UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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NEW YORK UNIVERSITY,

Employer,

- and Case No. 2-RC-23481

GSOC/UAW,

Petitioner.

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POLYTECHNIC INSTITUTE OF NEW YORK UNIVERSITY,

Employer,

- and Case No. 29-RC-12054

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKS OF AMERICA, UAW,

Petitioner.

----------X

TO: Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street NW
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REQUEST FOR PERMISSION TO FILE A BRIEF *AMICI CURIAE*

In response to the National Labor Relations Board's ("NLRB") June 22, 2012 "Notice and Invitation to File Briefs," the American Council on Education ("ACE"), the Association of American Medical Colleges ("AAMC"), the Association of American Universities ("AAU"), the College and University Professional Association for Human Resources ("CUPA-HR") and the National Association of Independent Colleges and Universities ("NAICU") (collectively,

the "*amici*") respectfully request permission to file an *Amici Curiae* brief in the above-captioned matters.

ACE is a non-profit, national educational association with approximately 1,800 member institutions of higher education, including a substantial majority of colleges and universities in the United States. ACE's principal purpose is to further the goals of higher education in a belief that a strong higher education system is the cornerstone of a democratic society. The AAMC is a non-profit association representing all 138 accredited U.S. medical schools, nearly 400 major teaching hospitals and health systems, and 90 academic and scientific societies. The AAMC provides an ongoing forum for the leadership of biomedical science research training units to promote quality in the graduate programs of accredited medical schools in the United States.

The AAU is an organization of 59 United States and two Canadian major research institutions committed to developing strong national and institutional policies supporting research and both graduate and undergraduate education. CUPA-HR serves as the voice of human resources in higher education, representing more than 11,000 human-resources professionals at over 1,700 colleges and universities across the country. Finally, NAICU serves as the unified national voice of private, non-profit higher education in the United States, representing its member institutions on policy issues.

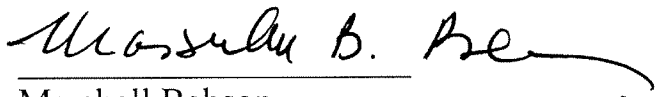
The *amici* respectfully request that the National Labor Relations Board grant the instant request and accept this brief for consideration because the issues raised in the above-captioned matters are of paramount importance to higher education in the United States, and therefore, are of significant interest to the *amici* and its member institutions. In asking the NLRB to reconsider *Brown University*, 342 NLRB 483 (2004) ("*Brown*"), and to revisit *Leland Stanford Junior University*, 214 NLRB 621 (1974) ("*Stanford*"), Petitioners seek to undo decades of well-reasoned and settled NLRB precedent and policy. A decision by the NLRB to overturn *Brown* and *Stanford*, particularly on the records before it, will unsettle fundamental relationships in higher education in the U.S., and will impact adversely the ways in which universities address basic issues in graduate student education, including financial aid, degree requirements, curriculum content and related matters. In addition, a reversal of either *Brown* or *Stanford* impermissibly will intrude upon academic freedom and the relationship between university professors and their students, with implications that are both extensive and far reaching.

Dated: New York, New York
July 23, 2012

Respectfully submitted,

OF COUNSEL

SEYFARTH SHAW LLP



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AMICI CURIAE BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE ASSOCIATION OF AMERICAN UNIVERSITIES, THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES AND THE NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES

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INTEREST OF *AMICI CURIAE*

The American Council on Education ("ACE") is a non-profit, national educational association that represents all sectors of American higher education. Its approximately 1,800 member institutions of higher education include a substantial majority of colleges and universities in the United States. These institutions include both public and private colleges and universities, as well as more than 175 non-profit education associations and organizations. As a leading participant in higher education affairs, ACE's principal purpose is to further the goals of higher education, including the interests of all members of the academic community -- students, faculty, administration and the institutions themselves. Since its founding in 1918, ACE has sought to promote high standards in higher education, in the belief that a strong higher education system is the cornerstone of a democratic society. ACE participates as an *amicus curiae* only on those rare occasions, such as this, where an issue presents matters of substantial importance to higher education in the United States.

The Association of American Medical Colleges ("AAMC") is a non-profit association representing all 138 accredited U.S. medical schools, nearly 400 major teaching hospitals and health systems, and 90 academic and scientific societies. Founded in 1876, the AAMC provides national leadership in medical education, research and health care. Of particular relevance to this case, the AAMC provides

an ongoing forum for the leadership of biomedical science research training units to promote quality in the graduate programs of accredited medical schools in the United States.

The Association of American Universities ("AAU") is an organization of 59 United States and two Canadian major research institutions committed to developing strong national and institutional policies supporting research and both graduate and undergraduate education. The College and University Professional Association for Human Resources ("CUPA-HR") serves as the voice of human resources in higher education, representing more than 11,000 human-resources professionals at over 1,700 colleges and universities across the country, including 90 percent of all United States doctoral institutions, 70 percent of all master's institutions, more than half of all bachelor's institutions and nearly 500 two-year and specialized institutions. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 States.

