220 NLRB at 1264 (rental representatives occasionally moved vehicles, did some refueling, and cleaned vehicles for service agents); *Avis*, 132 NLRB at 1136 (rental representatives occasionally delivered vehicles to customers or cleaned vehicles during rush periods, and a utility-man regularly handled rental agent duties every day).

interchange occurs with a *majority* of the petitioned-for employees. See *Rhino Northwest, LLC*, 19-RC-152947, D&DE, slip op. p. 5 (June 18, 2015), *available at* <http://apps.nlr.gov/link/document.aspx/09031d4581caef69>.

In *Rhino Northwest, LLC*, the petitioner sought elections for a group of riggers in an industry that is normally organized wall-to-wall. *Id.* The Employer argued that the fact that “the *majority* of riggers have also accepted work in non-rigger positions” showed “significant interchange.” *Id.* The Regional Director rejected that position, finding the petitioned-for unit appropriate and explaining that—even with a *majority* of riggers moving between various departments of the employer’s operation—no interchange could be shown unless *the employer transfers the employees* as part of its operations, i.e., involuntary transfer:

The fact that the majority of riggers have voluntarily accepted non-rigger positions when rigger work is not available does not establish interchange between the riggers and other employees.” *Id.* Further, the significance of riggers accepting non-rigger jobs is diminished because it occurs largely as a matter of employee convenience, i.e., it is voluntary.

Id. (citing *Red Lobster*, 300 NLRB at 911).

Similarly, in *J.B. Hunt Transport, Inc.*, found evidence of interchange insubstantial where such evidence involved petitioned-for employees voluntarily bidding on driving routes outside the petitioned-for unit. 14-RC-160960, D&DE, slip op. at 8 (October 16, 2015), *available at* <https://www.nlr.gov/case/14-RC-160960> (finding petitioned-for unit appropriate). In *J.B. Hunt Transport*, as here, “[n]ot only is this evidence [of interchange] limited, but the Board places less weight on incidences of voluntary interchange.” *Id.* (citing *Red Lobster*, 300 NLRB at 911).

Thus, even if Yale had adduced any evidence of any Graduate Teacher moving from an assignment in one Assigning Department to an assignment in a different Assigning Department—which it has not done (at least not where any petitioned-for Department is at issue)—it would have to further show that the Graduate Teacher in question did not *voluntarily* accept the new position. The Employer has failed to present any such evidence.

The Employer ventured an argument, however, that the petitioned-for Department Units

have a “form of interchange” because some Graduate Teachers in the petitioned-for Departments are not studying for a degree in the same Department. (Tr. 916:17.) This does occur: some petitioned-for Departments hire Graduate Teachers not studying in the Department, where they have the relevant skills and training to teach the Assigning Department’s course. (*See* Bd. Ex. 6; Pet. 33a; Tr. 2024-2025, 2035-2037 [Winant].) For example, this hiring practice happens extensively in the East Asian Languages and Literatures Department, only five of whose 29 Graduate Teachers are students are studying for a degree in the Department. The other twenty-four (24) hail from departments and schools as far flung as Divinity, Physics, Architecture and Public Health. (*See* Bd. Ex. 6.) The Department exercised its authority to hire these twenty-four (24) Graduate Teachers because they are native speakers, as Yale admits: “the East Asian language faculty likes the undergraduate students to have multiple opportunities to hear different people speak.” (Tr. 1798 [Schirmeister]; *accord* Tr. 601-602 [Schirmeister: “There will be tutors or graders attached in multiplicity to a single section, because the students in the class need to hear the language spoken by multiple speakers”]; Tr. 1836, 1903-1907 [Niedermaier].)

The Employer characterizes this as a “form of interchange” (Tr. 916:17) because, it contends, “student activity and teaching activity is really so inextricably intertwined” (Tr. 918). But facts and common sense show otherwise.

The East Asian Languages and Literatures Department *did not* hire 8 Public Health students (Bd. Ex. 6) to teach East Asian languages because of any “intertwine” between the study of Public Health and the teaching of East Asian language. It hired those teachers because they were qualified to fill a need, as the Employer admits. (Tr. 601-602, 1798 [Schirmeister].)⁹

⁹ Similarly, Rosenblum taught a course in the History Department not because of any “intertwine” between the Law School and the History Department, but because he had extensive qualifications to teach History. (Tr. 2343 [Rosenblum].) As Winant testified, four of the seven Graduate Teachers in history who are Ph.D. students in other departments (Pet. 33a) are all teaching one course because that course was drastically over-enrolled. (Tr. 2026 [Winant].) Graduate Registrar Marcy Kaufman confirmed that the History Department considers applications from outside the Department whenever it has such a need—and the central administration is not involved. (Tr. 1645-1646 [Kaufman].) Indeed, every example in the record

This is not a “form of interchange.” It is a student being hired to do a job for which they have skills having nothing to do with their studies.

As the Board recognized in *Columbia*, “collective bargaining and education occupy different institutional spheres.” 364 NLRB No. 90, slip op. at 7 (August 23, 2016); *see also id.*, at 8 (“examples of collective bargaining in practice ‘appear to demonstrate that economic and academic issues on campus can indeed be separated.’”) (citation omitted). A Graduate Teacher’s student and employee identities are distinct and separable. Local 33 seeks to represent the petitioned-for employees in their capacity as employees.

The Board’s recognition in *Columbia* that “economic and academic issues on campus can indeed be separated” comports with the well-established meaning of the term “interchange” as a factor in unit determinations. The Board uses the term “interchange” to refer to an employer’s transfer of employees from jobs within the proposed bargaining unit to jobs outside the unit, or vice versa. The fact that an Assigning Department has hired an unemployed student from a different department is not “interchange.” It is simply the Assigning Department hiring someone qualified to meet a staffing need.

Moreover, even if the Employer’s misguided “interchange” argument were properly in issue, it would be entitled to insignificant weight. As discussed above, the Board has held that “voluntary interchange” is insignificant—i.e. where an employee working outside the unit voluntarily bids to work in it, or vice versa. (*See supra* pp. 102-103 [discussing *Red Lobster*, *Rhino Northwest, LLC*, and *J.B. Hunt Transport, Inc.*].) All examples in the record show that unemployed students who apply cross-departmentally for Graduate Teacher positions do so of their own volition. (*See, e.g.*, Tr. 1633-1635 [Kaufman]; Tr. 2392 [Rosenblum]).

demonstrates that where a petitioned-for Department hired someone from outside the Department it did so to fill a need with someone qualified to teach. (*E.g.*, Tr. 1051-1052, 1080 [Tipton: “we had a real crisis”]; Tr. 1137 [Wilkinson]; Tr. 1634-1635 [Kaufman].) By contrast, the Employer has presented no evidence that any employee in any of the petitioned-for Units was hired because of some kind of “intertwine” rather than the person simply being qualified to fill a need.

Moreover, because the Board has never considered the hiring of an unemployed student to be a community-of-interest factor, any weight accorded the Employer's ill-conceived "form of interchange" argument should be especially minimal.¹⁰ The Employer must meet an extraordinarily heavy burden here. A novel "form of interchange" argument unrelated to work transfers should have insubstantial effect on the Employer's burden to prove an "overwhelming community of interest." The question here is not whether the Employer's proposed unit is the "optimum unit," but simply whether each petitioned-for Unit is appropriate in and of itself.

III. The Employer cannot establish an "overwhelming community of interest" by reference to "industry standards."

The Employer's reliance on so-called "industry standards" is unavailing for three reasons. *First*, the Board has explained that community-of-interest factors (of which "industry standards" is not one) and the employees' right to self-organization are what make a petitioned-for unit appropriate, regardless of any industry standards. *Second*, there are no industry standards here: the Board has not developed body of law about this industry. *Third*, the Employer's analogies to public-sector and faculty units are misplaced.

First, in *Specialty Healthcare*, the Board explained that industry standards are largely irrelevant to the appropriate-unit analysis: "The suggestion that there is only one set of appropriate units in an industry runs counter to the statutory language and the main corpus of our unit jurisprudence." *Specialty Healthcare*, 357 NLRB at 940. This is nothing new. As the D.C. Circuit held in 2000, "more than one appropriate bargaining unit logically can be defined in any particular factual setting." *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir.

¹⁰ It should be noted that the graduate students enrolled in a Department's Ph.D. program are overwhelmingly the primary source of new Graduate Teacher hires. In fact, of the 297 Graduate Teachers enrolled in any of the nine Ph.D. programs associated with the petitioned-for Departments, over 91% were working in the same Department where they were getting a degree (Er. 38 [in the nine Departments at issue here (i.e., excluding Comparative Literature): 26 assigned outside "Home" Department; 271 assigned in "Home" Department].)

2000). Thus, “when an appropriate unit can exist separately, industry practices should not preclude it.” *Armco, Inc.*, 279 NLRB 1184, 1219 (1986).

The Board in *Specialty Healthcare* named the principal factors relevant to determining whether employees share a community of interest. Industry standards was not one of these principal factors. Nor could it be. Under Section 9(b) of the Act, the Board must “‘assure to employees the fullest freedom in exercising rights guaranteed by this Act.’ i.e., the rights of self-organization and collective bargaining.” *Macy’s*, 361 NLRB No. 4 (July 22, 2014) (citing *Federal Electric Corp.*, 157 NLRB 1130, 1132 (1966)). The “fullest freedom” in “self-organization” means permitting a free and fair election on whether to have a union according to a showing of interest in an appropriate *petitioned-for* Unit.

That is why the “petitioner’s desire concerning the unit ‘is always a relevant consideration.’” *Specialty Healthcare*, 357 NLRB at 941 (citing, *inter alia*, *Marks Oxygen Co.*, 147 NLRB 228, 229 (1964)). And it is why industry standards are not. Collective bargaining is a flexible instrument that defies “one set of appropriate units in an industry” (*Specialty Healthcare*, 357 NLRB at 940): “[u]nionism and collective bargaining are dynamic institutions capable of adjusting to new and changing work contexts and demands in every sector of our evolving economy.” *NYU*, 332 NLRB at 1208. Whatever practice there may be in another employer’s shop cannot override the rule that the Board will direct an election in an appropriate unit based on the facts of each case, notwithstanding that it is not the “most” appropriate unit. An election must be directed in the “smallest appropriate unit” that encompasses the petitioned-for unit.

Indeed, both before and after *Specialty Healthcare*, the Board has approved of units contrary to the prevailing practice in an industry. Until 1966, for example, the Board’s “policy for the hotel industry was to find only overall units to be appropriate.” *Beck Corp. v. N.L.R.B.*, 590 F.2d 290, 293 (9th Cir. 1978) (citing *John Hammonds*, 160 927, 930 (1966)). In 1966, the Board noted “that the operations of every hotel were not so highly integrated, nor all employees so similar, as to negate the existence of a separate community of interest among smaller groupings.” *Id.*; see *77 Operating Co.*, 160 NLRB 927 (1966), *enfd.* 387 F.2d 646 (4th Cir.

1967). The Board held that it would thereafter ““consider each case on the facts peculiar to it in order to decide wherein lies the true community of interest among particular employees’ of a hotel.” *Beck*, 590 F.2d at 293; *see Omni In’t Hotel of Detroit*, 283 NLRB 475 (1987).

The same is true of the retail industry, where until 1977 bargaining units consisted of “all employees, including office clericals, [to] be included in a single overall unit.” *Wickes Furniture*, 231 NLRB 154, 155 (1977). The Board changed that in 1977, recognizing that “no justification appears for continued slavish adherence to a rigid rule. . . . each case must be decided on the basis of the facts presented. As in other industries, the unit in a retail store need not be the most appropriate one; it is sufficient if the unit sought is or may be an appropriate unit.” *Id.*; *see also, e.g., Wright City Display Mfg.*, 183 NLRB 881, 882 (1970) (“[W]e find that the nine over-the-road drivers and the one local driver constitute a homogeneous, functionally distinct group such as the Board has traditionally accorded the right of self-determination, *notwithstanding a history of bargaining on a broader basis*”). And, in *Macy’s*, 361 NLRB No. 4 (2014), despite the dissenting Board Member’s assertion that this was at odds with “retail industry standards,” the Board approved an appropriate unit of just one department in a store under *Specialty Healthcare*.

And Regional Directors have recently found departmental units appropriate in several industries traditionally organized on a broader basis. In just the past year, for example, department units have been found in, *inter alia*, a housekeeping department only, *e.g., KHRG Employer, LLC*, 13-RC-171442, Tally of Ballots (April 1, 2016) *available at* <https://www.nlr.gov/news-outreach/graphs-data/tally-of-ballots/13-RC-171442>; *MH Lodging LLC*, 13-RC-164568, Tally of Ballots (Dec. 15, 2015), *available at* <https://www.nlr.gov/news-outreach/graphs-data/tally-of-ballots/13-RC-164568>; a pharmacy department only (*e.g., Target Corporation*, 29-RC-157687, D&DE (August 26, 2015), *available at* <http://apps.nlr.gov/link/document.aspx/09031d4581d8f8a4>); and a riggers department only (*e.g., Rhino Northwest LLC*, NLRB Region 19, D&DE, <http://apps.nlr.gov/link/document.aspx/09031d4581caef69>, *review denied* 2015 WL 7750721, at *1 (Nov. 30, 2015).)

Second, there are no established “industry standards” for bargaining units of private-sector graduate employees. Until recently, Graduate Teachers have not been allowed to bargain in the private sector, so a pattern has not developed. Indeed, there is only one graduate-employee bargaining unit currently extant in the private sector—at NYU. (*See* Tr. 1197 [Estreicher].)

How collective bargaining may develop is anything but clear. The Board in *Columbia* directed a graduate-employee election in a unit that is different from the unit at NYU. (*Compare Columbia*, 364 NLRB No. 90, slip op. at p. 1, n. 1 with Er. 46T, p. 1). The unit found appropriate in *Columbia*, unlike the unit at NYU, includes research assistants funded by external grants and undergraduate teaching assistants. 364 NLRB No. 90, slip op. at 13. And the unit at NYU, unlike the potential unit at Columbia, excludes the medical school. (*Compare id. with* Er. 46T, p. 1.)

Notably, the unit that the Employer contends is appropriate here does not conform to the units at *either* NYU or Columbia. Both of the latter units include research assistants as well as Graduate Teachers. The Employer asserts that the appropriate unit in this case would be limited to Graduate Teachers, and includes neither undergraduate teaching assistants nor professional schools. Given the developing nature of this industry, there are no “standards” at this time.

Third, because of the lack of any body of law in this industry, the Employer urges the Regional Director to reach even further—to attenuated examples of collective-bargaining agreements for public-sector units and adjunct-faculty units. Those separate industries (the former not even within the Board’s jurisdiction) cannot establish any industry standard for Graduate Teachers at private-sector universities.

Even if they could, however, there are examples of department units among adjunct faculty and among public-sector Graduate Teachers. Three are most notable:

- First, in March 2016, Region 13 issued a Decision and Direction of Election directing an election in a unit consisting of adjunct faculty in just one program at Loyola University Chicago: “All full-time and part-time English Language Learning Program/ESL faculty and team members (adjunct instructors, instructors, ESL professors, ESL teachers, and ESL tutors) employed by Loyola University Chicago in the English Language Learning Program.” *Loyola University Chicago*, 13-RC-168082, D&DE, slip op. at pp. 1-2 (March

4, 2016), *available at* <https://www.nlrb.gov/case/13-RC-168082>, *review denied* (July 20, 2016).

- Second, since 2006, adjunct faculty in Cornell’s Industrial Labor Relations School have been organized as a department unit. ([Er. 47E, p. 1].)
- Third, in 1969, the University of Wisconsin—the first university to recognize a graduate-teacher union—recognized department units. Some departments voted in support of the union, and negotiated departmental labor agreements. Other departments did not vote for the union, and thus did not engage in departmental collective bargaining. *See* Nathan P. Feinsinger and Eleanore J. Roe, *The University of Wisconsin, Madison Campus—TAA Dispute of 1969-1970: A Case Study*, 1971 Wis. L. Rev. 229 (1971); Judith S. Craig, “Graduate Student Unionism: The Teaching Assistants Association at the University of Wisconsin-Madison, 1970-1980”, Ph.D. dissertation, University of Wisconsin, 1986, p. 208, *available at* <http://search.proquest.com/docview/303515796>.

In short, departmental units of university faculty and graduate employees have been recognized for decades, and Region 13 just directed an election half a year ago.

The above examples demonstrate that collective bargaining is a flexible tool and department units are nothing new. The Employer’s imagined “industry standards” are nothing more than a repackaged claim that a university-wide unit is the “optimum unit” here. But that is not the question before the Regional Director. Each petitioned-for Unit is appropriate under the traditional community-of-interest factors. Elections should be directed accordingly.

CONCLUSION

For the foregoing reasons, the Regional Director should find each petitioned-for Unit to be appropriate and direct an election in each petitioned-for Unit.

Dated: October 25, 2016

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing document entitled **Union's Post-Hearing Brief** was filed using the National Labor Relations Board on-line E-filing system on the Agency's website and copies of the aforementioned were therefore served upon the following parties via electronic mail on this 25th day of October 2016 as follows:

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I declare under penalty of perjury under the laws of the United States that the above is true and correct.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1**

YALE UNIVERSITY

-and-

UNITE HERE, LOCAL 33

**Case Nos. 01-RC-183014
01-RC-183016
01-RC-183022
01-RC-183025
01-RC-183031
01-RC-183038
01-RC-183039
01-RC-183043
01-RC-183050**

YALE UNIVERSITY'S POST-HEARING BRIEF

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PRELIMINARY STATEMENT

On August 29, 2016, UNITE HERE Local 33 (“Petitioner”, “Local 33” or the “Union”) filed 10 petitions with the National Labor Relations Board (“NLRB” or the “Board”) seeking to represent approximately 310 Teaching Fellows, Part-Time Acting Instructors, Graders and Associates in Teaching (collectively referred to as “Teaching Fellows”)¹ in the following 10 academic departments in the Graduate School of Arts and Sciences (“Graduate School” or “GSAS”) at Yale University (“Yale” or the “University”): East Asian Languages and Literature (01-RC-183014), Math (01-RC-183016), Geology & Geophysics (01-RC-183022), History (01-RC-183025), History of Art (01-RC-183031), Comparative Literature (01-RC-183036), Political Science (01-RC-183038), Physics (01-RC-183039), English (01-RC-183043) and Sociology (01-RC-183050).²

Based on common issues of fact and law, these 10 cases were consolidated for hearing in the Hartford Sub-Regional Office of the NLRB. The hearing began on September 12, 2016, before Hearing Officer Jennifer Dease and continued until October 7, when the record closed after 17 days of hearing.

