UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

POLYTECHNIC INSTITUTE OF NEW YORK UNIVERSITY, Employer, and INTERNATIONAL UNION, AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW (UAW), Petitioner.	Case No.: 29-RC-12054
NEW YORK UNIVERSITY, Employer, and GSOC/UAW, Petitioner.	Case No.: 2-RC-23481

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I. STATEMENT OF AMICUS CURAE

The Employment Law Alliance ("ELA") is an integrated, global practice network comprised of independent law firms that are distinguished for their practice in employment and labor law. With more than 3,000 experienced attorneys located in more than 130 countries, it is the world's largest network of labor and employment lawyers. The Higher Education Council of the ELA is a sub-Council of the ELA which includes the following United States law firms with labor and employment practices with significant expertise in the field of higher education.

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The Higher Education Council (the "ELA HEC" or "Council") collectively represents hundreds of private institutions of higher education across the United States. The Council submits this brief in order to seek clarity and a workable approach for its clients with respect to their graduate students.

II. INTRODUCTION

There is no reason for the Board to overturn *Brown* (342 NLRB 483 (2004) (*"Brown"*). *Brown* relied on nearly thirty years of settled precedent under *Leland Stanford Junior University*, 214 NLRB 621 (1974) ("*Stanford*"),[1] when concluding that graduate student assistants should not be characterized as statutory employees under the National Labor Relations Act ("NLRA"). To this date, the Board's reasoning in *Brown* and *Stanford* is still valid: collective bargaining under the NLRA (for the protection of the individual worker through the power of the group) is the antithesis of the type of individualized, educational decision-making that is necessary to mentor, guide and evaluate graduate students on their academic paths. Not only are such decisions inappropriate in the collective bargaining context, the very nature of such an adversarial, economic relationship could undermine the fundamentally academic nature of the relationship between faculty and their graduate students.

III. LEGAL ARGUMENT

A. There is No Reasoned Justification for the Board to Modify or Overrule its Brown University Decision

In *E.I. Du Pont de Nemours and Company v. NLRB*, 2012 U.S. App. LEXIS 11604 (D.C. Cir. June 8, 2012), the U.S. Court of Appeals for the D.C. Circuit recently reiterated that decisions of the Board that deviate from Board precedent will not be enforced unless there is a "reasoned justification" for such a deviation. *Id.*

There is absolutely no reasoned justification for the Board to modify or overrule its decision in *Brown.* In *Brown*, the Board emphasized that the National Labor Relations Act (the "Act") was intended to cover only ***economic*** relationships. Relationships that are primarily ***academic*** in nature were considered inappropriate for collective bargaining. *Brown*, 342 NLRB at 488. Nothing has changed. The important national labor and educational policies that formed the basis for the Board's decision in *Brown* are just as applicable today as they were in 2004 when *Brown* was decided. Indeed, in *Brown*, the Board expressly stated that it wished to return

[1] Excluding of course the aberrant decision in *New York University*, 332 NLRB 1205 (2000) ("*NYU I.*")

to the principles outlined in *Stanford* which were in effect for more than 25 years until the Board decided *New York University*, 332 NLRB 1205 (2000) ("NYU I"). Accordingly, the Board should not modify or overrule its *Brown* decision.