The National Association of Independent Colleges and Universities ("NAICU") serves as the unified national voice of private, nonprofit higher education in the United States. Founded in 1976, NAICU currently has nearly 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business and other professions. NAICU represents these

institutions on policy issues primarily with the federal government, such as those affecting student aid, taxation and government regulation. Hereinafter, ACE, AAMC, AAU, CUPA-HR and NAICU will be collectively referred to as "*amici*."

In asking the National Labor Relations Board ("NLRB" or "Board") to reconsider *Brown University*, 342 NLRB 483 (2004) ("*Brown*") and to revisit *Leland Stanford Junior University*, 214 NLRB 621 (1974) ("*Stanford*"), Petitioner Graduate Student Organizing Committee/United Auto Workers ("GSOC/UAW") and Petitioner International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW ("International Union/UAW") (collectively hereinafter "Petitioners") seek to contravene decades of well-reasoned and settled Board precedent and policy. Such a decision will impact adversely the way in which universities are able to address significant issues in graduate student education, including financial aid, degree requirements and similar matters, and will intrude unnecessarily upon academic freedom and the relationship between university professors and their students. A reversal by the NLRB of its decision in *Brown* and a change in the principles underlying *Stanford* will affect universities throughout the country, with deleterious implications that are both extensive and far reaching.

ARGUMENT

I. INTRODUCTION.

Petitioners ask the NLRB to stray far from its statutory mandate by reversing its decision in *Brown* with respect to graduate students assigned to teaching, and to overrule the principles underlying its decisions in *Stanford* and *New York University*, 332 NLRB 1205 (2000) ("*NYU I*"), with respect to graduate student research assistants. Petitioners' unabashed purpose is to intrude collective bargaining as broadly as possible into academic matters central to the student-teacher relationship and to higher education in the United States.

Echoing the dissent in *Brown*, Petitioners characterize that decision and other long-standing Board precedent as backward looking and based on an outdated image of a mature university. Contrary to those misrepresentations, the essential nature and mission of the university has not changed; and now, as much as ever, that mission depends upon the university's academic freedom to make decisions affecting the relationship between students and faculty. This includes the right to evaluate students, determine admission and matriculation standards, tuition, enrollment levels, eligibility for and issuance of award scholarships and grants, and all aspects of the educational curriculum, including what courses will be offered, to whom and by whom courses will be taught, and the teaching methods to be used.

The student/faculty relationship is not a static one: progress in demonstrating a mastery of subject areas must be guided and monitored and, ultimately a degree awarded, based on academic, not labor, standards. Teaching assignments and research requirements for a dissertation are an integral part of doctorate programs and involve quintessentially academic concerns. An improvident exercise of the NLRB's jurisdiction over these matters inevitably would harm the universities' core educational mission.

The Supreme Court and the NLRB have recognized that the nature of the university "does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world," *NLRB v. Yeshiva University*, 444 U.S. 672, 697 (1980), citing *Adelphi University*, 195 NLRB 639, 648 (1972), and that "the principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" *Id.* at 681, citing, *Syracuse University*, 204 NLRB 641, 643 (1973). This observation, which pertained to the collegial structure of "shared authority" in a university's faculty body, applies as well to the student-teacher relationship, which is materially different than the master-servant relationship to which Section 2(3) of the National Labor Relations Act ("Act") applies. Isolated elements of the graduate students' relationship with the university pertaining to teaching and research assignments cannot be cabined for collective bargaining purposes under the Board's broad

definition of mandatory subjects of bargaining without infringing upon the predominantly academic character of a relationship that is alloyed to a fundamentally pedagogical purpose.

Petitioners urge a cynical view, that the university is just another big business, that graduate students are no more than wage earners, and that using graduate student teachers and researchers is merely a cost-saving measure. The NLRB correctly found otherwise in *Brown.* The academic student/teacher relationship is, and should remain, removed from the issues and problems that our labor laws address.

Consistent with this principle, the NLRB repeatedly has drawn distinctions, here and elsewhere, between individuals engaged in a commercial relationship and those individuals who -- while arguably falling into the most literal definition of "employee" under Section 2(3) -- nevertheless fall outside the Act's breadth due to the inherently non-commercial nature of the relationship at issue. Petitioners present no compelling reason to depart from this long standing precedent. Moreover, the facts in *Brown,* which are representative of institutions of higher education in the United States, are far removed from the facts now before the Board in *New York University,* Case No. 2-RC-23481 ("*NYU II*") and in *Polytechnic Institute of New York University,* Case No. 29-RC-12054 ("*Polytechnic*"). The record in the instant cases, drawn from a singular, and in

many respects an idiosyncratic set of circumstances, presents no opportunity for the Board to reconsider *Brown*.