The principal issue litigated in this proceeding was appropriateness of the bargaining unit, not the employee status of Yale’s Teaching Fellows. The Union takes the position that under the Board’s decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357

¹ On September 12, Local 33 amended its petitions at hearing to seek representation of all Teaching Fellows, Discussion Section Leaders, Part-Time Acting Instructors (PTAIs), Associates in Teaching, Lab Leaders, Graders/Tutors, Graders without Contact and Teaching Assistants in the 10 named departments. (Tr. 11-14)

As used in this brief, the term “Teaching Fellows” refers to graduate student teachers in all 56 academic departments in the Graduate School, not solely in the 10 departments named in the petitions.

² On or about October 14, the Regional Director approved the Union’s request to withdraw its petition in Case No. 01-RC-183036 (Comparative Literature department), leaving only nine departments in dispute. See Appendix A.

NLRB 934 (2011), units limited to Teaching Fellows in each of the 10 (now nine, *see n.2*) academic departments identified in the petitions are appropriate for collective bargaining.

For its part, the University has maintained from the outset and in this post-hearing brief that even if Yale's Teaching Fellows were deemed to be statutory "employees" under the Board's recent decision in *Columbia University*, 364 NLRB No. 90 (2016), the petitions nevertheless should be dismissed because they each seek an election in a "fractured" unit limited to Teaching Fellows in a single academic department -- to the exclusion of hundreds of other Teaching Fellows with whom they share an overwhelming community of interest. The smallest appropriate unit for graduate students whom Local 33 seeks to represent is a unit that includes all Teaching Fellows in the Yale Graduate School's Teaching Fellow Program ("Teaching Fellow Program" or "TFP"), which is the entity that centrally administers and controls all graduate student teaching at Yale.

The petitions also fail to raise a "question concerning representation" under Section 9 of the National Labor Relations Act ("NLRA" or the "Act") because the Teaching Fellows are students, not statutory employees. The University properly raised and sought to litigate that threshold issue, but on September 13 the Regional Director rejected its Offer of Proof. (Tr. 183-84; Er. Ex. 3) However, the following day the University made a Supplemental Offer, which was granted on four specific elements of the Section 2(3) analysis. Yale addressed all four items at the hearing.³ (Tr. 229-38) Although the Regional Director would not permit the University to

³ Testimony was permitted on the following points: That "[t]he University's Teaching Fellow Program is a unitary program of the Graduate School of Arts and Sciences that sets out central and uniform policies and procedures governing all academic departments and that is designed to prepare doctoral candidates for their eventual role as educators"; that "[t]he University's undergraduate students are not subject to core curriculum requirements; as a result the teaching performed by the University's graduate students is, in the main, closely connected to their principal areas of study"; that "[t]eaching is expected in all departments, but not required in all departments, of Graduate Students at the University"; and, that "Graduate Students may and do receive the portion of the stipend allocable to teaching whether or not they have received a teaching appointment." (Er. Ex. 3a)

brief the employee status question, he did agree to receive Yale's Statement in Support of its Supplemental Offer of Proof on the final day of the hearing. (Er. Ex. 52)

As we demonstrate below, the nine departmental units sought by Petitioner are inconsistent with decades of collective bargaining at colleges and universities around the country -- including at Yale. Moreover, these units are contrary to the Board's recent analysis in its *Columbia University* decision, where an election was directed in a university-wide unit. Local 33's fractured units are plainly inappropriate under the Board's *Specialty Healthcare* rule.

At the close of the hearing, the Union advised the Hearing Officer that it would not agree to proceed to an election in any other unit if its nine departmental units were found to be inappropriate. Accordingly, the petitions must be dismissed.⁴

SUMMARY OF ARGUMENT

The Union would have the Regional Director do something here that has *never* been done in the decades-long history of collective bargaining in higher education: certify a bargaining unit limited to employees within a single academic department. The certification that Local 33 seeks has no precedent, whether for teaching/research assistants, faculty or, to our knowledge, any other employee classifications. Neither the NLRB nor *any* state labor relations authority ever has certified such a unit.⁵ The Regional Director should not make this unfounded leap.

⁴ To be clear, just as each of the nine individual departmental units is an "arbitrary segment" of a University-wide unit of Teaching Fellows, so, too, is a combined unit comprised of Teaching Fellows in the nine departments, as it would still exclude hundreds of similarly-situated Teaching Fellows and, in addition, would fail to correspond to any Yale organizational or administrative unit.

⁵ Notwithstanding any references that may be made in this brief to Teaching Fellows as "employees," graduate student stipends as "wages," or any other term or phrase that may be construed to denote an employment relationship, Yale maintains its position that Teaching Fellows are not "employees" within the meaning of Section 2(3) of the NLRA.

The nine units in which Local 33 seeks to represent the University's Teaching Fellows -- each a *per se* fractured unit -- are ineligible for certification. Yale has demonstrated an unbroken national pattern of university-wide bargaining in higher education, supported by no fewer than 68 collective bargaining agreements from around the country, each covering broad university or system-wide units of both graduate assistants and faculty in the private and public sectors. Just as the Board relied on public sector bargaining patterns in *Columbia University* to reach its conclusions that the student assistants in that case were statutory employees and that a university-wide unit was appropriate, the Regional Director should follow the pattern of public sector bargaining units.⁶ Yale's evidence stands un rebutted in the record. The Union did not identify a single collective bargaining relationship in which employees of one academic department negotiate separately with a college or university -- *not even one*.

This longstanding pattern of bargaining on a university-wide basis -- at Yale and all other unionized institutions of higher education -- demonstrates the acceptance of that model in higher education by both labor and management, for good and obvious reasons.⁷ Whatever recent unit determinations the Union may point to outside academia, the *universal* practice of university-wide bargaining should be given great weight by the Regional Director. As the Board has said, most recently in *Columbia University*, just a week before these petitions were filed, "the academic-employment setting poses special issues of its own." *Columbia University*, 364 NLRB No. 90 slip op. at 7; *see also NLRB v. Yeshiva University*, 444 U.S. 672, 680-81 (1980) (citing

⁶ *See Columbia University*, 364 NLRB No. 90 slip op. at 9 ("[T]he experience with graduate-student collective bargaining in public universities is of relevance in applying the Act, as the closest proxy for experience under the Act."). If those agreements were relevant to the employee status issue in *Columbia University*, they are likewise relevant to the unit scope issue litigated here, and should compel the conclusion that a University-wide unit is the appropriate unit at Yale -- as at Columbia -- not the nine departmental units sought by Local 33.

⁷ *See Yale University*, 184 NLRB 860 (1970) (finding inappropriate and dismissing the union's petition for a unit of clerical/technical employees in a single department of Yale's Medical School); *see also Macy's, Inc.*, 361 NLRB No. 4, slip op. at 13 fn.50 (2014) ("[A]rea practice and the history of bargaining in the industry [] are relevant considerations.").

Syracuse University, 204 NLRB 641, 643 (1973)) (emphasizing that “principles developed for use in the industrial setting cannot be imposed blindly on the academic world.”).⁸

Plainly, it would only be by improperly giving controlling effect to the Union’s “extent of organization,” in violation of Section 9(c)(5) of the Act, that the Regional Director could find appropriate any of the nine fractured units in which the Union seeks elections. It should come as no surprise, and it certainly is no secret, that the Union’s strategy of pursuing certifications on a departmental basis is all about where its support may lie, nothing more. This is apparent from statements in the local press by the Union’s Chairperson, Aaron Greenberg (*see* Appendix C), and Local 33’s history of failed organizing at Yale.⁹

Simply stated, Teaching Fellows with appointments in each of the nine named academic departments do not share a community of interest separate and apart from the Teaching Fellows in all 56 academic departments in Yale’s Graduate School. To be sure, the Union has failed to demonstrate, based on the criteria traditionally applied by the Board and federal courts, that Teaching Fellows in any of these cherry-picked departments have an identity that distinguishes them from their colleagues in all other academic departments, such as might justify a bargaining unit of their own. There can be no doubt that these are *per se* fractured units, *i.e.*, “arbitrary segments” of a University-wide unit of Teaching Fellows. Indeed, this is just the type of unit that the *Specialty Healthcare* Board said “would likely be a fractured unit,” inappropriate for collective bargaining. 357 NLRB at 946.

⁸ Indeed, within the last few days, Harvard University and the UAW International entered into a Stipulated Election Agreement providing for a university-wide vote on representation of graduate student assistants and others, which we believe has been or will be approved by the Regional Director. (Case No. 01-RC-186442 (2016), *see* Appendix B).

⁹ The Graduate Employees and Students Organization (“GESO”), Local 33’s predecessor, conducted a *University-wide election* in 2003 in which Yale’s graduate students voted down a proposal to adopt GESO as their collective bargaining representative in negotiations with Yale. (*See* Statement of Facts, p. 40, below.)

As noted, the Union principally relies on *Specialty Healthcare* to support its dubious claim for nine separate departmental units.¹⁰ However, and as we demonstrate below, Local 33 has failed to make the showing required by that case.

To start with, the unrebutted evidence shows that there is a steady flow of faculty and students between departments; that departmental lines are blurred as a result of numerous joint appointments, combined degrees and cross-listed courses; and that Yale and other leading universities have been steadily moving toward interdisciplinary programs. Based on this evidence alone, it is clear that the petitions do not seek representation of employees who are “readily identifiable as a group,” as required by the first prong of *Specialty Healthcare*. But even if the Union were able to make that necessary preliminary showing, it still would have to demonstrate that the Teaching Fellows in each of the individual academic departments share a community of interest sufficient to warrant a separate bargaining unit. And Local 33 has failed to do so.

Unlike in a typical departmental unit in a manufacturing or retail facility, the Teaching Fellows who have appointments in the nine academic departments do not provide instruction (or any other academic services) under supervision of any administrator within the department in which they are teaching. Rather, as the Union stipulated, *Teaching Fellows in all departments are supervised by the faculty member responsible for the particular course to which the Teaching Fellow is assigned*. Only where two or more Teaching Fellows are appointed to sections of the same course is there common supervision by the same faculty member.

¹⁰ Yale maintains that *Specialty Healthcare* was wrongly decided, but recognizes that the Regional Director is bound by that decision unless and until it is either overruled or reversed. (See Bd. Ex. 2, Employer’s Statement of Position.)

Otherwise, supervision is separate. This lack of common supervision of Teaching Fellows in any academic department precludes a community of interest finding.

In addition, Teaching Fellows in all departments largely work independently. There is little, if any, integration of one Teaching Fellow's work with that of another. Course content and schedules vary and, as a result, teaching is of different material, on different days, at different times and in different places, even within the same department. The proof shows that when the Teaching Fellows prepare for and lead their discussion and lab sections, they mostly do so alone, not in collaboration with other Teaching Fellows. The same is true of how the Teaching Fellows schedule and hold office hours with their students and grade papers/exams, with modest exceptions. Each and every one of the Teaching Fellows who testified on behalf of the Union conceded as much on cross-examination. Being a Teaching Fellow is a largely solitary pursuit. Thus, contact among Teaching Fellows within any of the nine departments is sporadic and casual.

The final nail in the coffin for the Union's unprecedented argument for bargaining units limited to an academic department is that many of the Teaching Fellows whom they seek to represent as members of these individual departmental bargaining units *are from outside those departments*. In other words, they are not pursuing a degree in the department where they have been appointed to teach; their "home" is a different academic department, often one where the Union is not seeking to represent Teaching Fellows at all. And to the extent that there may be minor variations, such as the semesters during which Teaching Fellows typically teach, they would be a function of the department where the Teaching Fellows are "homed," not where they are teaching.

As we demonstrate in detail below, on this record the Board cannot make the necessary finding under the second prong of *Specialty Healthcare* that the Teaching Fellows in each of the nine departmental units share a community of interest justifying a separate appropriate unit. The complete absence of common first-level supervision, the scant contact among Teaching Fellows within a department, and the fact that many Teaching Fellows with appointments in any particular academic department are homed elsewhere, necessarily require the Regional Director to reject Local 33's argument that nine separate departmental units are appropriate for bargaining.

But even if the Union could establish that Teaching Fellows in any of the nine departments share the requisite community of interest, it still cannot meet the test in *Specialty Healthcare*. As shown by the University over the course of 17 days of hearing, the many hundreds of Teaching Fellows whom Local 33 has excluded from its tactically narrow organizational effort share an overwhelming community of interest with the petitioned-for Teaching Fellows, satisfying *Specialty Healthcare*'s third prong. Plainly, Local 33 seeks elections in what amount to nine *per se* fractured units, each consisting of an "arbitrary segment" of the entire complement of Yale's Teaching Fellows. As the Board stated in *Specialty Healthcare*, a unit that includes only a selected and limited number of employees in a particular classification "would likely be a fractured unit." 357 NLRB at 946. That is precisely the situation here.

Teaching Fellows in the University's Teaching Fellow Program are, with few exceptions, subject to a common set of terms and conditions that are outlined in their admissions letters, official only when signed by the Dean of the Graduate School.¹¹ No Graduate Student is

¹¹ For example, professional school students are not admitted through GSAS.

admitted to Yale without GSAS approval. The department's authority regarding admission of students is thus limited to recommendation.

All Teaching Fellows are subject to the policies and procedures of the Graduate School's Teaching Fellow Program, which funds and controls the amount of teaching resources allocated to each department. That all bears directly on *whether, where and when* any Teaching Fellow will be given an opportunity to teach or provide other instructional support during any particular semester. The role played by the Teaching Fellow Program is emblematic of the Graduate School's expansive control.

Although a department may be responsible for matching Teaching Fellows with specific teaching assignments, *it has no day-to-day role in the activities of graduate students* with respect to their teaching appointments after they are made. All departmental policies relating to graduate students in general, and Teaching Fellows in particular, are subject to all Graduate School policies. The GSAS "Programs and Policies" ("P&P") bulletin is referred to as "the Bible." In the event of any conflict with departmental protocol, it is the Bible that controls.

The departments have no internal human resources or labor relations officers. Rather, those important functions are served by the Teaching Fellow Program and Graduate School. Thus, *there is no departmental role in disciplinary or other personnel matters* for Teaching Fellows, just as there is no role in their supervision.

The proof also shows that regardless of the department in which a Teaching Fellow may have his/her appointment, all Teaching Fellows have the same general duties and responsibilities across the 56 academic departments comprising the Graduate School. The Union failed in its considerable effort to demonstrate that Teaching Fellows in one department "perform distinct

work under distinct terms and conditions” in relation to Teaching Fellows in any other department. *Specialty Healthcare*, 357 NLRB at 946 n.31.

Whatever differences may have been shown by the Union are attributable to the *content* of the course in which a Teaching Fellow is teaching, and differences or similarities in course content have little correlation with which department happens to list the course. Similarly, the essential qualifications to serve as a Teaching Fellow do not vary materially by department. The few subtle differences that the Union may have identified are insufficient to distinguish the Teaching Fellows on a departmental basis, and could have no real impact on the community of interest analysis that the Regional Director must apply here. Notably, in *Columbia University* those same subtle differences were not an obstacle to the Board’s finding that the university-wide unit was appropriate for collective bargaining. 364 NLRB No. 90, slip op. at 18-20. This case is no different in that respect.

Significantly, the record reflects substantial crossover of Teaching Fellows from one academic department to another. The proof shows that this semester a total of 64 Teaching Fellow appointments in the original 10 departments named in the petitions are filled with graduate students who are homed in departments other than the one in which they are teaching, including many who are pursuing a degree in academic departments outside the group of nine encompassed by the Union’s petitions. Similarly, a considerable number of graduate students, 39 to be exact, are homed in one of the 10 departments, but have teaching appointments in another department, in many cases a department not part of this proceeding.¹² Departments that do not have sufficient teaching opportunities for their own graduate students “export” them to

¹² We note that several Board and Employer exhibits that include information and analyses regarding the departmental crossover of Teaching Fellows (*e.g.*, Bd. Exs. 6, 7, and Er. Exs. 34, 35, 36, 38, 40, 41 and 42) were prepared before the Union withdrew its petition to represent Teaching Fellows in the Comparative Literature department. Therefore, all references to those documents throughout this brief include information from Comparative Literature, without impact on the relevance and probative value of those exhibits.

other departments that have more demand than their own students are able to satisfy. Those other departments become the “importers” of graduate students in this symbiotic relationship until equilibrium is achieved across the Graduate School. This crossover materially impacts the *Specialty Healthcare* analysis; when considered together with the absence of common supervision of the Teaching Fellows in any of the petitioned-for departments and the minimal contact between Teaching Fellows within the departments, it shows that the units in which the Union seeks elections are inappropriate for purposes of collective bargaining. In sum, the record establishes that the Teaching Fellows appointed to teach in the jumble of nine departments thrown together by the Union -- three in Natural Sciences, four in the Humanities, and two in the Social Sciences -- share an overwhelming community of interest with all other Teaching Fellows across the Graduate School.