1. Collective Bargaining is Not Well Suited to Educational Decision-Making

In *Brown*, the Board recognized that imposing collective bargaining on the academic relationship between Brown and its graduate student assistants would have a "***deleterious impact***" on the educational decisions made by Brown's faculty and administrators. *Brown, supra,* 342 NLRB at 490. Specifically, collective bargaining would intrude upon decisions with respect to the subject and manner of teaching and research, which are primarily academic issues that should be left to the discretion of Brown's faculty and administrators. *Id.* As recognized by the Board in *Brown*, the danger of characterizing graduate student assistants as statutory employees under the Act is that purely ***academic*** decisions could become the subject of collective bargaining, such as course length and content, standards for advancement and graduation, and administration of exams under the broad definition of subjects subject to collective bargaining.[2] *Id.* at 490-491. For example, negotiations over whether there must be "just cause" for discharging a graduate student assistant will be inseparable from negotiations regarding whether a faculty member can exercise his or her discretion to determine whether a graduate student is meeting the academic requirements to continue in the graduate program. These types of decisions regarding a graduate student's progression toward their degree and their fulfillment of academic requirements are exactly the types of decisions that faculty members must have the discretion to make on an individualized basis while exercising due concern for a student's academic progress and career without being hampered by the provisions of a collective

[2] The NLRA defines the obligation to bargain collectively as follows: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." NLRA 29 U.S.C. § 158.

bargaining agreement. This Board properly determined in *Brown* that "collective bargaining is not particularly well suited to educational decisionmaking and . . . ***any change in emphasis from quality education to economic concerns will prove detrimental to both labor and educational policies***." *Brown*, 342 NLRB at 489, citing *St. Clare's Hospital*, 229 NLRB 1000 (1977).

2. Characterizing Graduate Student Assistants as Employees Under the Act Would Substantially Harm and Alter the Fundamentally Academic Nature of the Relationship Between Faculty and Graduate Student Assistants

At the outset, we note that the fundamentally academic relationship between graduate student assistants and the colleges or universities in which they are enrolled is principally the same today as it was in 2004 when this Board decided *Brown* and previously in 1974 when the Board decided *Stanford*. *Stanford* explicitly recognized the fundamentally academic nature of the relationship between faculty and graduate students. *Stanford, supra,* 214 NLRB 622-23. The funded research projects in *Stanford* gave the students the opportunity to work with faculty members to develop their research skills and to identify dissertation topics or eliminate them from consideration – steps that graduate students had to take on their road to obtaining an advanced degree. *Id.* Although the Stanford RAs received compensation (referred to as a salary) for conducting their research, were required to devote at least 20 hours per week to their projects, and were subject to discharge for failure to meet their performance requirements, the Board found that "the RAs are seeking to advance their own academic standing and are engaging in research as a means of achieving that advancement." *Id.*, 214 NLRB at 623. The Board also held that:

> [T]he 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 projects' needs.

Id., 214 NLRB at 623.

As noted by the Board in *Stanford*:

> Each student's graduate career usually involves progression from fairly carefully supervised research problems designed to acquaint him or her with research techniques, through graduate-student classroom work where a definite answer exists to the research project undertaken, and then to Ph.D. thesis research into problems where the answer is unknown or uncertain or there may be no answer at all. ***The exercises prepare the student for selection of a topic for a dissertation and serve as a trial period for both the student and the faculty advisor to determine the student's interest and ability.*** The preliminary training and research may or may not be related to or be included within the topic ultimately selected for the dissertation, and it appears that a candidate may work on various projects before finding one suitable for a thesis. Thus, the student may work on a practice problem to acquaint him with research, may start to research in one direction and learn there is not enough material for a thesis, or may find something different that interests him or her more. Or, the subject of the research may exceed the capabilities of the student or of his advisor to a system; the early research may not fit into the thesis; the subject may have been treated by someone else; or there may be no space or equipment available to accommodate the project selected by the student. ***It is clear, however, that all steps lead to the thesis and are toward the goal of obtaining the Ph.D. degree.***

Id., 214 NLRB at 622 (emphasis added).