II. THE FACTS OF NYU ARE NEITHER SIMILAR TO *BROWN* NOR REPRESENTATIVE OF HIGHER EDUCATION GENERALLY, AND THIS CASE, THEREFORE, PROVIDES NO OPPORTUNITY TO RECONSIDER OR OVERRULE *BROWN*.

Petitioner GSOC/UAW's unique history with New York University ("NYU"), and the singular facts involved in that matter, are far removed from the facts and circumstances in *Brown*. In *NYU II*, the University sought to separate graduate students' teaching assignments from the rest of their academic curriculum to the greatest extent possible. Consistent with NYU's effort to establish a unique relationship for graduate students, NYU (i) made teaching voluntary, (ii) included graduate student teachers in a unit of adjuncts under contract with Local 7902, and (iii) provided compensation for teaching under the adjunct contract, separate and apart from the students' fellowship stipend. Indeed, most of the briefing and the Regional Director's decision are devoted to the parties' argument over unit placement. But the facts in *Brown* are entirely opposite. In *Brown,* the University fully integrated mandatory teaching assignments into the doctorate curriculum and provided no additional compensation for teaching beyond the general fellowship

stipends.[1] The circumstances of *Brown* are representative of larger practice throughout higher education, generally, which have not changed since the *Brown* decision.

While the NLRB generally is entitled to deference as to whether to invoke its rule-making authority or whether to decide cases through litigation on a case-by-case basis, *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293 (1974), it may not take a rule-making approach in the guise of adjudication. *Amicus* briefing is no substitute for rule-making; nor does the instant litigation before the Board, with its unique facts and idiosyncratic history, address the very different facts and circumstances presented in *Brown*. Certainly, the testimony of

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[1] Specifically, in *Brown,* the Board found that teaching was required as a precondition to obtaining a graduate degree for the "substantial majority" of graduate students and that, accordingly, "[g]raduate student assistant positions are . . . directly related to the core elements of the Ph.D. degree and the educational reasons that students attend Brown." *See Brown,* 342 NLRB 483, 484, 488. Further, Brown's financial aid stipends were wholly unrelated to student work as a TA or RA and, as the Board properly found, did not constitute "consideration for work" performed. *Id.* at 485, 488. Indeed, Brown provided all graduate students receiving financial aid the same stipend regardless of whether they worked as a TA or RA or whether the student "worked" exclusively on his or her dissertation. *Id.* Similarly, the amount of the stipend did not change depending on the hours worked or the value of the services performed, and graduate students did not receive fringe benefits from the University. *Id.* at 484, 486. Ultimately, the Board in *Brown* found the overall relationship between graduate students and Brown to be "a primarily educational one" in light of, *inter alia,* the "status of graduate student assistants as students, the role of graduate student assistantships in graduate education, the graduate student assistants' relationship with the faculty, and the financial support they receive to attend Brown[.]" *Id.* at 489.

Dr. Voos does not satisfy the empirical foundation for rule-making in this instance.[2] Accordingly, even if the Board were inclined to reconsider *Brown*, it does not have before it a record based on facts similar to *Brown.* Given the material differences between this case and *Brown*, it would be an abuse of discretion to reverse *Brown* in these cases. It also would lend credence to the view of the Board's critics, expressed by Member Hayes in his dissent to the Board's October 25, 2010 Order, that the Board's "view of the law is wholly partisan and thus changeable based on nothing more than changes in Board membership" and that "overruling *Brown* is a preordained result." *New York University,* 356 NLRB No. 7, at 4 (2010). Administrative jurisprudence demands *more* of NLRB decision making and this Board has a statutory obligation to ensure that its decision making is so principled.

The Board's decisions here must be tailored to the facts and circumstances of these cases, as must be the approach of courts adjudicating cases. *See Morse v. Frederick,* 551 U.S. 393, 425 (2007) (the Court "need not and should not decide" difficult issues if a narrower ground will resolve the controversy). Just as the dissent in *Brown*, commenting on the application of the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672, noted that "not all faculty members

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[2] *See* Point III (D), *supra.*

at every university would fall into the same category," *Brown*, 342 NLRB at 500, fn. 6, and opining that the Board should proceed on a case-by-case analysis, so too, the Board should proceed on a case-by-case basis here.

III. BROWN WAS CORRECTLY DECIDED.

A. Graduate Students' Relationship With The University Is Fundamentally One Of Student-Teacher Not Master-Servant Under Section 2(3) Of The Act.

Students enroll in graduate school to complete their higher education, not to work for wages. Their relationship with the university and faculty is fundamentally one of a student and teacher, not master-servant. Where the university, through its faculty, exercises "control" or "supervision" over graduate students, their purpose is pedagogical not commercial or transactional. Faculty members provide instruction and act as mentors and guides, not as a student's boss. And where graduate students perform teaching assignments, they are not "working at the trade" for wages, but learning to become future teachers by developing their pedagogic skills. Accordingly, the Board in *Brown* correctly determined that graduate students, whose relationship with Brown University was predominately academic rather than economic, were not statutory employees covered by the Act. Except for a brief period after the decision in *NYU I*, which was overruled by

Brown, this view has been held consistently by the NLRB for more than 38 years.[3] There is no compelling basis, much less the records in the cases *sub judice*, to disturb this well settled view which properly reflects the realities of 21st century graduate education in the United States.