The Union’s position here is not only at odds with patterns of collective bargaining in higher education generally and the lengthy history of University-wide bargaining at Yale, it also conflicts with the position taken before the Board by a sister Local in an earlier case. In 1970, the Board dismissed a petition by the Yale Non-Faculty Action Committee to represent a unit of clerical and technical employees in the Department of Epidemiology and Public Health at Yale’s Medical School. The NLRB ruled that the departmental unit sought in that case was inappropriate. Local 35, which continues to represent employees at the University and is an affiliate of Petitioner, opposed the departmental unit and agreed with Yale that “the history of collective bargaining at the University since 1943 has established a pattern of university-wide bargaining units encompassing employees holding similar job titles, and that, therefore, ***only a campus-wide unit is appropriate.***” *Yale University*, 184 NLRB 860, 862 (1970). That history and the absence of departmental bargaining units has continued until this day, not only at Yale

but at colleges and universities from coast to coast. Local 33 has offered no reason to break with that tradition.

As emphasized above, conducting a vote in any of the nine departmental units sought by Local 33 would amount to an unjustifiable departure from the uniform pattern that has prevailed in higher education, where bargaining has been carried on for many decades in university-wide units. *Specialty Healthcare* did not erase longstanding practices related to unit scope/composition that have developed in particular industries. As noted in that case, the Board's decision making in this area "has always been informed by empirical knowledge about the industry and workplace at issue." 357 NLRB at 939.

The Union's proposed bargaining units, if adopted by the Regional Director, would lead to an absurd result. Yale's graduate students with teaching appointments across the 56 departments in GSAS could be represented in potentially 56 separate units, by 56 different labor organizations, under 56 collective bargaining agreements, each with different terms and expiration dates, exposing the University to frequent labor disputes and ceaseless interruptions of work on campus.¹³

Such an outcome would frustrate -- not further -- the purposes and policies of the Act, to the detriment of countless students pursuing their education in hundreds, if not thousands, of colleges and universities across the country. This is plainly not what the Board could have intended in *Specialty Healthcare*. It would lead to an unprecedented and destabilizing proliferation of bargaining units. This result is not sound labor policy and the Regional Director should not embrace it here.

¹³ As discussed below, in 1995 GESO engaged in what the NLRB determined was an unprotected "grade strike." The threat of disruption is real, not imagined.

In each of the nine petitions, the Union seeks an election in an inappropriate fractured unit, in the face of an insurmountable showing of an overwhelming community of interest that those Teaching Fellows share with the hundreds of others in the Teaching Fellow Program who are appointed to teach in all 56 academic departments. For the reasons stated herein, and based on the evidence presented by Yale at the hearing, the petitions should be dismissed.

STATEMENT OF FACTS

I. Yale's Organizational Structure

Founded in 1701, Yale is one of the preeminent institutions of higher education in the United States. It has approximately 5,500 undergraduate students and 6,900 graduate and professional students. The Yale Corporation, over which the President of the University presides, is the governing body of the University. (Tr. 33)

Operationally, the University has two sides: academic and administrative. (Tr. 33-34; Er. Exs. 1, 2) The academic side is led by the President, Peter Salovey; the Provost, Benjamin Polak; and the Deans of Yale's various schools, one of the largest of which is the Graduate School. Professor Lynn Cooley is Dean of GSAS. (Er. Ex. 2) The GSAS has a student body of approximately 2,800 graduate students and a faculty of just under 1,000 members. (Er. Ex. 4 p.15) Professor Tamar Gendler is Dean of the Faculty of Arts and Sciences ("FAS"), which is comprised of faculty who teach in the Graduate School and/or Yale College, the undergraduate school. (Tr. 39; Er. Ex. 2) FAS is organized into three divisions. The divisions of Humanities and Social Sciences are each led by a division dean appointed by the FAS Dean, and the division of Natural Sciences is led by a divisional director, also appointed by the FAS Dean. (Tr. 99-100, 199)

Graduate and undergraduate academic departments at Yale do not fit neatly within any administrative or academic organizational structures. (See Er. Exs. 1, 2; *see also* Tr. 40-41, 47-48, 199, 1023) There are no organizational charts for the academic departments. Rather, the departments and programs are permeable groups of faculty with common interests.¹⁴ (Tr. 40, 55, 199, 1201-02) Faculty members must have an appointment in at least one academic department; many have appointments in more than one department or in an interdisciplinary program.¹⁵ (Tr. 52-53) Several of the departments and programs cross divisional lines. (Tr. 52, 99)

II. Academic Departments at Yale: Overlapping Areas of Intellectual Interest

A. Academic Departments in the GSAS Have Minimal Budgetary and Administrative Autonomy

The Graduate School maintains significant administrative control over its academic departments and programs. An academic department is a “group of faculty with common academic interests who have limited responsibility for thinking about issues like curriculum, faculty hiring, and areas of research in which they jointly engage.” (Tr. 40) All rules and regulations governing the Graduate School are set forth in the GSAS Programs and Policies Bulletin (“P&P”). (Er. Ex. 4; Tr. 196-97, 243, 1025-26, 1203-04) The P&P governs all academic departments within the GSAS. (Tr. 1025-26, 1203-04) No department can act in contravention of the P&P, affectionately referred to as “the Bible.” (*Id.*) The P&P covers all

¹⁴ Other witnesses defined “department” in a similar fashion: “a group of faculty with a common intellectual interest” (Tr. 199); “mostly an intellectual home for those who reside in it” (Tr. 1023); and “a group of people, professors, who have a shared intellectual background” (Tr. 1201-02)

¹⁵ Faculty members may have primary, secondary or joint appointments. (Tr. 997-99) A primary appointment means that the faculty member is treated as a full member of a department’s faculty with voting privileges in the department. (*Id.*) Some faculty members have “fully joint” appointments where they hold a primary appointment in multiple departments, meaning that they have full privileges and voting rights as faculty members in each department. (*Id.*) Faculty with secondary appointments are invited to be part of a department’s faculty for purposes other than voting. (*Id.*) Departments have limited authority to appoint and promote faculty, subject to University approval. (Tr. 41, 44-45)

aspects of student life in the Graduate School, including, *inter alia*, the Teaching Fellow Program, financial aid, and degree requirements (including required teaching) for each department and program. (Er. Ex. 4, pp. 21, 26-505, 561-66, 592-95) Academic departments must operate within this framework. (Tr. 301) Any departmental rules and procedures are expressly superseded by GSAS policy as provided in the P&P. (Tr. 319-20) The 2016-17 Director of Graduate Studies (“DGS”) Handbook, a guide for each department’s DGS, explicitly states: “[P]olicies and requirements provided in the P&P supersede statements in departmental handbooks and websites.”¹⁶ (Tr. 319; Er. Ex. 8, p. 25) The department handbooks themselves also make this clear. (Tr. 1026-30, 1575; Er. Ex. 44, pp. 1, 10-11, 24; Pet. Ex. 13a, p. 2)

The Graduate School, in appropriate circumstances, will allow exceptions to be made to the rules and regulations set forth in the P&P. However, such modifications must be approved by the Graduate School. For example, Union witness Jeffrey Niedermaier, a graduate student in the East Asian Languages and Literature department (“EALL”), testified that he wanted to teach in his second year even though the P&P provides that EALL students are not expected to teach until their third year. (Tr. 1908-09) As Mr. Niedermaier admitted, and Dean Pamela Schirmeister (Senior Associate Dean of the Graduate School and Yale College, Dean of Strategic Initiatives for both units, Dean of Undergraduate Education at Yale College and leader of the Teaching Fellow Program) confirmed, the Graduate School needed to approve this exception to the teaching year requirement for it to be effective. (Tr. 1908-09, 2452)

The Graduate School grants academic departments and programs latitude to manage the substantive content of its professors’ research and teaching. For example, while the Graduate School requires that academic departments administer a qualifying exam, each department has

¹⁶ As discussed herein at p. 18, a DGS is a faculty member serving a limited term as a part-time department administrator responsible for helping graduate students progress through their doctoral studies. (Tr. 1217)

the freedom to structure the exam to suit its educational objective.¹⁷ (Tr. 287-88, 327, 394-95)

Academic departments also may *recommend* undergraduate courses to be taught, but those recommendations are subject to review by the Course of Studies committee within Yale College, which may approve or reject the course. (Tr. 40-41) Similarly, academic departments may *propose* majors, but again, only subject to approval by a committee within Yale College called the Committee on Majors. (Tr. 41) Academic departments also may recommend degree requirements, but the Graduate School has authority to accept or reject those requirements as well. (Tr. 117-18, 771-72) After students complete their degree requirements, the Graduate School, not the individual academic departments or programs, confers the degree subject to approval by Yale Corporation. (Tr. 199-200)

The following academic and administrative functions are also controlled by the Graduate School, leaving academic departments with a very limited role:

- Admissions – the GSAS sets the general requirements for admission and is the ultimate decision-maker on which graduate students will be admitted, upon recommendation from the departments.¹⁸ (Tr. 307-08) Even if the department recommends admitting a student, the Graduate School may reject the

¹⁷ The Graduate School also requires that academic departments direct their students to submit a prospectus, which is a description of the dissertation that the student plans to submit to the Graduate School for his/her Ph.D. degree. (Tr. 287-88)

¹⁸ Several students testified about being contacted by departmental faculty before and/or during the admissions process. (Tr. 1330-31, 1809-10, 1816) Dean Schirmeister clarified that although faculty members may contact and recruit applicants, they cannot make an offer of admission until the GSAS Associate Dean approves the student's application for admission. (Tr. 2474-75) The P&P, DGS Handbook, and the testimony of Deans Schirmeister and Cooley, as well as Political Science department chair Professor Steven Wilkinson all make clear that no offer of admission is official until after Graduate School approval. (Tr. 375, 1132-33, 2474-75; Er. Ex. 4, pp. 19, 555-56; Er. Ex. 8, p. 2)

recommendation.¹⁹ (Tr. 375, 1132-33, 2474-75) Dean Cooley signs all letters of admission to the Graduate School. (Tr. 314-16; Er. Ex. 10)

- Course Enrollment – the online process for graduate-level course selection and registration is operated centrally through the GSAS registrar’s office. (Tr. 325; Er. Ex. 4, p. 575)
- Disciplinary Matters – the GSAS handles all disciplinary matters involving graduate students. (Tr. 331-33; Er. Ex. 4, p. 585) Academic departments cannot unilaterally dismiss or discipline a student for engaging in academic misconduct. (*Id.*) Likewise, academic departments cannot unilaterally terminate a graduate student’s teaching assignment. (Tr. 458-59, 464)
- Financial Aid – as discussed in greater detail in Section III.B, financial aid is controlled centrally by the Graduate School. (Tr. 270-71, 301, 320-22, 841; Er. Ex. 4, p. 592-93) The GSAS provides five years of guaranteed financial aid (sometimes six years), which includes healthcare and a stipend, as centrally determined each year by the GSAS.²⁰ (*Id.*)
- Leaves of Absence – the Graduate School controls whether students receive leaves of absence and administers the GSAS leave of absence policy in the P&P.²¹ (Tr. 331, 2109, 2120-21; Er. Ex. 4, p. 580)

¹⁹ Hearing Officer Dease asked Professor Wilkinson, “[I]f the DGS wants to admit a candidate but the graduate school doesn’t, who wins?” (Tr. 1132) Professor Wilkinson replied, “That’s clear, the graduate school wins.” (*Id.*)

²⁰ Department chairs have authority over relatively small budgets, generally between \$10,000-100,000, funding for which is provided by the FAS. (Tr. 45) Those budgets cover things like dinners with prospective graduate students or attendance at conferences. (Tr. 1076-77) By contrast, the FAS annual budget is approximately \$750 million, which pays for things like faculty salaries. (Tr. 45)

²¹ Gabriel Winant, a History student, Union organizer and researcher, testified during the Union’s case-in-chief that the leaves of absence he took (to work for the Union) were required to be -- and were in fact -- approved by the Graduate School. (Tr. 2109, 2121)

- Department Administrative Structure – certain faculty members and some staff hold administrative positions within many of Yale’s departments and programs. (Tr. 41) Each academic department and program has a chair who helps coordinate faculty research, teaching, promotion, and recruitment in the department; a DGS, if the department has a graduate curriculum, who is responsible for providing guidance to graduate students; a director of undergraduate studies (“DUS”), if the department has an undergraduate curriculum, responsible for assisting undergraduate students; and, some departments have their own graduate registrar, undergraduate registrar, or both, who are responsible for organizing and tracking the administrative/logistical aspects of students’ progression to a graduate degree. (Tr. 41, 150, 1043-46, 1085, 1217-19) The department chairs are appointed by Yale’s President upon Dean Gendler’s recommendation; DGSs are appointed by Dean Cooley; and, DUSs are appointed by the Dean of Yale College, Jonathan Holloway.²² (Tr. 41)
- Organizational Infrastructure – departments depend on the Graduate School and University for the following: human resources, labor relations, personnel policies, IT systems, payroll systems, and finance/accounting.²³ (Tr. 1024-25, 1092-94, 1202-03)

²² Yale produced as witnesses department chairs from three departments, one from each of the three divisions of the Graduate School. (Tr. 1309) Yale offered to produce witnesses from the other seven petitioned-for departments, as well as witnesses from each of the remaining 46 departments that should be included in the appropriate bargaining unit. (Tr. 1309) Hearing Officer Dease ruled that such evidence would be “cumulative.” She disallowed further testimony, with the understanding that the testimony of the department chairs would be regarded as representative of the others. (Tr. 1311)

²³ For example, there is no human resources or labor relations person in the departments who is handling the petitions filed in this matter. (Tr. 1092-94)

- Teaching – as discussed in greater detail in Section III below, graduate student teaching at Yale is run by the GSAS through its Teaching Fellow Program and is centrally administered, funded and otherwise controlled by Dean Schirmeister.²⁴ (Tr. 39-40, 57, 246, 412, 416, 422) Departments may recommend teaching requirements (*i.e.*, the time and amount of teaching expected or required) to the Graduate School for their students, subject to GSAS approval.²⁵ (Tr. 117-18, 403-06)

B. Permeable Nature of Yale’s Academic Departments

Academic departments at Yale do not have rigid borders constraining faculty and students. Rather, “the boundaries across [departments] are deeply permeable.” (Tr. 52) For example, many faculty members are appointed to more than one department. (Tr. 51-53, 997-99; Er. Ex. 42) Departmental crossover by faculty is common at Yale. (*Id.*) More than 25% of the faculty in seven of the nine petitioned-for departments have a primary or secondary appointment in at least one other department. (Er. Ex. 42) In both English and History, more than 55% of the faculty have appointments in other departments. (*Id.*)

In addition, even some department administrators hold faculty appointments outside the department in which they have an administrative role. Professor Naomi Lamoreaux, for instance, is the chair of the History department, but her main appointment is in the Economics department. (Tr. 1222) Similarly, Professor Steven Wilkinson chairs the Political Science department, with a faculty position in the MacMillan Center for International and Area Studies. (Tr. 1118)

²⁴ Of the nine petitioned-for units, seven receive more than 90% of their funding for graduate student teaching from the Graduate School; the other two departments receive slightly less. (Er. Ex. 40)

²⁵ Teaching requirements may vary based on the student’s home department. (Bd. Ex. 12)

A single academic department may be located in multiple buildings around the University. And, it is not unusual for Faculty members to have offices next to faculty from other departments. (Tr. 50, 399, 1225) Classrooms are spread across Yale's campus and are normally assigned by the University registrar based on course enrollment. (Tr. 724, 1121-22, 1225-26) Notably, the University is in the process of further integrating academic departments. (Tr. 54-55) Yale's future building projects "are meant to co-locate faculty across traditional disciplinary boundaries." (*Id.*)

Yale is committed to interdisciplinary study. In pursuit of this goal, a large number of undergraduate and graduate courses are cross-listed, *i.e.*, have course listings for multiple departments. (Tr. 59) Cross-listed courses permit students to study an area at the intersection of multiple different disciplines. (Tr. 60) Students may use a cross-listed course to satisfy degree requirements for any department that lists the course. (Tr. 61-62) For example, this semester, the Geology & Geophysics department ("G&G") is offering a course called Science of Complex Systems. (Er. Ex. 41) This course is cross-listed among four different departments (G&G, Ecology and Evolutionary Biology, Physics, and Applied Math) as G&G 428/E&EB 428/PHYS 428/AMTH 428/G&G 528. (*Id.*) This semester, the 310 graduate student teachers in the original 10 petitioned-for units are teaching in 135 different courses.²⁶ (Tr. 908; Er. Ex. 41) Of those courses, 24 of them are cross-listed (18%). (Tr. 1009) Thus, those students, by definition, are teaching across departmental lines.