Graduate student education is dependent upon ***individual*** relationships between graduate students and their faculty advisors, and the ***collective*** treatment of graduate student assistants is inappropriate and detrimental to the educational process. *Brown, supra,* 342 NLRB at 489, citing *St. Clare's Hospital, supra,* 229 NLRB at 1002 (" 'the student-teacher relationship is not at all analogous to the employer-employee relationship' ... the student-teacher relationship is based on the "mutual interest in the advancement of the student's education," while the employer-employee relationship is "largely predicated on the often conflicting interests" over economic issues.") Graduate student assistants hold their positions as a result of their enrollment as graduate students, and conduct research or teaching that is part and parcel of their academic requirements. The faculty members who oversee the research and teaching conducted by the graduate student assistants are generally the same faculty members who oversee the graduate students' academic programs and serve as their thesis or dissertation advisors. *Brown* 342

NLRB at 489 (the same faculty members who supervised the teaching and research of the graduate student assistants generally also served as dissertation advisors for those graduate students.) The relationship between a graduate student assistant and his or her faculty advisor is an extremely individualized relationship that is often based on the similarity of research interests and academic disciplines. See e.g., Schwartz, Harriet L. & Holloway, Elizabeth L., *Partners in Learning: A Grounded Theory Study of Relational Practice Between Master's Students and Professors, Mentoring & Tutoring: Partnership in Learning*, Vol. 20, No. 1, Feb. 2012, 115 (describing how meaningful academic relationships between graduate students and faculty advance student learning); Lechuga, M. Vincente, *Faculty-Graduate Student Mentoring Relationships: Mentors' Perceived Roles and Responsibilities*, Higher Education, Vol. 62, Feb. 2011, 757 (describing how various facets of faculty-graduate student relationships enhance graduate students' education). Departing from *Brown* would risk narrowing the relationship between graduate students and faculty into a fundamentally economic relationship, which in turn, deemphasizes the academic facets of the relationship to the detriment of the academic experience of a student. For these reasons, there is no reasoned justification for the Board to modify or overrule its *Brown* decision, and it should not do so.

B. The Board Should Continue to Apply the Rationale of *Stanford* To Find That Certain Graduate Assistants, Such as Those Funded by External Grants, Are Not Employees Even If the Board Decides To Modify or Overrule *Brown*.

1. The *Stanford* Factors Include More Than Just The Receipt of Funding From External Grants

Even if the Board decides to modify or overrule *Brown* (which it should not do), it should do so only in the most limited manner so as to observe the D.C. Circuit's admonition to justify such reversal of the Board's own precedent. The Board should continue to apply the rationale of *Stanford*, which the Board relied upon in *NYU I* to find that certain graduate assistants, particularly those who were funded by external grants, cannot be regarded as employees within the meaning of the NLRA. The Board should continue to rely on its long-standing precedent and the factors considered in *Stanford* to test whether graduate assistants do or "do not work or

perform a service for the [university]" and to find, if they do not, that they are not employees within the meaning of the Act. *See NYU I*, 332 NLRB at 1221.

Even in *NYU I,* the Board acknowledged that certain graduate students, like the Physics graduate students at issue in *Stanford,* were not statutory employees. In Footnote 10 of *NYU I*, the Board stated:

> For the reasons set forth by the Regional Director, we agree that the Sackler graduate assistants and the few science department research assistants funded by external grants are properly excluded from the unit [of GA's, TA's, and RA's the Petitioner sought to represent]. *Leland Stanford Junior Univ.*, 214 NLRB 621 (1974). The evidence fails to establish that the research assistants perform a service for the Employer and, therefore, **they are not employees as defined by Section 2(3) of the Act.**

Id. at 1209, FN 10. (Emphasis added.) The Regional Director identified RAs who were excluded from the petitioned-for unit by the fact that they were *supported by external grants*, but their funding source was *not* the Board's rationale for their exclusion. Instead, according to the Regional Director, the Sackler GAs and science department RA's were excluded because:

> These GAs and RAs have no expectations placed on them other than their academic advancement, which involves research. They receive stipends and tuition remission as do other GAs, RAs, and TAs, but are not required to commit a set number of hours performing specific tasks for NYU. The research they perform is the same research they would perform as part of their studies in order to complete their dissertation, regardless of whether they received funding. The funding for the Sackler GAs and the science RAs, therefore, is more akin to a scholarship.