Graduate students are the consumers, not the producers, of educational services. In order to subsidize the substantial costs of their graduate school education and the cost-of-living while enrolled, universities typically waive tuition, award scholarships, stipends and grants, as well as provide free health care -- none of which traditionally has been considered "wages." *See, e.g., Stanford*, 214 NLRB at 621-22. Fellowship stipends provide students' financial support, enabling them to pursue an advanced course of study whose cost would otherwise be prohibitive for most students.

Even in *NYU II,* where, unlike *Brown*, the University made separate, additional payments for teaching assignments under the Local 7902 contract, the Regional Director still concluded that such payments were combined with the typical five-year stipend as part of their total educational subsidy, allowing students the flexibility to customize and manage "their financial aid portfolio" throughout the graduate program, which may take 6 to 7 years to complete. *See*

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[3] *See e.g., Stanford*, 214 NLRB 621; *Adelphi University*, 195 NLRB 639.

Decision and Order Dismissing Petition by the Regional Director in *NYU II* ("R.D.") at 9; *see also, Stanford,* 214 NLRB at 622 ("A student may have financial support from several sources.")

Graduate students, admitted on the basis of their academic and scholarly potential, not on the basis of any employment-related qualifications, are expected to teach and conduct research in their quest to become independent scholars and teachers. Participation in teaching or research is one of the defining features of graduate education in the U.S. and one of the principal factors accounting for its exceptional quality. As the Board stated in *Brown*: "The relationship between being a graduate student assistant and the pursuit of the Ph. D. is inextricably linked..." *Brown*, 342 NLRB at 489. Nothing in the record before the Board contradicts this conclusion.

Graduate students are also an integral part of the intellectual life of their departments and share their department's educational goals, in which they have a mutual interest. Indeed, graduate education in the U.S. requires students to be able to engage freely in intellectual discourse with faculty, who serve as mentors, evaluators and critics. Students' choice of where to seek admission is based, in large part, on the reputation and accomplishments of faculty with whom they could study and from whom they could learn by engaging in research and teaching.

The Regional Director's conclusion in *NYU II* that "employment" aspects of this relationship can be isolated from student-teacher aspects is not only based on facts very different from *Brown*, but at odds with his own findings in *NYU II* which demonstrate the alignment of students' educational interest with their department and faculty in contrast to the interests of adjuncts. *Id.* at 18. These findings only serve to demonstrate the fundamentally educational character that pervades all aspects of the student/faculty relationship.

In short, graduate students engaged in teaching and research are fundamentally students, learning by doing in a direct student/faculty mentoring relationship that is the hallmark of doctoral education in the United States. These close interrelationships among graduate students and faculty in the nation's universities are widely recognized as a principal factor that has propelled U.S. universities to become the finest in the world. The success of this student/faculty model of graduate education, built on a direct engagement with students in teaching and research, enriches both the education of graduate students and the educational programs of the university. This model is emulated in countries worldwide that aspire to achieve that which U.S. universities have provided for this nation. Such critical academic relationships cannot be regulated by industrial procedures designed to govern the relations between labor and management.

B. Graduate Students Are Not "Employees" As That Term Is Commonly Understood.

Ignoring the caveat of the Supreme Court in *NLRB v. Yeshiva University*, 444 U.S. at 680-681, that principles applicable to an industrial setting cannot be "imposed blindly on the academic world," Petitioners instead turn a blind eye to the essentially educational nature of the graduate students' relationship with the university. Their characterization of graduate students engaged in teaching and research as "employees" under Section 2(3) -- merely because they are guided by faculty mentors and receive financial aid -- ignores the common usage of the word "employee," particularly in the academic context. The tautological reference to "employee" in Section 2(3) of the Act does not require the narrow and literal reading of the Petitioner and the Regional Director.

In *Goodwill Industries of Southern California*, 231 NLRB 536, 536-38 (1977), for example, the NLRB held that disabled individuals who work for Goodwill as part of a "rehabilitative process" might be "employees in the generic sense of the term," but it would not effectuate the purposes of the Act to assert jurisdiction over them given the true character of the relationship. Similarly, in *Brevard Achievement Center, Inc.*, 342 NLRB 982 (2004), the Board recognized that individuals who work in a '"primarily rehabilitative" relationship[s] . . . are not statutory employees." *See also*, *Goodwill Industries of Denver*, 304 NLRB 764, 766 (1991) ("the Employer's client/trainees are not statutory employees").