Similarly, many students pursue joint or combined degrees in multiple academic departments. (Tr. 329-31) A "combined degree" is an interdisciplinary Ph.D. program where students may pursue a degree in two different departments or programs; a "joint degree" is a

²⁶ The total number of individuals in the original 10 petitioned-for units was 308, two of whom are teaching simultaneously in two different departments. (Tr. 904-05; Bd. Ex. 6)

combination of a Graduate School and professional school degree. (Tr. 329-31; Er. Ex. 4, p. 558)

Lastly, and as discussed more fully in Section IV.E, below, graduate students often teach outside of the department in which they are seeking a degree. This semester alone, nearly 21% of the graduate students with teaching appointments in the original 10 petitioned-for departments are teaching outside their home department. (Bd. Ex. 6; Er. Ex. 34) Conversely, nearly 15% of graduate student teachers seeking degrees in the petitioned-for departments are teaching outside their home department. (Er. Ex. 38)

III. Yale's Graduate School of Arts and Sciences Centrally Administers All Graduate Student Teaching Through the Teaching Fellow Program

A. The Structure of the Teaching Fellow Program

Yale and its Graduate School consider “[l]earning to teach and to evaluate student work [] fundamental to the education of graduate students.” (Tr. 244, 472; Er. Ex. 4, pp. 21, 564) As such, all doctoral students are expected to teach; for many, teaching is a degree requirement. (Tr. 244, 421, 472; Er. Ex. 4, pp. 21, 564, Bd. Ex. 4, fn.11) In fact, virtually all of them teach at some point before earning a Ph.D. (Tr. 56, 244, 421)

Graduate student teaching throughout the GSAS is administered and controlled centrally by the Teaching Fellow Program. (Tr. 39, 57, 422) The TFP is overseen by Dean Pamela Schirmeister with Assistant Director Howard el-Yasin, and Jennifer Brinley, Director of Financial Aid for the Graduate School. (Tr. 39-40, 57, 246, 416) Dean Schirmeister reports directly to Deans Cooley and Holloway.²⁷ (Tr. 246, 464-65)

²⁷ As part of its plenary control over graduate student teaching, the TFP has the authority to make systemic changes to teaching requirements in any or all departments. For example, in or around 2014, the TFP, over the objection of the History of Art department, increased from one to two the number of sections that History of Art graduate students were required to teach in their third year. (Tr. 2475-77)

The TFP is the “principal framework at Yale in which graduate students learn to become effective teachers.” (Er. Ex. 4, p. 21, 564; Tr. 243-44, 420, 478) The TFP is Yale’s sole source for allocating graduate teaching resources, which it does in ten-hour blocks of time to all academic departments, programs, majors and professional schools across the University, thereby funding and controlling all teaching opportunities for graduate students. (Tr. 423-24)

The TFP classifies all graduate student teachers at Yale as “Teaching Fellows,” who may be assigned to one or more of four positions:

- 1) Discussion section leader – discussion section leaders are Teaching Fellows who lead small sections that are related to a larger lecture presented by a faculty member. (Tr. 443-44) They teach under the guidance of the faculty member responsible for the course. (*Id.*) Discussion section leaders also hold office hours, where they make themselves available to meet with students, and have grading responsibilities as well. (Tr. 1951, 2345-46);
- 2) Lab leader – lab leaders lead laboratory sections related to lectures presented by the faculty member responsible for the course, hold office hours and grade student work. (Tr. 438-39, 444);
- 3) Part-time acting instructor (“PTAI”) – PTAs lead sections in multi-section courses that are not ancillary to a larger lecture. (Tr. 440-41; Bd. Ex. 4, n. 15) For example, in foreign language courses the students are assigned to one of several sections, where all instruction is given by the PTAI under the supervision of a faculty member. (*Id.*) A faculty member referred to as a Course Director oversees all such sections, providing the syllabus and assignments to PTAs. (*Id.*); and

4) Grader/tutor – grader/tutors evaluate and grade student work, hold office hours and occasionally lead study groups, but do not run a discussion section or lab. (Tr. 444)

There are two different assignment levels of Teaching Fellows: TF10 and TF20. (Tr. 275-76) These levels apply to Teaching Fellows across the entire Graduate School, irrespective of the academic department in which they may be teaching. TF10s are expected to devote on average between 6-10 hours per week to their teaching assignment. (Tr. 275-76; Bd. Ex. 4, n.12) TF20s are expected to devote on average between 15-20 hours per week. (Tr. 276; Bd. Ex. 4, n.13)

B. The Graduate School Provides Full Financial Aid For Doctoral Students

All doctoral students in centrally-funded programs receive a full financial aid package guaranteed for at least five years. (Tr. 270-71, 838, 2501; Er. Ex. 4, p. 594) In many cases, the Graduate School will guarantee a sixth year of funding. (Tr. 270-71, 2501-02; Er. Ex. 4, p. 594) This package includes a tuition fellowship for all years in which tuition is due, health insurance, and a stipend. (Tr. 838) The Graduate School determines the level of funding each year, which varies slightly by division, but not by department. (Tr. 841-42) Doctoral students in the Humanities and Social Sciences receive a standard stipend of \$29,650 for the year. (Tr. 273-74, 841) Students in the Natural Sciences receive a stipend of \$33,150, often supplemented by external funding.²⁸ (Tr. 271-72, 841) If the student loses the external funding, the Graduate School will pay the remainder of the stipend. (Tr. 655) The bottom line is that doctoral students do not pay a penny in tuition. (Tr. 273) The Graduate School also provides health insurance to doctoral students in all academic departments through the Yale Health Plan, which is different from the plan for faculty and staff. (Tr. 838-39) Including the value of tuition, the Graduate

²⁸ The Graduate School offers stipend incentives to highly qualified applicants. Therefore, individual stipend amounts may vary. (Tr. 841)

School spends approximately \$370,000 or more per doctoral student during the course of their studies. (Tr. 273-74, 656-57)

While receiving a stipend, Teaching Fellows should not teach more than 20 hours per week. (Tr. 426-27) The stipend, however, is unaffected by the assignment level (TF10 or TF20). (Tr. 276) In cases where no appropriate teaching opportunity can be identified in a term in which a student is expected to teach, graduate students nonetheless receive the same overall stipend.²⁹ (Tr. 267, 276, 857-58) A Teaching Fellow's assignment level affects only the amount of the Teaching Fellow's stipend that is allocable to teaching (for tax purposes). (Tr. 276, 842) The Graduate School allocates \$4,000 of the semester's stipend to teaching for TF10s and \$8,000 per semester for TF20s. (*Id.*)

After graduate students complete their required teaching (based on their degree requirements), they may opt to do "non-stipend teaching," which is teaching above and beyond what is expected or required of that student. (Tr. 657) The non-stipend pay rate, provided by the Graduate School, is the same as the amount of the stipend allocable to required teaching: \$4,000 for a TF10 and \$8,000 for a TF20. (Tr. 656; Er. Ex. 4, p. 594-95)

C. The Teaching Fellow Allocation Process

Departments, programs, undergraduate majors, and professional schools that need Teaching Fellows for their courses receive allocations in ten-hour blocks of time for Teaching Fellows through the TFP. (Tr. 478, 481) An "allocation" is the amount of Teaching Fellow resources that Dean Schirmeister provides to each academic department. (Tr. 356) Dean Schirmeister sets the allocation for academic departments based on historic enrollment in courses

²⁹ This is true except in the rare case where a student voluntarily elects not to teach. (Tr. 267-68)

within that department and her knowledge of classroom/lab sizes and layout.³⁰ (Tr. 423, 480, 486-87)

Dean Schirmeister then notifies the department, program, major or professional school of its allocation, and sends them a separate memorandum outlining rules pertaining to graduate student teaching. (Tr. 423; Er. Ex.18, pp. 7-8) These rules include, for example, the requirement that all graduate students must be registered in the GSAS (or, in some cases, a professional school) and be in good academic standing. (Tr. 467-68) In addition, priority must be given to students in their teaching years (*i.e.*, when students are required or expected to teach) before using “non-stipend” teaching, and students must pass an English proficiency test before they can teach a course. (Tr. 467-69, 479, 837-38, 844; Bd. Ex. 4, n. 1, 19; Er. Ex. 4, p. 594; Er. Ex. 18, pp. 7-8)

As noted, the TFP allocates resources not only to departments, but also to professional schools (*e.g.*, School of Public Health), programs, and majors.³¹ (Tr. 427-28, 481) A program is considered “a constellation of faculty or of students who are engaged in a particular kind of research project that are recognized organizationally as useful to consider for certain kinds of university operations.” (Tr. 47) One such program is the Cognitive Science Program, which is comprised of faculty across various departments, jointly engaged in research on the nature of cognition. (*Id.*) A “major” is a course of study pursued by an undergraduate student to fulfill Yale College graduation requirements. (*Id.*) A number of Yale’s programs and majors are not

³⁰ The University generally caps sections at 18 students. If an undergraduate course has 18 students enrolled, then generally one Teaching Fellow will be allocated. (Tr. 359, 482, 485-87) Higher course enrollment translates to greater need for Teaching Fellow resources. (*Id.*)

³¹ As Dean Schirmeister testified: “[O]ur students are teaching in things that are not even departments. They’re inter-disciplinary programs. So . . . they could teach at the divinity school or they – they’re teaching in multiple places. So the departments are just one thing among many, one organization among many that provide structures in which students can teach.” (Tr. 648)

located within any particular academic department, but they still receive Teaching Fellow allocations. (Tr. 81, 427-28) For example, the TFP provides teaching resources in support of an undergraduate major called Ethnicity, Race, and Migration, which involves studies in history, literature, urban studies, sociology, anthropology and other areas. (Tr. 427-28, 483) Because that major does not have any graduate students -- it is only an undergraduate major -- the Teaching Fellows assigned to its courses by necessity come from other GSAS departments, such as African American Studies, American Studies, English, Political Science, and/or Sociology. (Tr. 428)

After the department or program receives its resource allocations from the TFP, the department determines which of its courses require Teaching Fellows, and distributes allocations accordingly. (Tr. 423) Departments then do the “matchmaking” of assigning individual graduate students to specific courses. (*Id.*) As departments know more about each student’s work, they are in a better position than the TFP to make the match. (Tr. 639-40) In addition, given that there are approximately 800-900 Teaching Fellow assignments per semester, it would be “logistically impossible” for the TFP to make each assignment. (Tr. 58, 769) The department’s role is limited to matching individual Teaching Fellows with a course and instructor. To be clear, departments have no role in making the resource allocation. That is the central responsibility of the TFP. (Tr. 465-66)

The matchmaking is typically performed by a departmental administrator (*e.g.*, DGS) or committee. (Tr. 481-82) After a graduate student is matched with a course, the departmental administrator enters the assignment into the Teaching Fellow System (“TFS”), a software

program created and controlled by the TFP.³² (Tr. 425, 471) The software generates an appointment letter to the student informing him/her of the assignment. (Tr. 471) The assignment is not official until the letter is transmitted to the student through the TFS. (*Id.*) The TFP may veto any assignment made by a department and all matches must comply with the requirements established by the TFP. (Tr. 261-62, 359, 426-27) The TFS is programmed so that an assignment will not be processed if it does not fully comply with TFP rules (*e.g.*, failure of the English proficiency test or trying to use non-stipend teaching before exhausting priority students). (Tr. 479, 837-38, 844) In fact, if a department attempts to assign a student to do non-stipend teaching before all stipend teaching has been assigned, the TFS blocks the assignment or, if the TFS accidentally lets the assignment be made, Dean Schirmeister will terminate the student's assignment. (Tr. 1802-06) Dean Schirmeister terminated at least two such assignments this semester. (*Id.*) The record establishes that no faculty member, departmental administrator, or committee has authority, acting unilaterally, to assign graduate students to Teaching Fellow positions. (Tr. 471, 479)

If a department or program believes that the amount of Teaching Fellow resources allocated to it by the TFP is insufficient, its only remedy is to request additional resources from the TFP. (Tr. 482, 526, 540-41) Departments cannot simply recruit and assign additional Teaching Fellows on their own. (*Id.*) Once a department exhausts its allocated resources, the TFS will prevent the department from making any further assignments. (Tr. 526-27) Only the TFP can add additional resources. (*Id.*) If a department requests additional resources, Dean Schirmeister examines the enrollments and other data, and determines whether to allocate further

³² The 2016-17 GSAS DGS Handbook states that DGSs are “master approvers for assignments,” which Dean Schirmeister explained is a designation in the TFS that grants permission to the DGS to access the software to match graduate student teachers with courses. (Tr. 484-85)

resources. (*Id.*) If, in her judgment, the department did not utilize resources efficiently in the past (*e.g.*, assigning Teaching Fellows to unjustifiably small sections), or the enrollments do not support additional resources (or for any other reason as determined by Dean Schirmeister), the TFP may deny the department's request.³³ (Tr. 485-86)

Because teaching assignments often are tied to course enrollment, assignments regularly change during Yale College's "shopping period," a period at the beginning of each semester when undergraduate students sit in on multiple courses before they decide which courses to take. (Tr. 304-05, 524-25) Dean Schirmeister's initial allocations are based on historic enrollment data, but during shopping period the TFP monitors actual enrollments, which may require adjustment of a department's or program's need for resources. (*Id.*) For example, the TFP may initially determine that a new course would not need Teaching Fellows, but if there is high enrollment during shopping period, Dean Schirmeister could decide to allocate additional resources to the department or program offering that course. (Tr. 524-25) Alternatively, if there is low enrollment, resulting in an excess of Teaching Fellows assigned to a department or program, Dean Schirmeister would consult with the DGS to find new assignments for those students outside the department.³⁴ (Tr. 525) As such, Dean Schirmeister plays an "uber matchmaking" role in the Teaching Fellow assignment process. (*Id.*)

Beyond this, the TFP runs the Teaching Opportunities website, where individual faculty members can list courses in need of Teaching Fellows, if after a specified date there is still an unfulfilled need for Teaching Fellows in individual courses. (Tr. 518, 641) Teaching appointments made through the website must be processed centrally with the TFP. (*Id.*)

³³ Departments may elect to have smaller sections than the Graduate School's 18-student maximum. However, they do so, as the History department chair testified: "with [] the specter from the [G]raduate [S]chool hanging over us, which is our fear. So we're told that we will be punished if our sections are too small." (Tr. 1289-90)

³⁴ This type of reassignment also may occur after shopping period has ended. (Tr. 765-66)

Approximately five weeks into each semester, the TFP surveys all Teaching Fellows to determine whether their assignment level accurately reflects the work they are doing. (Tr. 425-26, 650-51) When a Teaching Fellow's time commitment exceeds the GSAS-imposed maximum for average hours worked per week (*e.g.*, 10 for TF10 and 20 for TF20), Dean Schirmeister works with the faculty member and the graduate student to adjust the assignment to the correct level. (*Id.*) In addition, if Teaching Fellows experience any other problems related to their assignments, the TFP helps resolve the issues. (*Id.*)

IV. Common Terms and Conditions Apply to All Teaching Fellows

A. All Teaching Fellows Perform the Same Duties and Fulfill the Same Job Function

Teaching Fellows in all departments perform the same job function -- they teach and provide other forms of instructional support.³⁵ (Tr. 244, 437-38, 446-47, 455-56, 472, 1336, 1405-06, 1707, 1824-26, 1957-68, 2345; Bd. Ex. 11, n.30; Er. Ex. 4, pp. 21, 564; Er. Ex. 29) More specifically, Teaching Fellows lead discussions, hold office hours, tutor students, attend lectures, prepare materials for class and evaluate/grade student work. (*Id.*) As noted above, discussion section and lab leaders lead sections attached to larger lectures; PTAs lead sections that are not attached to a lecture. (Tr. 440-41, 1447-48, 1707, 1956-57) Although grader/tutors do not teach a section, one of their responsibilities is to meet with and tutor students. (Tr. 444)

Similarly, Teaching Fellows in all departments hold office hours with students, during which they answer questions and discuss course material.³⁶ (Tr. 1336, 1338, 1707, 1715-16,

³⁵ Yale and the Union stipulated that the testimony of witnesses from the various departments "apply in all material respects" to the petitioned-for departments from which no witness testified. (Bd. Ex. 11, n.36)

³⁶ Teaching Fellows also meet with students in review sessions, language clinics and study halls. (Tr. 1402, 1707-08, 1902-03) Jifeng Shen, a Teaching Fellow in the Math department, testified that review sessions are akin to office hours; Emily Sessions, a Teaching Fellow in the History of Art department, described study hall as answering students' questions about lecture or homework; and, Jeffrey Niedermaier, a Teaching Fellow in EALL, described the language clinic as one-on-one tutoring. (*Id.*)

1823-26, 1956-57) When and where Teaching Fellows conduct office hours may vary, but any differences are the result of individual decision-making by the Teaching Fellows, not due to the academic department in which they have their teaching appointment. (Tr. 1537-40, 1712, 1855) Some Teaching Fellows hold office hours in an office, classroom or student lounge; others meet with students in coffee shops. (*Id.*; Tr. 1363, 1967-68) Wherever they may meet, office hours are usually scheduled for one or two hours weekly. (Tr. 1707, 2202) In some cases, Teaching Fellows may schedule office hours by ad hoc appointment, rather than at prearranged times. (Tr. 1537-40, 1714, 1855) Flexibility for determining office hours exists in all departments. (*Id.*; Tr. 1712, 1926)

All Teaching Fellows, regardless of department, also must prepare, organize and present course material to students in a comprehensible manner so that it is understandable to students. (*Id.*; Tr. 455-56)

In addition, all Teaching Fellows throughout the GSAS evaluate student work. (Tr. 447, 455-56) Discussion section leaders, lab leaders, PTAs, and grader/tutors are responsible for grading homework, papers and midterm/final exams. (Tr. 444, 1406, 1541, 1756-57, 1763-64, 1923, 1956, 2202-03, 2232) No significant departmental distinctions in Teaching Fellow responsibilities were identified by the Union. Even within a particular department, faculty may assign different types of grading to their Teaching Fellows. (Tr. 793-94, 1406) For example, Dean Schirmeister testified that “if you were to [take] six history courses, you might find that all six of those teaching fellows are doing a different kind of grading.” (Tr. 794) Indeed, grading responsibilities may vary among Teaching Fellows in the same course. (Tr. 2197-98) In certain courses, a number of sections may be designated “writing intensive.” In those sections, Teaching Fellows grade more papers than do their counterparts in sections that are not

designated as “writing intensive.”³⁷ (*Id.*) Therefore, the type of grading may vary by course (or by section within a course), but all Teaching Fellows, regardless of where their teaching appointment may be, evaluate student work.³⁸ (Tr. 447, 455-56)

Differences that may exist in Teaching Fellows’ duties are driven mostly by course content, which “could vary very widely from course to course,” not necessarily from department to department. (Tr. 457) In History of Art, Teaching Fellows may work with objects, but their counterparts in other departments also utilize objects to teach students. (Tr. 1445, 1453-54, 1462) For example, in Treasures of Yale, a course offered by the Humanities undergraduate major, the curriculum includes student observation of a collection of musical instruments at one of Yale’s art galleries. (Tr. 2458-59) Dean Schirmeister herself taught a course cross-listed in English and Humanities, where she took students to Beinecke Library to view maps from the Lewis and Clark expedition. (*Id.*)

B. All Teaching Fellows Have Similar Teaching Skills, Qualifications, and Training

All Teaching Fellows, regardless of department, have the same fundamental skills and qualifications for imparting knowledge. (Tr. 456-57) The chief differences lie in the subject matter. (*Id.*) However, whether “they’re talking about photosynthesis or photography, [Teaching Fellows] have to be able to take the material and make it [understandable] to somebody unfamiliar with it. That’s at the heart of teaching.” (Tr. 455) The common denominator is that Teaching Fellows must be equipped to present topics in an organized and

³⁷ The writing intensive designation satisfies a Yale College writing requirement for undergraduate students. (Tr. 1962, 2493)

³⁸ Some Teaching Fellows may teach courses in a slightly different manner than others, *e.g.*, in “flipped classes.” (Tr. 2449-50) In a flipped class, lectures are available for students to watch or read online on their own, and students perform course work in class, rather than the traditional course structure where students attend class to hear a lecture and do course work at home. (*Id.*; Tr. 794-95) The flipped classroom method is not specific to any particular department. (Tr. 2449-50) In fact, History of Science and Medicine, Computer Science, Physics, Math, and other departments use this teaching method in certain courses. (*Id.*)

clear manner. (Tr. 455-56) In all departments, faculty look for articulate students who can clearly present material in the classroom. (Tr. 699)

Although every graduate student may have a specific area of expertise related to their studies, that is not particularly relevant to their qualifications as Teaching Fellows. In many courses, Teaching Fellows have no subject matter expertise in the areas covered by the course to which they may be assigned. (Tr. 1285) Indeed, the record reflects that Teaching Fellows may not be conversant with the subject matter. For example, Mr. Winant testified to this effect regarding a course to which he was assigned on the Great Recession. (Tr. 1979-81, 2234) Because he did not have detailed knowledge of the 2008 financial crisis, he first needed to “make that material intelligible” to himself before he could teach it to others.³⁹ (*Id.*)

In addition, as History registrar Marcy Kaufman testified, “Sometimes, students have to teach something that’s a little far afield from what they do[.]” (Tr. 1626) The TFP encourages graduate students to teach outside their area of expertise because it makes them more well-rounded as teachers and stronger candidates for later employment. (Tr. 645-46)

Teaching Fellows are not expected to have highly specialized teaching skills. Most arrive at the Graduate School without prior teaching experience. In fact, a key role of the TFP is to provide graduate students with opportunities to develop teaching skills. (Tr. 472) One such opportunity is “Teaching at Yale Day,” a full-day program designed to prepare Teaching Fellows to teach Yale undergraduates. (Tr. 280, 678; Er. Ex. 32) Participation is mandatory for all

³⁹ Mr. Winant attempted to distinguish teaching in History from other teaching by citing the example of African American history, which he said required “a particular set of approaches, [such as] how you teach a matter like the Klu [*sic*] Klux Klan and lynching... [and] appropriate ways of engaging people in discussion about that [] who have different . . . experiences.” (Tr. 2172) At that point in his testimony, Hearing Officer Dease inquired of the witness whether that kind of teaching would be common to other departments. (*Id.*) When Mr. Winant answered that it would not, the Hearing Officer asked: “Well, what if... I’m teaching Tom Sawyer, do I have to have some sensitivity to discussing... race in that context?” (*Id.*) The Hearing Officer’s question highlights that the fine distinctions drawn by Mr. Winant and the several other Union witnesses, between the skills required to teach in different departments, do not stand up to scrutiny and are irrelevant in any event.

Graduate School students before they will be allowed to teach for the first time.⁴⁰ (Tr. 280, 678; Er. Exs. 7, 32) Students who are unable to attend must do so the following semester, or participate in a teaching workshop series entitled “The Fundamentals of Teaching.” (Er. Ex. 32) Teaching at Yale Day is run by the Center for Teaching and Learning (“CTL”), “a [U]niversity wide center dedicated to improving learning outcomes through better teaching.” (Tr. 675-78) It offers trainings, materials and support to all Teaching Fellows throughout their teaching experience. (Tr. 59, 279-80, 675-78; 1598, 2169-70)

The Graduate School also encourages departments to initiate workshops specific to certain disciplines so that Teaching Fellows can learn to become effective teachers in those areas. (Tr. 2459-60) Where they exist, these workshops are presented by, or in collaboration with, the CTL, not through the department.⁴¹ (Tr. 744-45, 1036, 1357, 1774-76) Faculty also provide “on-the-job” training to Teaching Fellows in weekly course meetings held with Teaching Fellows assigned to their class. (Tr. 709, 1443-44, 1707-08, 1837-38, 1980-81)

C. Teaching Fellows Are Not Supervised or Evaluated at the Departmental Level

Teaching Fellows are not supervised by any departmental administrator, or any other individual at the departmental level. (Tr. 651-52, 707, 709, 1044, 1111, 1210) Rather, and as the Union stipulated, all Teaching Fellows are supervised directly by the faculty member -- whether a tenured professor, lecturer, or otherwise -- assigned to teach the course to which the

⁴⁰ Teaching at Yale Day is only required for students registered in the Graduate School. The Graduate School cannot require students from other parts of the University, *i.e.*, professional schools, to participate. (Tr. 714-15)

⁴¹ Only one exception has been identified. Graduate students seeking a degree in English must attend a “Teaching Practicum,” which is an academic degree requirement offered by English department faculty. (Bd. Ex. 11, n.12) However, this “training” is not specific to *Teaching Fellows* in English. (*Id.*) Rather, all *graduate students* in the English department must attend the course. (*Id.*) Thus, Teaching Fellows in the English department who are homed in other departments -- this semester, there are seven -- are not required to take the course. (*Id.*; Er. Ex. 34) Therefore, this “training” is not taken by all Teaching Fellows in the English department bargaining unit. Moreover, this semester, there is an English student teaching in History. (Er. Ex. 34) That student would be required to take the English Teaching Practicum, whereas his History Teaching Fellow counterparts would not.

Teaching Fellow has been assigned. (Tr. 1531-32) The responsible faculty member may or may not be in the same department as the Teaching Fellow that he or she is supervising. (Tr. 1051, 1300-02; Er. Ex. 42)

The nature and extent of the supervision is consistent across departments. Faculty are expected to meet weekly with their Teaching Fellows to provide guidance. (Tr. 707-08) At these meetings, faculty discuss the topics that Teaching Fellows should cover in their discussion/lab section; address questions that the Teaching Fellows have raised about the course; and, handle general logistical issues, *e.g.*, scheduling. (Tr. 1407, 1443-44, 1707-08) Faculty are expected to observe and critique their Teaching Fellow's section at least once, and the professor may offer them the opportunity to give a course lecture, which the professor will then critique. (Tr. 707-08) Faculty also supervise Teaching Fellows in writing grading rubrics, essay prompts, and exams. (Tr. 709)

Individual faculty members supervising Teaching Fellows are expected in all departments to provide feedback, typically oral, on their performance.⁴² (Tr. 710, 1210) Departmental administrators (the chair, DGS, *etc.*) have no role-- formal or informal -- in the Teaching Fellow's evaluation. (Tr. 710)

D. Academic Departments Exercise No Disciplinary Authority Over Teaching Fellows

Academic departments do not have any authority to discipline Teaching Fellows. (Tr. 459, 1209) In fact, departments do not have labor relations or human resources functions. (Tr. 458) Dean Schirmeister and the individual faculty member supervising the Teaching Fellow are together responsible for discipline, on the rare occasion that it is necessary. (Tr. 459-60) In one

⁴² Undergraduate students complete a more formal course evaluation towards the end of the course, which includes a space for the student to evaluate their Teaching Fellow.

recent example, a student from the School of Music (one of the professional schools) teaching an undergraduate music course did not attend the first three meetings of the course and showed up late for the fourth. (Tr. 460) The department chair, not knowing how to handle the situation, contacted Dean Schirmeister and informed her that the faculty member wanted to terminate the Teaching Fellow. (*Id.*) Dean Schirmeister authorized the termination of the appointment and the Teaching Fellow was removed from the course. (Tr. 460-62)

Of course, occasionally Teaching Fellows are involved in minor disputes that do not require issuing actual discipline but merely require maintaining good interpersonal relations. In those instances the faculty member of record for that course (as the supervisor) will typically speak with the student or students involved to try to resolve the issue.⁴³ (Tr. 1989-90, 2243-44, 2248-49)

E. Teaching Fellows Cross Departmental Lines

Teaching Fellows are frequently assigned to teaching appointments in a department other than their home department.⁴⁴ (Tr. 643-44) The Graduate School actually encourages students to teach outside their home department because “when [they] go on the [job] market they are

⁴³ The Union called attention to two incidents that it may attempt to characterize as “discipline.” However, neither situation was disciplinary. Mr. Winant was the subject of both instances of so-called “discipline.” He testified that he was “disciplined” for grading a paper too harshly. (Tr. 1989-90) In that case, the professor of the course suggested that Mr. Winant apologize to the student, which he did. (Tr. 1989-90, 2243-44) Nothing further occurred and Mr. Winant never received any oral or written warning, letter, or other adverse effect on his teaching based on this incident. (Tr. 2243-44)

Mr. Winant also testified that he and another Teaching Fellow who was assigned to the same course got into a verbal disagreement. (Tr. 1988-89) The Teaching Fellow complained to the faculty member of record for that course who did not want to be involved, so the Teaching Fellow next complained to the department chair. (*Id.*) The chair asked to speak with Mr. Winant and “advise[d]” or “counseled” Mr. Winant to stay away from the other Teaching Fellow. (Tr. 1988-89, 2248-49) Mr. Winant admitted that he was unaware of anything being placed in his file about the incident and he has never experienced any adverse consequences based on that incident. (Tr. 2250-51)

⁴⁴ Indeed, counsel for Petitioner acknowledged that, when he was a Yale law student, he served as a Teaching Fellow in a History course. (Tr. 387)

much better served by having an array of teaching experiences.”⁴⁵ (Tr. 646; *see also* Tr. 418-19)

In some cases, Teaching Fellows teach in other departments out of necessity because there are not enough teaching opportunities available in their home department. (Tr. 645-46) This practice is so prevalent in some departments -- Sociology, African American Studies, and Comparative Literature -- that they have complained to the TFP that they want their graduate students to teach more in their home department. (Tr. 648-49)

Two department chairs, Professor Naomi Lamoreaux (History) and Professor Paul Tipton (Physics) and, both testified that they have taught courses with Teaching Fellows from a number of different departments other than history and physics, respectively. (Tr. 1051-52, 1300-01, 1306-07) In Professor Lamoreaux’s most recent course, U.S. Economic History, which was cross-listed as a History and Economics course, she had no Teaching Fellows from the History department and only one from Economics. (Tr. 1300-02) Instead, she interviewed students from the Law School, the School of Management, the Jackson Institute for Global Affairs, and even the School of Nursing. (Tr. 1306-07) Professor Tipton testified that his head Teaching Fellow was a Chemistry Ph.D. while serving as a Teaching Fellow in Physics. (Tr. 1051) Professor Tipton also testified that Teaching Fellows in the Physics department have come from the Law School, Applied Physics, and other Engineering departments. (Tr. 1051-52)

At the hearing, Yale also presented empirical data showing the level of crossover between departments. Dean Plummer, Yale’s Director of Business Management, compiled and analyzed voluminous data illustrating that in Fall 2016, of the 310 individuals with teaching appointments in the original 10 petitioned-for departments, 64 of them – almost 21% – had

⁴⁵ Petitioner Exhibit 13a, the 2015-16 History of Art Graduate Student Handbook, specifically states that “teaching positions may be within, or in some cases, outside of [Teaching Fellows’] department or program, or in newly identified areas of professional development, such as assistantships in Yale’s collections, in digital humanities, and in the teaching of writing or other skills.” (Pet. Ex. 13a, p. 9)

Teaching Fellow appointments in a department outside their home department.⁴⁶ (Bd. Ex. 6; Er. Ex. 34, 36)

Conversely, of the 287 graduate students homed in the original 10 departments that are encompassed by the petitions, 39 of them (14%) are teaching outside their home department. (Er. Ex. 38)

Looking beyond the petitioned-for departments, the degree of crossover is even greater. (Bd. Ex. 7; Er. Ex. 35) This semester, there are 539 Teaching Fellows with appointments in the 46 departments where the Union is not seeking an election. (*Id.*) Within that group, 131 (24%) are teaching outside their home department. (*Id.*)

Mr. Plummer also testified, and the analyses that he prepared clearly demonstrate, that two graduate students in the petitioned-for units have concurrent assignments in two different petitioned-for departments. (Tr. 904-05) One East Asian Studies student (a terminal master's program) is teaching in both EALL and History of Art. (Bd. Ex. 6; *see also* Tr. 833-34) The other Teaching Fellow is a graduate student in Physics who has appointments in both Physics and EALL this semester. (*Id.*) Therefore, should the Regional Director approve elections consistent with the Petitioner's request, these two individuals would be permitted to vote twice.

F. Teaching Fellows Seldom Substitute for Each Other

Occasionally, Teaching Fellows substitute for one another. When a Teaching Fellow cannot teach his or her section due to illness or other reason, the favored option is for the faculty member to fill in and teach the section. (Tr. 722) Seldom, another Teaching Fellow in the same course will substitute. (Tr. 1368-69) However, in other instances, a Teaching Fellow from

⁴⁶ The Union's attempt to undermine this evidence was to no avail. On cross-examination, Mr. Winant was forced to concede that Yale's analysis of the crossovers was supported by the facts. (Tr. 2288-90, 2294-95, 2299-2301; Pet. Ex. 33a)

outside the course or department may substitute. (Tr. 2436) Thus, Noah Rosenblum, a Yale law student, testified that as a Teaching Fellow in the History department he once had a Directed Studies (non-History department) student substitute for him while he was absent. (*Id.*) There is no rule or consistent practice regarding who may substitute for an absent Teaching Fellow, but when substitutions are necessary, the substitute and the absentee are not necessarily from the same department.

G. Teaching Fellows Primarily Interact with Others Assigned to the Same Course

Whatever the department, Teaching Fellows perform the majority of their teaching duties independently and often solitarily, *i.e.*, they do not collaborate with other Teaching Fellows inside or outside the department, and generally not much with Teaching Fellows assigned to the same course. (Tr. 716-17) Typically, they lead discussion/lab sections without any other Teaching Fellow present, they hold office hours on their own, and they often grade papers and exams by themselves. (Tr. 1391, 1539, 1544, 1715, 1756, 1884, 2394, 2399) Occasionally, Teaching Fellows may meet with their students in coffee shops and graduate student lounges, resulting in some incidental contact with other Teaching Fellows in the department. (Tr. 1855, 1967-68, 2347) However, when Teaching Fellows meet with one another, hold office hours together, or grade in groups, it is almost always with other Teaching Fellows assigned to other sections of the same course. (Tr. 1455, 1959-60, 1981) Thus, where interaction occurs at all, it is on the course level, not departmentally. (Tr. 716-17, 721, 1527-28)

Department-wide events, *e.g.*, workshops or seminars, are not limited to graduate students who may be teaching in the department at that time; rather, they are open to all graduate students in the department and even outside the department.⁴⁷ (Tr. 1571-72) Teaching Fellows

⁴⁷ Teaching Fellow witnesses testified about department-specific social gatherings or other interactions, such as parties at the start or beginning of a term, *e.g.*, “tea time,” department lunches or meetings, or simply spending time

may have somewhat greater contact with others within the same department, but if they are not teaching sections of the same course, those contacts are at best casual and infrequent. (Tr. 1052, 2224)

However, Teaching Fellows teaching in one department do meaningfully interact with graduate students teaching in other departments. For example, all incoming graduate students attend an orientation together upon arrival at Yale. (Tr. 279-80) Then, throughout their time at Yale, graduate students participate in training programs open to all graduate students, such as the Fundamentals of Teaching workshop, attend yearly GSAS parties and other events open to all graduate students, spend time in student lounges across the Graduate School, and otherwise interact with students in other departments. (Tr. 59, 279-80, 675-82, 1598, 2169-70, 2461; Er. Ex. 32)

H. Teaching Fellows Across All 56 Departments in the Graduate School Receive Similar Compensation and Benefits

Upon admission, all doctoral students in the Graduate School, regardless of department, are guaranteed five years of financial aid. (Tr. 270-71, 2501; Er. Ex. 4, p. 594) For students in the Humanities or Social Sciences, the Graduate School guarantees a sixth year of full funding if the student is on track to complete his or her dissertation by the end of the sixth year of study. (Tr. 270-71, 2501-02; Er. Ex. 4, p. 594) Graduate student funding does *not* vary at all by department. (Tr. 841-42) All students in the Humanities and Social Sciences receive the same stipend of \$29,650, though students in the Natural Sciences receive slightly more at \$33,150. (Tr. 273-74, 841-42) Graduate students also have the same amount of their stipend allocated to

in student lounges. (Tr. 1379-81, 1570) However, those witnesses also conceded such interactions involve *all* graduate students in the department, not just Teaching Fellows. (*Id.*)

teaching, irrespective of department: \$4,000 (per semester) for TF10s and \$8,000 for TF20s.⁴⁸ (Tr. 267, 276, 842, 857-58) In addition, all Graduate Students receive the same student health benefit; there are no departmental variations. (Tr. 840)

I. Bargaining History in Higher Education

At Yale, affiliates of Petitioner -- UNITE HERE Locals 34 and 35 -- currently represent two separate University-wide units of clerical and technical employees and service and maintenance employees, respectively. (Tr. 1672) GESO, the precursor union to Local 33, has a long history at Yale. In 1995, members of GESO conducted a “grade strike” in a misguided attempt to force the University to enter into a bargaining relationship with the union. The NLRB ruled that GESO’s grade strike was an illegal partial strike, and that the strikers had misappropriated university property. *Yale University*, 330 NLRB 246 (1999). In 2003, GESO conducted its own election among graduate students on a University-wide basis -- but lost it -- despite “organiz[ing] the vote with procedures that were widely viewed as skewing the poll in its favor.”⁴⁹