Invoking the principle of "*expressio unius est exclusio alterius*," Petitioner GSOC/UAW argues for an interpretation of Section 2(3) on the grounds that Section 2(3) does not expressly exclude graduate students. *See* Petitioner GSOC/UAW's Request For Review ("Pet. Br.") at 13. But neither does Section 2(3) exclude managerial employees -- who are employees in a literal sense -- but not deemed "employees" because their interests are fundamentally aligned with the employer. *See generally, NLRB v. Bell Aerospace*, 416 U.S. 267 (affirming the Second Circuit's reversal of the Board's holding that managerial employees were "employees" covered by the Act). "Managerial employees" therefore are not truly "employees" nor treated as such, although a blindly literal interpretation of Section 2(3) might dictate otherwise.

Newport News Shipbuilding & Dry Dock Co., 57 NLRB 1053 (1944) and *General Motors Corp. (Grand Rapids, Mich.) (Fisher Body Div.)*, 133 NLRB 1063 (1961), on which Petitioner GOSC/UAW heavily relies, only serve to distinguish further the nature of "apprentices" from graduate students. While apprentices may sometimes participate in limited class-room training, they do not teach or receive remuneration from the school that provides their classes. Their pursuit is not academic nor is their goal to become college and university teachers. Rather apprentices work at the trade, while earning wages from an employer whose primary role is commercial not educational. For example, in *General Motors*

Corp., the Board held that the apprentice journeymen at issue "share the same working conditions, benefits and hours of work as other employees," and that "the interests of the apprentices are intimately and inseparably allied to those of the journeymen craftsmen who are part of the multi-plant production and maintenance unit." 133 NLRB at 1064-65; *Newport News Shipbuilding*, 57 NLRB at 1059 (finding apprentices "have interests akin to those of production and maintenance employees in selecting a collective bargaining representative").

Similarly, Petitioner GSOC/UAW's reliance on *Boston Medical Center Corp.*, 330 NLRB 152 (1999), holding interns, residents and fellows (collectively, "residents") to be employees, also is misplaced. While the Board's assertion of jurisdiction over residents may itself be questioned on other grounds, the Board in *Boston Medical* distinguished the bases for that decision from the case of graduate students. *See also, e.g., St. Barnabas Hospital,* 355 NLRB No. 39 (2010) (refusing to apply *Brown* to overrule *Boston Medical,* holding "[i]t is apparent that the role[s] of TAs and RAs at universities is different from that of house staff at medical centers"). For example, residents "have already completed and received their academic degrees." *Brown*, 342 NLRB at 487. Also, like non-student adjuncts, whom the Regional Director in *NYU II* readily distinguished from graduate students, residents are not pursuing graduate studies or a graduate degree and do not have the predominantly educational relationship that graduate students

have with their faculty and department. Residents are not teaching as part of the doctorate program nor performing research on their dissertation; they are largely working at their profession for an employer whose business is providing health care, spending 80% of their time in direct patient care. *See Boston Medical*, 330 NLRB at 160. In contrast, graduate students perform only a small portion of their time on teaching assignments.

Thus, in finding residents to be employees within the meaning of the Act, the Board in *Boston Medical* took pains to distinguish them from students, including teaching and research assistants, noting that "while [residents] possess certain attributes of student status, they are unlike many others in the traditional academic setting." *Id.* at 161. The Board articulated a series of factors which distinguish residents from students; notably, each factor identified in *Boston Medical* as indicative of "student" status applies to graduate students here. *Id.* The Board observed that residents, as opposed to students, "do not pay tuition or student fees. They do not take typical examinations in a classroom setting, nor do they received grades as such. They do not register in a traditional fashion. Their education and student status is geared to gaining sufficient experience and knowledge to become Board-certified in a specialty" as opposed to earning a doctoral or other advanced degree. *Id.*

Finally, each of the remaining cases Petitioners cite in support of the argument that "the literal language of the statute includes employees who are also students" involves an inherently commercial or economic relationship and is thus inapposite here. *See generally,* Pet's. Br. at 12-15; *see e.g., NLRB v. Town & Country Elec., Inc.*, 116 S.Ct. 450 (1995) (addressing whether job applicants with an employment agency are employees); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (analyzing whether illegal aliens working at a leather processing firm are employees); *Seattle Opera Association,* 331 NLRB No. 148 (2000) (finding paid "auxiliary choristers" to be employees, not volunteers, equal with "alternate choristers"); *Sundland Constr. Co.*, 309 NLRB 1224 (1992) (analyzing whether union organizers are employees in connection boilermaker and/or welder positions).

C. Mandatory Collective Bargaining Obligations Cannot Be Imposed Without Undermining The University's Control Over Academic Decisions At The Core Of Its Educational Mission.

Consistent with the Regional Director's findings, Petitioners contend that "employee-like" aspects of the students' relationship with the university can be separated from the student-teacher character of that relationship for purposes of the exercise of Board jurisdiction. *See, e.g.,* R.D. at 15-16; Pet. Br. at 24-33. This argument fails, however, because mandatory subjects of bargaining cannot be sequestered from academic matters. Graduate students are not wage-earning

employees in a master-servant relationship, but first and foremost students pursuing their education. The Board cannot impose collective bargaining on the students' relationship with the university without undermining the university's freedom to control the academic elements of a pure pedagogical relationship. This is because the breadth of mandatory subjects of bargaining goes far beyond any limited "employee-like" role that the Regional Directors or Petitioners would create for graduate students in their teaching or research capacities and directly intrudes on the core issues of the university's educational mission.

The history of collective bargaining where units of graduate students have been recognized is replete with examples of bargaining demands that, however laudable their aims, encroach upon the academic sphere.[4] To avoid this result, in

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[4] For example, graduate students at Southern Illinois University sought to bargain for the "freedom to create syllabi, select course materials and to determine grades" and "to freely express in their work environment their political beliefs and/or affiliations." *See*, http://gaunited.files. wordpress.com/2010/09/contract2007-2010.pdf; Temple University's graduate students bargained for an Affirmative Action Plan for "the selection of graduate and undergraduate candidates for admission," and increased "funding for Future Faculty Fellowships targeted towards graduate students from minority groups." *See* http://tugsa.org/wordpress/history-2/the-8-point-platform/; http:tugsa.org/wordpress/wp-content/uploads/2010/08/contract2010.pdf. Graduate students at the University of Illinois and the University of Wisconsin bargained for provisions that prevent faculty from evaluating student teachers through unannounced visits. *See* http://www2.uic.edu/stud_orgs/gsc/documents/ bor.20090616.pdf; http://taa-madison.org/wp-content/pdf/TAA_07-09_CBA.pdf; and the University of Michigan graduate students sought a contract provision that non-native English speakers who passed a qualifying test would "not be pulled

the case of public institutions subject to state laws that impose collective bargaining on universities, the scope of collective bargaining is often limited by law with respect to academic and curriculum related matters. This is not the case under the National Labor Relations Act.

Thus, the NLRB properly recognized in *Brown* that none of the subjects of collective bargaining which Petitioners would characterize as unalloyed issues of wages, hours and "terms and conditions of employment" can be separated from the core educational concerns and academic decisions of a university -- such as decisions over who, what and where to teach or research, the class size, time, length and content of graduate students' duties, stipends, and the evaluations of their performance. *See Brown,* 342 NLRB at 490. Precisely because teaching and research are "part and parcel of the core elements of the Ph.D. degree," the Board in *Brown* properly concluded that they "cannot be divorced from the other functions of being a 'graduate student.'" *Id.* at 488.

In response to the fact that the subjects of bargaining cannot be confined to matters affecting students *qua* "employees" but must inevitably impinge on the University's freedom to control academic aspects of the student-teacher

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from their teaching assignment on the grounds that they lack English language proficiency[,]" even if class room performance was inconsistent with the test results." *See* "GEO Bargaining Platform," at http://www.umgeo.org/bargaining-2010-11/bargaining-platform-2010-11/.

relationship, Petitioner in *NYU II*, like the Petitioner in *Brown*, initially disclaimed interest in collective bargaining over academic matters, which they conceded to be outside the ambit of the Act. For example, Petitioner, like the Petitioner in *Brown*, initially stated as follows: "The UAW recognized that certain issues involving the academic mission of the University lie outside the scope of bargaining as defined by the National Labor Relations Act";[5] and they incorporated this philosophy in their first collective bargaining agreement with the University.[6]

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[5] *See* 2001 Letter of Agreement Between NYU and Local 2110, UAW, Petitioner's Request for Review at Employer's Exhibit ("Exh.") 38. Included among issues Petitioner acknowledged lay outside the scope of bargaining were: "the merits, necessity, organization, or size of any academic activity, program or course established by the University, the amount of any tuition, fees, fellowship award or student benefits (provided they are not terms and conditions of employment), admission conditions and requirements for students, decision on student academic progress (including removal for academic reasons), requirements for degrees and certifications, the content, teaching methods and supervision of courses, curricula and research programs..."

[6] *See* "Management and Academic Rights" provision, Petitioner's Request for Review at Petitioner's Exh. 6 at 19-20, which states, *inter alia*, that the University has the exclusive right "to determine how and when and by whom instruction is delivered; to determine in its sole discretion all matters relating to . . . student admission; to introduce new methods of instruction; or to subcontract all or any portion of any operations; and to exercise sole authority on all decisions involving academic matters"; and further, that "[d]ecisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University" and that "no action taken by the University with respect to a management or academic right shall be subject to the grievance or arbitration procedure . . ."