Outside Yale, the pattern of bargaining in higher education is similarly university-wide in scope. Professor Samuel Estreicher, a noted authority on labor relations and collective bargaining, who has been a tenured member of the faculty of New York University School of Law since 1983 and has practiced labor law for approximately 40 years, testified that he could locate *no* examples of collective bargaining units limited to employees of individual academic departments *anywhere* in the country, either among graduate teaching assistants or faculty. (Tr. 1190-91; Er. Ex. 45) Professor Estreicher compiled a list of every collective bargaining

⁴⁸ The non-stipend pay rate is the same as the amount of the stipend allocable to required teaching: \$4,000 for a TF10 and \$8,000 for a TF20. (Tr. 656)

⁴⁹ *Grad Students Reject Union in Yale Vote*, New York Times, May 2, 2003, at Appendix D.

agreement that could be found with graduate assistant bargaining units, and a separate list of agreements covering private sector faculty units. (Tr. 1177-79, 1185-87; Er. Exs. 46, 46a-hh, 47, 47a-hh) Professor Estreicher identified 34 graduate assistant units and 34 faculty units. (*Id.*) Every bargaining unit was university-wide, system-wide, or college-wide in scope, with occasional carve-outs for law or medical schools. (*Id.*) *There were no departmental units.* (*Id.*)

ARGUMENT

THE UNION’S NINE PETITIONS MUST BE DISMISSED AS EACH SEEKS AN ELECTION IN A “FRACTURED” UNIT INAPPROPRIATE FOR COLLECTIVE BARGAINING

I. The History of Bargaining on a University-Wide Basis at Yale and Throughout Higher Education Requires Dismissal of the Union’s Departmental Petitions

As the Board stated in *Specialty Healthcare*, “the traditional community-of-interest test . . . has always been informed by empirical knowledge acquired by the Board about the industry and workplace at issue.” 357 NLRB at 939; *see also Macy’s, Inc.*, 361 NLRB No. 4, slip op. at 13 fn.50 (“[A]rea practice and the history of bargaining in the industry [] are relevant considerations.”). By seeking elections in “fractured” bargaining units, limited to Teaching Fellows in each of the nine named academic departments but excluding all other Teaching Fellows in Yale’s Teaching Fellow Program, Local 33 ignores this well-established principle of Board law. It also ignores the undisputed, extensive history of collective bargaining at Yale. Indeed, Petitioner’s affiliates, UNITE HERE Locals 34 and 35, have for decades represented separate University-wide bargaining units of clerical/technical and service/maintenance employees, respectively. (Tr. 1672)

In addition, Local 33 ignores an earlier and unsuccessful effort to organize clerical and technical employees in a single department of Yale’s Medical School. *Yale University*, 184 NLRB 860 (1970). For many of the same reasons that the Board should dismiss Local 33’s nine

departmental petitions, the NLRB concluded in that earlier *Yale* case that a unit limited to employees in the Medical School's Department of Epidemiology and Public Health (EPH) was inappropriate. The Board observed that the petitioned-for employees were covered by standardized personnel policies and procedures applicable to all University employees; that the independence and autonomy of the EPH Department was questionable; that the EPH Department was dependent upon administrative and other services provided by the University to all its constituent parts; and that the employees whom the Union was seeking to represent worked in more than a dozen locations around the campus other than the EPH building. Notably, the decision reflects that for nearly 25 years (at the time of the ruling in 1970), there had been a pattern of University-wide bargaining units at Yale, and that Local 35, a sister local to the union here, had joined the University in opposing the EPH unit and urging that only a campus-wide unit was appropriate. The petition was dismissed by the Board. So, too, should the Regional Director dismiss Local 33's nine petitions.⁵⁰

This history of University-wide bargaining at Yale for the last 70 years, together with the Board's rejection of a prior attempt to organize employees on a departmental basis in the Medical School, is sufficient in and of itself to support a decision dismissing Local 33's nine petitions. However, the record in this case goes well beyond that, demonstrating not only a history of University-wide collective bargaining at Yale, but also a uniform pattern of bargaining on that broad basis for graduate assistants and faculty at all public and private universities around the country.

The record contains 68 collective bargaining agreements demonstrating that, without exception, graduate assistants and faculty are certified in university-wide units, and not in

⁵⁰ See also *Harvard College*, 269 NLRB 821, 824 fn.8 (1984) (noting the fact "that prior bargaining patterns are university-wide in scope demonstrates that bargaining on that basis is practicable").

individual academic departments. Professor Samuel Estreicher, appearing on behalf of Yale, testified based on his studies (Er. Exs. 46 and 47) that there are *no* collective bargaining units limited to employees of individual academic departments anywhere in the United States. (Tr. 1190-91; Er. Exs. 45, 46, 46a-hh, 47, 47a-hh); *See Columbia University*, No. 364 NLRB No. 90, slip. op. at 9 (finding that “the experience with graduate-student collective bargaining in public universities is of relevance in applying the Act, as the closest proxy for experience under the Act”). The Union did not even cross-examine Professor Estreicher on this core aspect of his testimony. Nor did it offer any evidence to refute his assertions that Local 33’s departmental units are unprecedented. The Union therefore has conceded the point.

The Board’s recent decision in *Columbia University* confirms the appropriateness of university-wide units in the higher education context. The Board found appropriate a university-wide bargaining unit of graduate and undergraduate teaching assistants, explaining that the exclusion of certain student assistants from the unit, as advocated by the university, “might undercut the integrity of the overall bargaining unit, because these employees perform not-readily differentiable work.” 364 NLRB No. 90, slip op. at 20, n.128. Here, as in *Columbia University*, Teaching Fellows in one academic department perform work that is “not readily differentiable” from the work of Teaching Fellows in any other academic department. In addition to Columbia, every other private university at which graduate students have held or will soon hold union elections has followed the industry pattern of school-wide bargaining units, including at NYU, Cornell, and most recently Harvard.⁵¹

⁵¹ See *New York University*, 2-RC-22082 (2000); *Union University Conduct Rules and Recognition Election Agreement*, between Cornell University and Cornell Graduate Students United (May 16, 2016), at Appendix E; *Harvard University*, 01-RC-186442 (2016), at Appendix B.

Local 33's nine petitions are subject to dismissal based on this well-established bargaining history alone. The longstanding pattern of bargaining in higher education is controlling. As the Supreme Court stated in *Yeshiva University*: "Principles developed for use in the industrial setting cannot be imposed blindly on the academic world." 444 U.S. at 680-81. In these circumstances, it is unnecessary for the Regional Director to analyze the remainder of the record to find that the petitions -- all nine of them -- seek elections in fractured units of Teaching Fellows that are inappropriate for bargaining.

Moreover, labor disputes and other administrative problems -- too obvious to require elaboration -- that would ensue from a finding that 56 individual academic departments could constitute separate appropriate units, compels dismissal of the petitions. Any other outcome would lead to a proliferation of bargaining units harmful to the educational interests of students, without any reciprocal benefit. Such a finding would frustrate -- not advance -- the Act's purposes.

Nevertheless, the University further demonstrates below through its analysis of the facts and the relevant case law why, even under *Specialty Healthcare's* micro-unit test, the smallest appropriate unit encompassing the Teaching Fellows sought by Local 33 must include all such students holding teaching appointments in Yale's Teaching Fellow Program.

II. The Petitioned-For Units, Consisting of Only an Arbitrary Segment of the Teaching Fellow Classification, Are Fractured Units Inappropriate for Purposes of Collective Bargaining

In *Specialty Healthcare*, the Board articulated a three-part analysis applicable to cases in which an employer contends that the smallest appropriate bargaining unit must include employees or job classifications not included in the petitioned-for unit.

First, the Board determines whether the petitioned-for unit consists of employees who are "readily identifiable as a group." 357 NLRB at 945. To make this determination, the NLRB

considers factors such as “job classifications, departments, functions, work locations, skills or similar factors.” *Id.*

If the Board concludes that the unit is “readily identifiable,” it then must determine whether the employees in that unit share a community of interest such that it meets the test of appropriateness. *Id.* In making that determination, the NLRB looks to the traditional factors, which include:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

357 NLRB at 942 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

If the petitioned-for employees share a community of interest, the burden shifts to the employer, who must demonstrate that the excluded employees share an “overwhelming community of interest” with the petitioned-for employees and that there “is no legitimate basis upon which to exclude [them] from” the larger unit because the traditional community of interest factors “overlap almost completely.” *Id.* at 943-44, n.28.

In that event, the petition will be deemed to seek an election in a “fractured unit,” *i.e.*, an “arbitrary segment” of an appropriate unit, and will be dismissed unless the union opts to proceed to an election in the broader unit. *See, e.g., Odwalla, Inc.*, 357 NLRB 1608, 1608 (2011). In *Specialty Healthcare*, the Board explained that where a union petitions for a unit composed of only selected employees in a particular classification, “it would likely be a fractured unit.” 357 NLRB at 946.

That is precisely what Local 33 has done here in its nine petitions for separate academic departmental units, each an arbitrary segment of an overall unit of Teaching Fellows in Yale's Teaching Fellow Program. There can be no denial that these are *per se* "fractured" units as defined in *Specialty Healthcare*, that are inappropriate for purposes of collective bargaining. Accordingly, the petitions must be dismissed.

Although that should end the analysis, we demonstrate below that the Union has failed to meet either the first or second prongs of the *Specialty Healthcare* test.⁵² Given the loose lines of distinction between academic departments, a unit of Teaching Fellows appointed to teach for only a semester in a particular academic department cannot be considered "readily identifiable as a group." Nor can it be shown that there is any greater community of interest among Teaching Fellows within any of the nine academic departments identified in the petitions than exists among all Teaching Fellows in the Teaching Fellow Program. While the Union argues that the fine distinctions between Teaching Fellows appointed to nine different departments are sufficient to warrant a separate unit, the law is to the contrary. The Board acknowledged in *Specialty Healthcare* that "some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries." *Id.* at 946. The distinctions relied upon by Local 33 fall comfortably into that category. In any event, and as more fully discussed below, the University has met its burden of showing that an "overwhelming community of interest" exists between the Teaching

⁵² Although *Specialty Healthcare* clarified the Board's unit determination standard, the Board has repeatedly argued and affirming courts have repeatedly held, that the standard was not *changed* by *Specialty Healthcare*. See *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 441 (3d Cir. Aug. 9, 2016) ("[T]he Board clarified—rather than overhauled—its unit-determination analysis.") (citing *Nestle Dreyer's, Ice Cream Co. v. NLRB*, 821 F.3d 489, 500 (4th Cir. Apr. 26, 2016); see also *Macy's, Inc. v. NLRB*, 824 F.3d 557, 566 (5th Cir. 2016); *Kindred Nursing Ctrs., LLC v. NLRB*, 727 F.3d 552, 561 (6th Cir. 2013) ("The Board has used the overwhelming-community-of-interest standard before, so its adoption in *Specialty Healthcare* ... is not new."); *FedEx Freight v. NLRB*, 816 F.3d 515, 525 (8th Cir. Mar. 7, 2016) ("We conclude that the overwhelming community of interest standard articulated in *Specialty Healthcare* is not a material departure from past precedent") (citation omitted). Therefore, caselaw pre-dating *Specialty Healthcare* continues to be relevant and instructive.

Fellows in each of the nine petitioned-for units and all other Teaching Fellows in the remaining 47 GSAS academic departments whom Petitioner has ignored. As such, the units are “fractured” and, therefore, inappropriate for certification.

At various points during the hearing (Tr. 761, 916-17, 1319), the Union called attention to the Board’s decision in *Macy’s, Inc.*, 361 NLRB No. 4 (2014) -- a case that arose in NLRB Region 1 -- where the Board found appropriate a separate unit of employees in the Cosmetics and Fragrance (“C&F”) Department. Putting aside whether *Macy’s* was correctly decided, there is no comparison to be made between the unit approved there and the fractured units here. The record in *Macy’s* included evidence of connected and defined work areas; common first-level supervision; and functional integration of work (all employees sold the same products). *Id.* at 8. By contrast, Teaching Fellows lead sections on their own in classrooms scattered across the University; are individually supervised by the professor responsible for the course to which they have been appointed; and teach different courses using different materials. (*See* Statement of Facts, pp. 20, 31, 33-34, 38, above.)

More importantly, the factors that support an overwhelming community of interest here were not present in *Macy’s*. Here, all Teaching Fellows are supervised at the first level by individual professors and at a higher level by the Graduate School; their only common supervision is on a school-wide and not departmental basis. (*See* Statement of Facts, pp. 21-22, 24-29, 33-35, above.) And, there is meaningful interchange across departmental lines. (*See* Statement of Facts, pp. 35-37, above.) By contrast, in *Macy’s*, the C&F Department had a separate supervisory structure, and the petitioned-for-employees had only minor contact or interchange with excluded employees. *Id.* at 9-10. Despite the Union’s repeated attempts to do

so, no analogy can be drawn between graduate student teachers at Yale and the retail employees in Macy's C&F department. The case is plainly inapposite.

More instructive are two decisions issued by the Regional Director in June 2016: *Ikea U.S. East, LLC*, 01-RC-176529 (2016), and *IGT Global Solutions*, 01-RC-176909 (2016). In both matters, the Regional Director found "fractured" units. The fact pattern in each of those cases closely mirrors ours and provides a clear road map to dismissal.

In *Ikea*, the union sought to represent a unit limited to the Goods Flow In (GFI) employees within the Goods Flow Department of the store. The employer contended that the smallest appropriate unit must include the Goods Flow Out (GFO) employees in the same department. *Id.* at 1-2. Relying on *Specialty Healthcare*, the Regional Director found that where a unit "includes some, but not all, of the co-workers who share the same job title and job description," the unit is "fractured." *Id.* at 7.

The factors on which the Regional Director based his conclusion are present here as well. In *Ikea*, the included and excluded employees in the Goods Flow Department shared the same job title and job description; were supervised by five different first-level supervisors, but had common supervision at a higher level; performed virtually the same duties; and received the same training. *Id.* 7-8. Here, all Teaching Fellows carry one of a handful of titles; are all individually supervised by the professors in the courses that they teach, but are commonly supervised at the Graduate School level; perform the same duties; and are trained in substantially the same manner. (See Statement of Facts, pp. 21-34, above.) Additionally, the Regional Director noted that although some community of interest factors were absent, *e.g.*, temporary interchange and work-related contacts, those differences were outweighed by the factors identified above. *Id.* at 8.

A fractured unit also was found in *IGT Global*. There, the union petitioned for a unit limited to six Field Service Technicians (FSTs). The employer maintained that the unit also should include Gaming Service Technicians (GSTs), as well as two FSTs who worked from home. *Id.* at 1. There, as here, the employees were “subject to the same terms and conditions of employment,” including the same benefits and the same employment policies. *Id.* at 5. They also possessed “similar skills and received similar training.” *Id.* at 5-6. All this similarly is true of Yale’s Teaching Fellows. And, as in *Ikea*, the Regional Director found a number of distinctions between the included and excluded employees, *e.g.*, different hours and work areas. However, the Regional Director found that “these factors [were] outweighed by the factors described above.” *IGT Global*, at 6. As we show below, the same may be said here. The similarities to our case are compelling and require the same outcome, *i.e.*, a finding that the petitioned-for units are “fractured” and, therefore, inappropriate for collective bargaining.

A. Teaching Fellows Appointed to the Nine Petitioned-For Academic Departments Are Not “Readily Identifiable as a Group”

A unit of employees is “readily identifiable as a group” under *Specialty Healthcare* when there is a “rational basis” for grouping them together in a bargaining unit. *See Odwalla*, 357 NLRB 1608, 1612. Failing that, the Board will find that the unit is not readily identifiable and dismiss the petition. *See, e.g., A.S.V., Inc.*, 360 NLRB No. 138, slip op. at 4 (2014) (finding that because there was “no rational basis for excluding” certain employees, unit sought was a fractured unit); *Becker College*, 01-RC-081265, at 20 (2012) (finding that “the unit sought is a fractured unit that is not readily identifiable as a group.”).

Here, the graduate students whom the Union seeks to represent are not readily identifiable as a group.⁵³ *First*, the Teaching Fellow classification is not specific to any single academic department or any group of departments, let alone the nine academic departments that are the subject of this proceeding. Rather, Teaching Fellows are common to all 56 academic departments within GSAS. *Second*, Teaching Fellow appointments are short term in nature and subject to change semester-to-semester. Thus, the mix of Teaching Fellows with appointments in any particular department will change from one term to the next, and a student may teach in one department one semester and another department the next. As such, the departmental units are not readily susceptible to identification. *Third*, the Teaching Fellows appointed to teach in any particular academic department are homed in various departments, not necessarily the department in which they are assigned. *Fourth*, given the high degree of overlap among the 56 academic departments within the GSAS, there is no administrative or operational underpinning for the nine separate units that the Union seeks to represent.

Plainly, there is no “rational basis” for a bargaining unit consisting of graduate students with teaching appointments in any one of the nine departments in issue. Instead, the petitions draw artificial lines around and isolate, without justification, a fraction of the total Teaching Fellow group that simply does not conform to any operationally meaningful line-drawing by the University. Accordingly, the units sought do not consist of employees “readily identifiable as a group” under *Specialty Healthcare*, and the petitions should be dismissed on that basis. In any

⁵³ It is important to note that the petitions did not clearly identify which Teaching Fellows the union sought to represent. They referred to graduate student teachers “in” each of the 10 petitioned-for academic departments, without specifying whether the Union was seeking graduate students who were (i) teaching in that department; or (ii) simply homed in that department regardless of where they may teach. At the hearing, it was necessary for the Union to clarify that it was seeking Teaching Fellows with teaching appointments in each of the petitioned-for departments.

event, the petitions seek elections in units that are “arbitrary segments” of an overall unit of Teaching Fellows, ineligible for certification.⁵⁴

B. The Teaching Fellows in Each of the Nine Named Departments Do Not Share a Community of Interest Warranting a Separate Bargaining Unit

As discussed, if the Regional Director determines that the employees in any of the petitioned-for units are “readily identifiable as a group,” the Union then must demonstrate that those employees “share a community of interest using the traditional criteria.” *Specialty Healthcare*, 357 NLRB at 944, n.25. The Union has not done so and cannot do so.