Despite Petitioner's initial disclaimer of interest in bargaining over subjects in the academic sphere, however, Petitioner GSOC/UAW forced arbitration over its contention -- based on the "recognition clause" in the agreement -- that bargaining unit members should be assigned to teach certain recitation discussions or lab sections instead of other individuals that the department had assigned.[7] That the Arbitrator denied the union's grievance in this instance was little consolation to NYU, which thought its right to make decisions in the academic sphere would not be a subject of bargaining or arbitration.[8] Thus, NYU's experience only confirms -- if further confirmation were needed -- that collective bargaining over graduate students assigned to teaching and research inevitably will encroach on academic matters that should remain outside the ambit of the Act. *See also, e.g.,* the Final Report of the Senate Academic Affairs Committee and the Senate Executive

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[7] *See* August 5, 2005 letter from NYU to UAW, withdrawing recognition, Petitioner's Request for Review at Employer's Ex. 4, referencing UAW grievances over who can teach and how many years graduate students can take to complete their studies.

[8] A survey conducted in the aftermath of the *NYU I* decision, asked graduate students to list their three most important concerns when negotiating a contract with their university. *See* 21 Hofstr lab. & Emp. L.J. 735, 786 (Spring, 2004). In addition to pay and health care benefits, their concerns included the desire to have some say in how the university and its departments are run, and included issues such as "job security," "class size" and "course offerings" (*id.* at 778) -- all of which impact a university's freedom in decide "who, what, and where to teach and research," which the Board in *Brown*, 342 NLRB at 490 found outside the ambit of the Act.

Committee attached to Pet's Br. as Employer's Exh. 38; Recommendation From the Faculty Advisory Committee on Academic Priorities, attached to Pet's Br. as Employer's Exh. 39 which also reach this conclusion.[9]

D. The Testimony Of Dr. Voos Cannot Provide Evidentiary Support For Overruling *Brown.*

In arguing *Brown* should be overruled, Petitioners rely heavily on the preliminary results of an unpublished opinion poll conducted by Dr. Voos of Rutgers University. *See, e.g.,* Pet. Br. at 9-11. Since this study has not been subjected to peer review and reflects only "partial findings," it should be excluded by the Board as noncompliant with the minimum standards for admissibility, as set forth in Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* November 18, 2010 Hearing Testimony of Paula Voos ("Voos Tr."), a copy of which is attached to NYU's August 11, 2011 Motion for Recusal, at 41-42; *see also,* R.D. at 24; *Santa Rosa Mem. Hosp.*, 2010 NLRB LEXIS 139 (May 28, 2010) (applying *Daubert* standards to exclude unreliable expert testimony).

With respect to opinion surveys, such as Dr. Voos', "[t]here must be some showing that the poll is conducted in accordance with generally accepted survey

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[9] While state laws limit bargaining on academic and curriculum related matters, consistent with the view that these lie outside the realm of labor negotiations, federal laws governing private institutions have no such limits.

principles and that the results are used in a statistically correct manner." *Baumholser v. Amax Coal Co.,* 630 F.2d 550, 552 (7th Cir. 1980) (collecting cases). The record is totally devoid of any such showing here. Dr. Voos did not even use a random sampling technique which is required for proper statistical inference. Accordingly, her survey presents, at best, anecdotal rather than scientific evidence. Dr. Voos seemingly rushed to produce an incomplete study, unencumbered by the requirements of scientific method, for the purpose of supporting the argument of the dissent in *Brown* and to be used in the instant case.

Professor of Labor Economics at Princeton University, Henry Farber, testified that, with respect to Dr. Voos' research, the evidence "is too imprecise to draw conclusions" and " [h]e questioned the methodology of the study, noting that the schools were not selected on a random basis and the preliminary analysis did not control for student demographics." R.D. at 25. Significantly, Dr. Farber argued the problem with the study is that it does not consider that "students unionize for a reason. It is possible that a university became union [sic] because the students worked very hard to get a union, or the climate at the institution was right for a union. In other words, the attitudes of the students and faculty are materially based [sic]." R.D. at 25. Ultimately, Professor Farber noted the research was "not predictive." *Id.*

Petitioners cite no authority to suggest that an unfinished, preliminary, scientifically unsound and ultimately biased opinion poll is a reliable basis to test whether unionization adversely affects the academic environment. Accordingly, because Dr. Voos' study does not satisfy even the minimal admissibility requirements under FRE 702 or *Daubert,* it should be wholly disregarded by the Board. *See, e.g., Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002) (affirming exclusion of expert testimony that amounted to "nothing more than unverified statements unsupported by scientific methodology").

IV. RESEARCH ASSISTANTS ARE NOT EMPLOYEES UNDER THE CONSISTENT BOARD PRECEDENT.

Petitioners ask the Board to overrule *Brown* and reinstate the *status quo ante* under *NYU I*; but in seeking to include Research Assistants ("RAs") in the collective bargaining unit, they ask the Board to overrule its holding in *NYU I* as well as its holding in *Stanford,* a case which still correctly reflects the nature of RAs in higher education after 38 years.