Local 33 would have the Board find that Teaching Fellows within each of the nine named departments share a community of interest simply because they teach within a single academic department in a given semester. (Tr. 1314) However, the Union’s argument rests on cases outside academia -- involving industrial and commercial workplaces, where departments are administrative and/or operational -- ignoring the Supreme Court’s admonition in *Yeshiva University*, “that principles developed for use in the industrial setting cannot be imposed blindly on the academic world.” 444 U.S. at 680-81.

The record demonstrates that academic departments are neither “administrative” nor “operational” in nature. Rather, the lines between departments merely represent an academic community’s attempt to “divid[e] up a multidimensional intellectual space.” (Tr. 50) An academic department is simply “a group of faculty with a common intellectual interest.” (Tr. 199, 1023) To be sure, that is no basis for defining a bargaining unit.

Academic departments at Yale contrast sharply with the departmental units that the Board has approved post-*Specialty Healthcare*. In each of those cases, none of which arose in higher

⁵⁴ While the Regional Director initially observed in his September 28, 2016 letter -- ruling on the University’s motion to require Petitioner to make an offer of proof prior to the start of the case -- that “[t]he units sought in each petition *appear* readily identifiable as a group by virtue of their department,” with the benefit of a full record it should now be clear that in fact they are not readily identifiable.

education, the employees in the department either (a) together played a distinctive role in the employer's operation that distinguished them from the excluded employees, or (b) they worked under supervision separate and apart from the other employees. *See, e.g., Guide Dogs for the Blind, Inc.*, 359 NLRB 1412, 1416-17 (2013) (unit employees performed work that had a "shared purpose" under the same manager, whereas excluded employees had a different purpose and reported to a different supervisor); *Fraser Engineering Co.*, 359 NLRB 681, 688 (2013) (petitioned-for employees were separately supervised at both the first and second levels); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015, 2017 (2011) (unit employees "share a unique function... [and] work in the same department under common supervision.") This cannot be said about the academic departments here. In none of them do Teaching Fellows work under common supervision separate and apart from their colleagues in other departments. Nor do they have a shared job function that distinguishes Teaching Fellows in one department from counterparts in another department.

Either or both of these factors -- a unique, shared purpose to the work performed and common supervision -- are present in each of the post-*Specialty Healthcare* cases where the Board found departmental units to be appropriate. But, they are absent here.

As the Board has acknowledged, departmental lines do not necessarily equate with community of interest. Thus, even if a group of employees is identified as a "department" on the employer's organizational chart, if separate supervision and other community of interest factors are missing, then "departmental distinctions [a]re relatively less important in the organization of the work force" and would not be accorded significant weight in a community of interest analysis. *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 3 (2014); *See also Ikea U.S. East, LLC*, 01-RC-176529, at 8 ("This grouping...does not constitute a traditional department based on

job duties or on function[.]” And, just as the Board will give weight to the employer’s administrative structure as reflected in its own organizational charts -- *see, e.g., A.S.V., Inc.*, 360 NLRB No. 138, slip op. at 5 -- so, too, will it ascribe significance to the absence of a departmental designation on an organizational chart. Yale’s organizational charts do *not* designate any academic departments as separate administrative units within the University. (Er. Exs. 1, 2, and 5) Accordingly, the fact that each petitioned-for unit may refer to a specific academic department is of little significance.

*i. There is No Common Supervision of Teaching Fellows
Within Any Particular Academic Department*

An important factor in any community of interest analysis is whether the employees in question share common supervision separate from other employees. *Specialty Healthcare*, 357 NLRB at 944. Here, it is indisputable that Teaching Fellows within each of the nine petitioned-for units are not supervised by the same individual unless they happen to be assigned to the same course. The Union stipulated that all Teaching Fellows, including those in each of the nine petitioned-for units, are supervised by the faculty member in charge of the course to which the Teaching Fellow is assigned. There is no supervisory relationship between any Teaching Fellow and the chair, DGS or DUS of the department to which the Teaching Fellow is assigned. (*See* Statement of Facts, p. 33, above)⁵⁵ In the absence of common supervision, there should be no finding that the employees share a community of interest warranting a separate unit. *See Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 3 (finding that “the balance of the community-

⁵⁵ The only common supervision of Teaching Fellows is at the Graduate School level, helps demonstrate an overwhelming community of interest across all 56 departmental lines. *See Pratt & Whitney*, 327 NLRB 1213, 1216 (1999) (“Although there is no common immediate supervision shared by the included and excluded employees, there is no common organizational or overall supervision of all the employees in the petitioned-for unit that does not also include excluded employees.”); *Ikea U.S. East, LLC*, 01-RC-176529, at 7 (“Although the [excluded employees] do not share common first- or second-level supervision with the [petitioned-for employees], the [petitioned-for employees] do not share common first-or second-level supervision among themselves[.]”).

of-interest factors weighs against finding that the petitioned for unit is appropriate,” where employees within the petitioned-for unit had “different department managers, different floor managers, and even different directors of sales.”); *Becker College*, 01-RC-081265, at 21 (finding unit inappropriate where it was not “structured along the lines of supervision”); *Odwalla*, 357 NLRB 1608, 1612 (finding petitioned-for unit inappropriate where certain employees had “entirely separate” supervision than others within unit).

ii. Teaching Fellows Within Any of the Nine Petitioned-For Academic Departments Do Not Share Work Duties, Wages or Hours that are Distinct from Teaching Fellows in Other Academic Departments

In analyzing whether a community of interest exists within a particular unit, the Board also will consider whether the employees in question “have distinct terms and conditions of employment.” *Specialty Healthcare*, 357 NLRB at 942. Here, Teaching Fellows within each of the nine petitioned-for units have compensation, benefits, and hours set at the Graduate School level, and they are identical or substantially the same across every academic department in GSAS. (See Statement of Facts, pp. 23-24, 29, 39-40, above.)

On comparable facts, the Board has found no community of interest. See, e.g., *A.S.V., Inc.*, 360 NLRB No. 138, slip op. at 4 (finding no community of interest where petitioned-for employees “do not have a separate wage structure”); *Becker College*, 01-RC-081265, at 22 (finding no community of interest where petitioned-for unit was “not drawn along lines of different methods of compensation...or hours of work”).

Similarly, the job responsibilities and tasks of Teaching Fellows are fundamentally the same across all academic departments. They include leading discussion, lab and review sections, holding office hours, and grading homework, papers, examinations, *etc.* (See Statement of Facts, pp. 29-31, above.) Each of the Teaching Fellow witnesses testified that they performed similar

duties. (Tr. 1405-06, Jifeng Shen (Math): review sessions, proctoring, training, teaching and grading); (Tr. 1528-29, 1542-43, Emily Sessions (History of Art): led discussion sections, held office hours, graded papers and exams); (Tr. 1707, Judith Hoeller (Physics): led discussion sections, held office hours and study halls); (Tr. 1823-26, Jeffrey Niedermaier (East Asian Languages and Literature): gave lectures, facilitated discussions, graded papers); (Tr. 1956-57, Gabriel Winnant (History): led discussion sections, graded papers, held office hours, presented lectures); (Tr. 2345, Noah Rosenblum (Law): led discussion sections, attended lectures, held office hours, graded papers); (Bd. Ex. 11, n. 30; Er. Ex. 29) ⁵⁶

Although their specific duties may vary, whatever differences exist are course-driven; there are no measurable distinctions at the departmental level. (*See* Tr. 794, “[I]f you were to take six history courses you might find that all six of those teaching fellows are doing a different kind of grading.”; Tr. 729-30, “The content of the courses” is the “chief distinguisher” across the Teaching Fellow experience; Tr. 783-84, “[I]ndividual faculty members decid[e] what their course requirements will be.”; Tr. 438-39, “[E]valuating or grading work...depends quite a bit on the course[.]”) Indeed, even within a single course, there is “enormous variation student to student...on how much time they spent on any given activity.” (Tr. 792)

Where, as here, there is no material difference in job duties distinguishing employees in the petitioned-for unit from those who are excluded from it, the Board has found no community of interest in the unit sought. *See, e.g., A.S.V., Inc.*, 360 NLRB No. 138, slip op. at 5 (noting in

⁵⁶ In an attempt to overcome the obvious similarities in Teaching Fellow duties across academic departments, certain Union witnesses strained to find aspects of teaching specific to their particular courses. For example, Emily Sessions, a graduate student in the History of Art Department, testified that teaching in her area of expertise is distinctive because it involves interpretation of objects as opposed to texts. However, the proof shows that this is not unique to art history. (*See* Statement of Facts, p. 31, above.) This sort of testimony typifies how the Union strained to identify distinctions between departments. However, none of it was sufficient to establish a departmental community of interest. *Specialty Healthcare*, 357 NLRB at 934 (“[s]ome distinctions are too slight to or too insignificant to provide a rational basis for a unit’s boundaries.”).

finding no community of interest that “different job functions and duties” among “employees sought by the union...are not present here.”).

iii. *Teaching Fellows Within Any One of the Nine Petitioned-For Academic Departments Do Not Share a Set of Skills or Training That Are Meaningfully Distinct from Teaching Fellows in Other Academic Departments*

In analyzing whether a community of interest exists, the Board also considers whether employees in the petitioned-for unit have “distinct skills and training.” *Specialty Healthcare*, 357 NLRB at 942. A Teaching Fellow teaching in a particular department does not need specialized knowledge unique to students homed in that department in order to assist in teaching a course. All Teaching Fellows must possess certain fundamental skills and abilities regardless of the department in which they are appointed. As Marcy Kaufman (Graduate Registrar, History Department) testified, “[s]ometimes, students have to teach something that’s a little far afield from what they do[.]” (Tr. 1626) The record establishes that a successful Teaching Fellow should be “articulate” and “have an ability to clearly explain things[.]” (Tr. 699) All must master the fundamental skills of teaching. (*See* Statement of Facts, pp. 31-33, above.)

As for training, Teaching Fellows within the departments are primarily trained at the Graduate School level through Yale’s Center for Teaching and Learning. (Tr. 279-80, 708-09, 675-76; Er. Ex. 7) (*See* Statement of Facts, pp. 32-33, above.) They also receive supplemental training and guidance from the individual faculty members who supervise them. (*See* Statement of Facts, p. 33, above.) To the limited extent that the record may demonstrate a degree of separate departmental training, that would not be sufficient to establish the necessary community of interest.⁵⁷ *See, e.g., Peterson/Puritan, Inc.*, 240 NLRB 1051, 1051 (1979) (finding that

⁵⁷ Not even the Teaching Practicum in the English department demonstrates a distinct community of interest, as it is required not just for Teaching Fellows in the English Department, but for *all* students seeking a degree in the English Department. (*See* Statement of Facts, p. 33, n.41, above.)

separate initial training as well as separate “occasional training classes” not sufficient to create “a distinct community of interest.”). Where, as in this case, employees in the petitioned-for unit do not have unique skills or special training, the Board has found that no community of interest exists. *See Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 4, fn.5 (“There is no evidence in the record establishing that sales associates in [the petitioned for unit] share any distinct skills or have received any specialized training.”); *A.S.V., Inc.*, 360 NLRB No. 138, slip op. at 4-5 (finding of no community of interest where both petitioned-for and excluded employees “require[d] similar skills and education,” and where there was “no specialized training required[.]”).

iv. Teaching Fellows Do Not Have Meaningful Contact or Interchange With One Another in Any of the Nine Petitioned-For Academic Departments

The Board also considers whether the employees “have frequent contact ... [and] interchange with other employees[.]” *Specialty Healthcare*, 357 NLRB at 942. This important community of interest factor is not present.

Unlike in a typical manufacturing or retail environment, where employees work side-by-side performing duties that are functionally integrated with one another, Teaching Fellows work independently. In *DPI Secuprint*, 362 NLRB No. 172, slip op. (2015), the Board found that the employees in the petitioned-for unit were functionally integrated, each “handl[ing] an aspect” of the overall production process. *Id.*, slip op. at 2. The employees had “daily contact with each other and substitute[d] for one another on an ad hoc basis.” *Id.* at 5. Here, on the other hand, Teaching Fellows have minimal work-related contacts with other Teaching Fellows, even those teaching in the same department. Nor is there any functional integration of Teaching Fellow work across the department. Teaching Fellows who are assigned to different courses within the same academic department have mostly casual contact with one another; it does not occur during

the course of their work as they teach different courses, at different times and in different locations. (*See* Statement of Facts, pp. 38-39, above.) Teaching Fellows seldom substitute for one another, and when it occurs the substitute will not necessarily be a Teaching Fellow from the same department. In fact, Noah Rosenblum, a law student who was a Teaching Fellow in the History department, testified that a student from outside the department substituted for him when he was absent.⁵⁸ (Tr. 2436)

Beyond weekly meetings between the professor and the Teaching Fellows assigned to his/her course, and occasional University-wide training programs, the opportunities for Teaching Fellows within a particular department to communicate with one another are infrequent. (Tr. 716-17, 1404, 1504, 2184) Where there is interaction, it typically is incidental to events that are not specific to graduate students *teaching* in the department. (*See* Statement of Facts, pp. 38-39, above.) The fact that classrooms are scattered across campus naturally contributes to absence of regular contact among Teaching Fellows. (Tr. 722, 1368-69)

Where, as here, there is limited contact and interchange among employees, the Board generally has found that no community of interest exists. *See, e.g., Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 3 (“[S]ales associates in Salon shoes and Contemporary shoes do not interchange with each other on either a temporary or a permanent basis and have only limited contact.”)

⁵⁸ In the event that a Teaching Fellow becomes ill or otherwise unavailable to teach his or her section, the faculty member of record typically will cover the class. (Tr. 722) If this does not happen, then a Teaching Fellow who has taught the same course before may substitute. (Tr. 722, 1368-69)

- v. *Based on the Lack of Community of Interest Within the Nine Academic Departments in Dispute, a Finding That Any of Those Units is Appropriate Could Only Be Based on the Union's Extent of Organization.*

Section 9(c)(5) of the National Labor Relations Act dictates that “[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling.” 29 U.S.C. § 159(c)(5). Inasmuch as the Union has failed to show that any of the traditional community of interest factors are present within any of the nine petitioned-for departmental units, directing an election in any of these units would by necessity be giving controlling effect to the Union’s extent of organization, there being no other way to justify an election in such a unit. Such an outcome would “violate[] the mandate of Section 9(c)(5) [] by tacitly making extent of organization controlling.” *Local 1325, Retail Clerks Int’l Ass’n v. NLRB*, 414 F.2d 1194, 1198 (D.C. Cir. 1969).⁵⁹

* * *

For all the foregoing reasons, a community of interest does not exist among the Teaching Fellows in any of the nine academic departments encompassed by the petitions sufficient to justify a finding that any of the units sought by Local 33 is appropriate for collective bargaining. Accordingly, the petitions should be dismissed without the necessity for analysis under *Specialty Healthcare*’s third prong.

III. The Petitions Seek Elections in Fractured Units: Teaching Fellows in All Academic Departments Share an Overwhelming Community of Interest

Even if the Board determines under the second prong of *Specialty Healthcare* that the employees in the petitioned-for unit do share a community of interest, a showing that those employees share an “overwhelming community of interest” with excluded employees will result

⁵⁹ The lack of a community of interest within the petitioned-for units is unsurprising, given statements to the media by the union representative that “the union’s organizing efforts have always been structured departmentally.” *Yale Daily News*, September 7, 2016, “Grad Student Union Efforts Provoke Debate,” Appendix C.

in a finding that the petitioned-for unit is fractured and inappropriate. *Specialty Healthcare*, 357 NLRB 934 at 945-46. An overwhelming community of interest exists when there “is no legitimate basis upon which to exclude certain employees from the larger unit because the traditional community-of-interest factors overlap almost completely.” *Id.* at 944.

In other words, when the employees in the petitioned-for unit share a community of interest that is equally shared by the excluded employees, the unit is deemed to be an “arbitrary segment” of a broader unit that cannot be certified. *See Odwalla*, 357 NLRB at 1611. Here, the Teaching Fellows in the nine petitioned-for units do not share any community of interest that is not equally shared by all other GSAS Teaching Fellows. Therefore, an overwhelming community of interest exists and the smallest appropriate unit must include all Teaching Fellows in Yale’s Graduate School Teaching Fellow Program.

A. The Graduate School Exercises Plenary Control Over and Ultimate Supervision of All Individuals in the Teaching Fellow Program

The first commonality supporting a finding of an overwhelming community of interest among all Yale Teaching Fellows is that they all share supervision at the Graduate School level through the Teaching Fellow Program, in which all graduate student teaching is “housed and administered.” (Tr. 39) Although the professors teaching each course determine certain aspects of Teaching Fellows’ experience -- *e.g.*, such as course content, grading rubrics, and office hours expectations -- the deans of the Graduate School retain the real supervisory control, including offering admission to graduate students, allocating Teaching Fellow resources annually to each department, approving Teaching Fellow assignments, setting training requirements, imposing discipline, approving or denying applications for leaves of absence, and setting all policies and

procedures that govern “the entire graduate student experience...start to finish.”⁶⁰ (Tr. 197, 247-49, 283, 307, 331-33) Additionally, the Graduate School provides the vast majority of funding for graduate student teaching; academic departments play a minimal role in funding student life. (Er. Ex. 40)⁶¹

As previously discussed, there is no supervision of Teaching Fellows at the department level. (Tr. 1043-44, 1111, 1210) Even in situations where limited discretion may be granted to the academic departments -- *e.g.*, as in matching Teaching Fellows to specific courses or in holding *ad hoc* training for Teaching Fellows -- the Graduate School always has final approval or veto power; the department’s actions must conform to Graduate School policies. (Tr. 261, 287-88, 301, 375, 404-05) The Board previously has found a departmental unit at Yale to be inappropriate, in part because “policies and practices emanate from one central...personnel office[.]” *Yale University*, 184 NLRB at 861. Therefore, the supervision that all Teaching Fellows share at the Graduate School level compels a finding that the smallest appropriate unit includes all Teaching Fellows.⁶²

⁶⁰ Petitioner argues that because the different administrators may be responsible for matchmaking in the various departments, this somehow serves to distinguish one academic department from another and also evidences departmental autonomy. The Union is wrong on both counts. As Dean Schirmeister testified, regardless of who may be responsible for making Teaching Fellow assignments in a department, many are ultimately made in consultation with the Teaching Fellow Program. (Tr. 2481-82)

⁶¹ Called as a witness on the Union’s case-in-chief, Dean Schirmeister testified to facts that make crystal clear that TFs are under highly centralized control by the Graduate School. On this point, it is important to note that the Union called Dean Schirmeister to give direct testimony during the Union’s case-in-chief. Thus, Dean Schirmeister testified, in part, as the Union’s witness. This is significant since the Union is “bound by [Dean Schirmeister’s] testimony as it called [her] as its witness.” *Hadco-Tiffin*, 198 NLRB 820 (1972) (refusing to adopt the trial examiner’s decision after taking into account the Union President’s adverse testimony when the Company called him as its witness).

⁶² See also *Harvard College*, 269 NLRB 821, 822 fn. 7 (1984) (finding that where within a specific subset of university employees, “authority is exercised strictly within established university guidelines... [there is] little justification in relying upon this factor as a basis for concluding that the employees in question somehow enjoy a separate community of interest.”); *NYC Two Way, Inc.*, 29-RC-063657, at 23-24 (2011) (finding overwhelming community of interest where included and excluded employees were both “directed in their work by the same dispatchers,” and where the same “management provide[d] supervision and administrative assistance to the drivers of all the companies.”); *Pratt & Whitney*, 327 NLRB 1213, 1216 (1999) (“Although there is no common immediate

B. All Teaching Fellows In the Graduate School Share Common Job Functions, Wages and Benefits

Teaching Fellows across all academic departments also share the same job functions performed under the same (or virtually the same) terms and conditions. All Teaching Fellows are part of Yale's Teaching Fellow Program, irrespective of the academic department in which they teach. (Tr. 244, 442-43, 472; Er. Ex. 4, p. 564) While there is some degree of difference in responsibilities depending on a Teaching Fellow's course assignment, the essential job duties do not differ. (See Statement of Facts, pp. 29-31, above.) Additionally, the Graduate School imposes standard requirements governing how much graduate students are expected/allowed to teach, and uniform benefits and pay rates.⁶³ (See Statement of Facts, pp. 23-24, 29, 39-40.)

The *Columbia University* Board found that there are "substantial similarities among the types of work" performed by graduate student teachers across all disciplines, and that they "serve similar functions with respect to the University's fulfillment of its teaching and research mission." 364 NLRB No. 90, slip op. at 19. Indeed, the Board expressed concern in *Columbia* that to exclude a subset of graduate student teachers from the unit "might undercut the integrity of the overall bargaining unit, because these employees perform not-readily differentiable work" from one another. *Id.* at 20, fn.128. The Board's concerns in that case apply with equal force here, where there are "substantial similarities" in the work of all Yale Teaching Fellows. See also *Harvard College*, 269 NLRB 821, 822 fn. 7 (refusing to approve bargaining unit based on

supervision shared by the included and excluded employees, there is no common organizational or overall supervision of all the employees in the petitioned-for unit that does not also include excluded employees."); *Ikea U.S. East, LLC.*, 01-RC-176529, at 7 (finding that where included employees did not share first-level supervision among themselves, and where they shared "common third level supervision" with excluded employees, there was an overwhelming community of interest); *A.S.V., Inc.*, 360 NLRB No. 138, slip op. at 4 (finding petitioned-for unit inappropriate where employees both within and excluded from the petitioned-for unit were "under the direct supervision of [one manager].")

⁶³ Unlike the graduate student teachers in *Columbia University*, Yale's Teaching Fellows receive the same overall stipend even when no appropriate teaching opportunity exists during a term in which they are expected to teach. (Tr. 267, 276, 857-58)

area of research where “the essential nature of the work performed...[is] virtually identical to employees...employed in other areas of the University,” and giving “little weight to the fact that the work may be medically oriented...economically oriented, sociologically oriented, legally oriented, *etc.*”)

When job function, pay and benefits are materially the same among employees inside and outside the petitioned-for unit, an overwhelming community of interest will be found despite differences among individual employees. *Odwalla*, 357 NLRB 1608 (2011); *NYC Two Way*, 29-RC-063657 at 23 (“There are some differences in working conditions...[h]owever, these differences do not appear to be significant in their terms and conditions of employment.”); *Ikea U.S. East, LLC*, 01-RC-176529, at 8 (finding that differences were “outweighed” by similarities between included and excluded employees); *IGT Global Solutions*, 01-RC-176909 (2016). To be sure, this is just such a case.

C. Teaching Fellows Across the Graduate School Share Common Training and Skills

Material differences in employee skills and training may justify the exclusion of certain employees from a petitioned-for unit. Conversely, the absence of such differences is a factor favoring inclusion. The latter is the case here.⁶⁴

In *DPI Secuprint*, the Board found that the petitioned-for unit of several production departments properly excluded employees in the employer’s “offset-press” department. 362 NLRB No. 172, slip op. at 5. The Board relied heavily on the fact that their specific purpose in

⁶⁴ Where the skills and training required for a given job are materially the same for included and excluded employees, the Board has found an overwhelming community of interest. *A.S.V., Inc.*, 360 NLRB No. 138, at 3-4 (petitioned-for unit inappropriate where both included and excluded employees required “similar skills” and “on-the-job training”); *NYC Two Way, Inc.*, 29-RC-063657, at 23 (finding an overwhelming community of interest where “the license [and] skills needed for their work and their training” was the same); *Ikea US East, LLC*, 01-RC-176529, at 8 (finding overwhelming community of interest where both included and excluded employees “undergo the same training.”)

the printing process, operating the offset-press machinery, required “greater skill and lengthier training” than the employees in the petitioned-for unit. *Id.*

By contrast, to be a successful Teaching Fellow in any area, a student must “be able to take the material and make it available to somebody unfamiliar with it.” (Tr. 455) Every new Teaching Fellow, before his or her assignment begins, is required to attend “Teaching at Yale Day.” (Tr. 280, 678; Er. Exs. 7, 32) Yale’s Center for Teaching and Learning offers trainings and materials to all Teaching Fellows throughout their teaching experience. (Tr. 59, 279-80, 675-76, 1598, 2169-70) Where there are training sessions or workshops specific to a certain academic disciplines or departments, they generally are offered under the auspices of the Center for Teaching and Learning. (Tr. 744, 1036, 1357, 1774-76) In addition to these centrally administrated trainings, all Teaching Fellows receive training from the professor responsible for the course to which they are assigned, as well as on the job, *i.e.*, through the act of teaching, grading, *etc.* (Tr. 709, 1443-44, 1707-08, 1837-38, 1980)

As we have pointed out, in higher education the Board has given “little weight” to differences in academic focus or discipline between employees where “it is evident that the essential nature of the work...as well as the skills which are required to perform the[] responsibilities [] are virtually identical to ... other areas of the University.” *Harvard College*, 269 NLRB at 823. Indeed, “it is the nature of the work and the skills required which creates a community of interest – ***not its academic orientation.***” *Id.* (emphasis added); *see also Yale University*, 184 NLRB at 862 (“While the research conducted in the department may vary from that undertaken elsewhere, the skills and techniques employed by [the petitioned-for employees] do not vary substantially from those of other Yale employees holding parallel jobs.”).

D. There is Meaningful Interchange and Contact Across Departmental Lines

In determining whether an overwhelming community of interest exists, the NLRB also considers the frequency of contact and interchange involving the included and excluded employees. *See Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 3 (“[S]ignificant interchange between the Salon Shoes department and the carved-out Contemporary Shoes group could support a finding of community of interest[.]”); *Kosher Plaza Supermarket*, 313 NLRB 74, 77 (1993) (declining to approve unit of employees consisting of one department where there was “substantial evidence of interchange” between included and excluded departments).

Yale’s Teaching Fellows frequently cross departmental lines, which illustrates the high degree of overlap among academic departments. There are a total of 310 Teaching Fellows with appointments in the 10 departments named in the Union’s original petitions. (Er. Ex. 34; Tr. 908) Each of those Teaching Fellows has a home department in which they are seeking a degree; Teaching Fellows seeking joint or combined degrees have two home departments. (Er. Ex. 34; Tr. 921)

Of the 310 Teaching Fellows, 64 (24%) of them are homed in a department different from the one in which they are teaching. (Er. Ex. 34; Tr. 913) In certain of the departments sought by the Union, there is an even higher degree of crossover with other departments. For example, there are 29 Teaching Fellows appointed to teach in East Asian Languages and Literature. (Er. Ex. 34; Tr. 911) Twenty-four (82%) of them are homed in departments other than East Asian Languages and Literature. (Tr. 911)

There also is evidence that the same Teaching Fellow may have appointments in multiple departments over the course of several semesters. (Tr. 2343, “Last semester I was teaching in the history department, and this semester and last year I was teaching and am teaching in the

computer science department.”) And, there are two Teaching Fellows who have appointments in two different departments this semester: Jiaying Gu, who is homed in East Asian Studies, and is teaching both in East Asian Languages and Literature and History of Art; and, Toshihiko Shimasaki, who is homed in Physics, and is teaching both in East Asian Languages and Literature and Physics. (Bd. Ex. 6)

Additionally, there is consistent contact among Teaching Fellows across departmental lines. All incoming graduate students attend the same orientation, at which teaching is given attention. (Tr. 279-80) Every new Teaching Fellow also is required to attend “Teaching at Yale Day,” and many Teaching Fellows attend other Graduate School-level training programs. (Tr. 59, 279-80, 675-76, 678, 1598, 2169-70) There also are regular opportunities for social contact among all Teaching Fellows. For example, the Graduate School has a yearly holiday party, to which all graduate students and faculty are invited. (Tr. 2461) And, there are several graduate student lounges on campus, access to which is available to Teaching Fellows (and graduate students generally) from many academic departments. (Tr. 2461)

The level of contact within the petitioned-for departments is no greater than the contact that occurs between Teaching Fellows across all academic departments, contributing additional support for an overwhelming community of interest finding.

* * *

For all the foregoing reasons, the Teaching Fellows in each of the petitioned-for departments share an overwhelming community of interest with all other Teaching Fellows in Yale’s Teaching Fellow Program. Accordingly, the petitions should be dismissed because each seeks an election in a “fractured unit” inappropriate for purposes of collective bargaining.

CONCLUSION

The petitions fail to raise a “question concerning representation” of employees in units appropriate for collective bargaining. As demonstrated above, the Union seeks elections in nine “fractured units” as that term is defined in *Specialty Healthcare*, each an “arbitrary segment” of an overall Teaching Fellows unit. Accordingly, the petitions must be dismissed. Further, the pattern of school-wide collective bargaining in higher education, at both public and private universities, also requires dismissal of these petitions. The certification of bargaining units comprised of Teaching Fellows in individual academic departments would frustrate the purposes of the NLRA.

Dated: October 25, 2016
New York, New York

Respectfully Submitted,

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1**

YALE UNIVERSITY

-and-

UNITE HERE, LOCAL 33

**Case Nos. 01-RC-183014
01-RC-183016
01-RC-183022
01-RC-183025
01-RC-183031
01-RC-183038
01-RC-183039
01-RC-183043
01-RC-183050**

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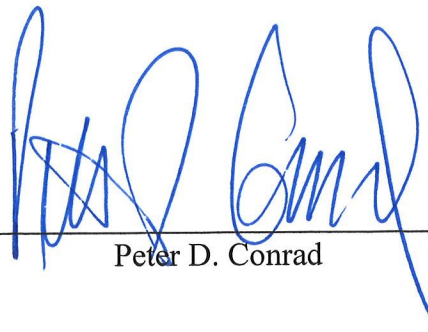
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DO NOT WRITE IN THIS SPACE	
Case No. 01-RC-183038	Date Filed 8/29/16

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer Yale University		2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code) Office of the President, Woodbridge Hall, 105 Wall St., New Haven, CT, 06511	
3a. Employer Representative - Name and Title Peter Salovey, A.B. - President		3b. Address (If same as 2b - state same) P.O. Box 208229, New Haven, CT 06520-8229	
3c. Tel. No. (203) 432-2550	3d. Cell No.	3e. Fax No. (203) 432-7105	3f. E-Mail Address president@yale.edu
4a. Type of Establishment (Factory, mine, wholesaler, etc.) Private University		4b. Principal product or service Education	5a. City and State where unit is located: New Haven, Connecticut

5b. Description of Unit Involved
Included: All graduate students who are regular full-time and part-time Teaching Fellows, Graders, Part-Time Acting Instructors, and Associates in Teaching in the Political Science Department.
Excluded: All other employees, managers, supervisors and guards.

6a. No. of Employees in Unit: 60
6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>

Check One: <input checked="" type="checkbox"/> 7a. Request for recognition as Bargaining Representative was made on (Date) <u>8/29/2016</u> and Employer declined recognition on or about <u>8/29/2016</u> (Date) (If no reply received, so state). by this petition	<input type="checkbox"/> 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.
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8a. Name of Recognized or Certified Bargaining Agent (if none, so state). none		8b. Address	
8c. Tel. No.	8d. Cell No.	8e. Fax No.	8f. E-Mail Address
8g. Affiliation, if any		8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? no If so, approximately how many employees are participating? _____
(Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)
none

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11b. Election Date(s): Tuesday, September 27, 2016	11c. Election Time(s): 8am-8pm	11d. Election Location(s): Dwight Hall, 67 High St., New Haven, CT 06511
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12a. Full Name of Petitioner (including local name and number)
UNITE HERE Local 33 (Chair: Aaron Greenberg)

12b. Address (street and number, city, state, and ZIP code)
425 College Street, New Haven, CT, 06511


12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)
UNITE HERE International Union

12d. Tel. No.	12e. Cell No. (818) 451-9034	12f. Fax No.	12g. E-Mail Address aarongreenb@gmail.com
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13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title Yuval Miller, Davis, Cowell & Bowe, LLP		13b. Address (street and number, city, state, and ZIP code) 595 Market St., Suite 800, San Francisco, CA, 94105	
13c. Tel. No. (415) 597-7200	13d. Cell No.	13e. Fax No. (415) 597-7201	13f. E-Mail Address ymiller@dcbsf.com

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) Yuval Miller	Signature 	Title Attorney	Date August 29, 2016
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WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.

01-RC-183036

Date Filed

8/29/16

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

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3a. Employer Representative - Name and Title Peter Salovey, A.B. - President		3b. Address (If same as 2b - state same) P.O. Box 208229, New Haven, CT 06520-8229	
3c. Tel. No. (203) 432-2550	3d. Cell No.	3e. Fax No. (203) 432-7105	3f. E-Mail Address president@yale.edu
4a. Type of Establishment (Factory, mine, wholesaler, etc.) Private University		4b. Principal product or service Education	5a. City and State where unit is located: New Haven, Connecticut
5b. Description of Unit Involved Included: All graduate students who are regular full-time and part-time Teaching Fellows, Part-Time Acting Instructors, and Associates in Teaching in the Comparative Literature Department. Excluded: All other employees, managers, supervisors and guards.			6a. No. of Employees in Unit: 22 6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>

Check One: ☒ 7a. Request for recognition as Bargaining Representative was made on (Date) 8/29/2016 and Employer declined recognition on or about 8/29/2016 (Date) (If no reply received, so state). by this petition
☐ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state). none		8b. Address	
8c. Tel No.	8d. Cell No.	8e. Fax No.	8f. E-Mail Address
8g. Affiliation, if any		8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? no If so, approximately how many employees are participating? _____
(Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)
none

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to
11a. Election Type: ☒ Manual ☐ Mail ☐ Mixed Manual/Mail

11b. Election Date(s): Tuesday, September 27, 2016
11c. Election Time(s): 8am-8pm
11d. Election Location(s): Dwight Hall, 67 High St., New Haven, CT 06511

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UNITE HERE International Union

12d. Tel No.	12e. Cell No. (818) 451-9034	12f. Fax No.	12g. E-Mail Address aarongreenb@gmail.com
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13a. Name and Title Yuval Miller, Davis, Cowell & Bowe, LLP		13b. Address (street and number, city, state, and ZIP code) 595 Market St., Suite 800, San Francisco, CA, 94105	
13c. Tel No. (415) 597-7200	13d. Cell No.	13e. Fax No. (415) 597-7201	13f. E-Mail Address ymiller@dcbsf.com

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) Yuval Miller	Signature 	Title Attorney	Date August 29, 2016
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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

SUBREGION 34
450 Main St Ste 410
Hartford, CT 06103-3078

Agency Website: www.nlrb.gov
Telephone: (860)240-3522
Fax: (860)240-3564

October 14, 2016

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Re: YALE UNIVERSITY
Case 01-RC-183036

Gentlemen:

This is to advise you that the Petitioner's request to withdraw the petition in the above case has been approved.

Very truly yours,

John J. Walsh, Jr.
Regional Director

By:
Michael C. Cass
Officer in Charge

cc: See Attached

cc:

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