In *Stanford,* the Board found that research assistants performing research in satisfaction of their doctoral theses, who received funding from external grants, such as federal government grants, were *not* employees under the Act. Specifically, the Board found that assistants' research "is part of the course of instruction, a part of the learning process ... Thus, the doctorate is a research

degree, and independent investigation is required in order to earn it." *Stanford,* 214 NLRB at 622-23. Accordingly, the Board held:

> . . . we are persuaded that the relationship of the RAs and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer. Rather it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary, as determined by the project's needs.

Id. at 623.

Consistent with the Board's holding in *Stanford*, in *NYU I* the Board similarly found ". . . that the Sackler graduate assistants and the few science department research assistants funded by external grants are properly excluded from the unit. . . The evidence fails to establish that the research assistants perform a service for the Employer and, therefore, they are not employees. . ." *NYU,* 332 NLRB at fn. 10. This conclusion was based on the findings that (1) RAs performed "the same research they would perform as part of their studies in order to complete their dissertation," regardless of what funding they received, *Id.* at 1220-1221; (2) RAs did not work a specific amount of hours, but worked for as much time as the research required, *id.*; (3) the funding for the RAs was therefore "more akin to scholarships," *id.*; and (4) RAs frequently worked under external grants, such as NIH or NSF grants, under the guidance of a faculty member designated as the "principal investigator" by the grant, and therefore did not

perform services for the University. *Id.* *See also,* R.D. at 2, fn. 3 (summarizing decision in *NYU I* with respect to RAs).

Consistent with this long term precedent, the Board in *Brown* observed that RAs "are typically generated from grants outside Brown," *Brown,* 342 NLRB at 485, and the grant money they received from the University was the same as fellows who perform no research services, such that "the services are not related to the money received." *Id.* Notably, even the dissent in *Brown* noted that the rationale in *Stanford* -- that the RAs relationship was "not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by the employer" -- supported the exclusion of RAs in *NYU I.* *Id.* at 495 (dissent).

The facts that the Regional Director cited in his Decision and Order in *NYU II* and those facts cited by the Regional Director in *Polytechnic* are entirely consistent with the basis for excluding RAs in *Stanford* and *NYU I,* and consistent with the views of both the majority *and* the dissent in *Brown.* In *NYU II*, the overwhelming testimony established that "the activities that the students [had] undertake[n] as RAs and the activities being undertaken simply as students" were indistinguishable and that "RAs are almost always conducting research which is very closely related to the student's doctoral program." R.D. at 23. Accordingly, the Regional Director in *NYU II* concluded, with curious understatement, that:

> "Irrespective of funding, the student pursues research in consultation with his or her thesis advisor/professor. Because the research itself is intertwined with the subject matter of the student's dissertation, it is often difficult to tease apart the hours worked as RA from the hours spent advancing the dissertation."

Id. at 21.

Perhaps even more significantly for this issue, the Regional Director in *Polytechnic* determined that "should the Board decide to overrule the Brown decision, the RAs involved herein would still not be considered employees under the Act." *Polytechnic* Regional Director Decision and Order ("*Polytechnic* R.D.") at 16. The *Polytechnic* Regional Director further held, "[l]ike the RAs in both Leland Stanford and NYU I Polytechnic's RAs are performing work funded not by the university itself, but by outside sources, particularly the federal government []" and "the research work they perform is required for receipt of their degree and they receive academic credit for engaging in this research." *Id.*

As evidenced by the findings of the Regional Directors in *NYU II* and *Polytechnic,* there has been little or no change in the circumstances pertaining to RAs since *Stanford* or *NYU I,* sufficient to justify a different conclusion from the decisions in those cases -- that RAs are not statutory employees under any set of circumstances.[10] The NLRB has never held otherwise.

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[10] Indeed, Martha Dunne, Associate Vice-Provost for Research Compliance and Administration at NYU "testified that in the past twelve years, there have been no

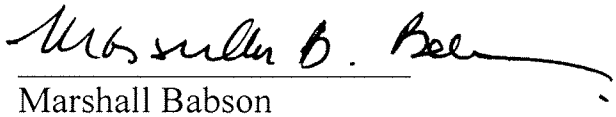
CONCLUSION

For the foregoing reasons, the Board should affirm the Regional Directors' decisions in *NYU* and *Polytechnic* and dismiss the Petitions for Review.

Dated: New York, New York
July 23, 2012

Respectfully submitted,

SEYFARTH SHAW LLP



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significant changes with respect to the Employer's processes for applying for or administering research grants." *See* R.D. at 21.

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2012, I caused copies of the within *Amici Curiae* brief as well as a copy of the within Request For Permission to File a Brief *Amici Curiae*, in connection with *New York University*, Case No. 2-RC-23481 and *Polytechnic Institute of New York University*, Case No. 29-RC-12054, to be served by electronic mail upon the following individuals:

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