Id. at 1220.

The Sackler GAs' and science RAs' relationship to NYU, like the research assistants' relationship to the university in *Stanford*, "was not grounded on the performance of a given task where both the task and the time of its performance was designated and controlled by the

employer." *Id.* at 1217. Rather, as the Board found in *Stanford*, "it was a situation of students within certain academic guidelines having particular projects on which to spend the time necessary, as determined by the project's needs." *Id.* at 1221.

The Regional Director, and the Board by implication, made clear in *NYU I* that the funding source for grants is not the critical factor for determining which categories of graduate assistants are not employees. *See, e.g., NYU I*, 332 NLRB at 1221, FN 51. The other factors enunciated in *Stanford* should continue to determine whether a graduate assistant's relationship to a university is academic rather than economic, and thus whether a graduate assistant is an employee for purposes of the NLRA. These factors include:

a. The purpose of the research or task performed.

Graduate assistants whose work is required to complete an advanced degree should not be considered employees. *Id.* at 1214 (Science department RAs "are performing the research required for their dissertation, which is the same research for which the professor has obtained an outside grant.") and 1215 (For Sackler GAs, "research is the focus of their degree."); *Stanford*, 214 NLRB at 623 ("the RA's are seeking to advance their own academic standing and are engaging in research as a means of achieving that advancement."). Under *NYU I* and even a narrow reading of *Stanford*, non-employee graduate assistants must still be distinguished from graduate assistants who may be deemed to have employee status because they are required to engage in research as a part of the course of instruction and do not operate outside their areas of academic concentration or perform duties involving skills and content with which they are already fully versed. *See NYU I*, 332 NLRB at 1218.

b. Whether a student's work as a graduate assistant is self-directed.

Graduate assistants whose work is "not grounded on the performance of a given task where both the task and the time of its performance [is] not controlled by the [university]" are not employees under the Act. *See id.* at 1217; *id.* at 1214 ("No specific services are required of these RAs—the students are simply expected to progress towards their dissertation.") and 1215

("[T]here are no duties required of a [Sackler] GA."); *Stanford*, 214 NLRB at 623 ("[A]t least in the final stage of study, each [RA] is likely to be working independently on a novel research project for which he or she is responsible.").

c. The criteria for selecting graduate assistants.

Non-employee graduate assistants do not apply for graduate assistant positions but are instead awarded graduate assistant positions coextensive with their status as graduate students. *NYU I*, 332 NLRB at 1214 (RAs in the science departments "do not specifically apply for these positions . . . Instead, the positions are awarded to them.") and 1215 ("Sackler doctoral students do not apply to be a GA; they are simply appointed as such upon their admission into Sackler."); *see also Stanford*, 214 NLRB at 621 (payments to RAs are "to permit them to pursue their advanced degrees and are not based on the skill or function of the particular individual.").

d. The penalty for poor work performance.

Where the penalty for poor performance is academic, interfering with a student's progress toward a degree, rather than economic, resulting in the student's loss of the position but having no effect on his or her continuation of the academic program, *NYU I* and *Stanford* establish a clear and reasonable basis on which the Board should continue to find that a graduate assistant is not an employee. *NYU I*, 332 NLRB at 1215 (Sackler students "are told that satisfactory academic performance is the only requirement of receipt of the 'scholarship' and continuation in the program."); *Stanford*, 214 NLRB at 623 (a non-employee research assistant "whose work is rated unsatisfactory merely receives a nonpassing grade.").

Even if the Board chooses to overturn or modify *Brown*, these *Stanford* factors should continue to determine the employment status of graduate assistants under the NLRA. The *Stanford* factors will almost always be met when a graduate student's research is funded by an external grant, but may also be met when the graduate student receives institutional funds, such as a stipend.

2. The Common Law Agency Test for Control Is Unworkable As Applied to Graduate Student Assistants

If the Board were to overrule *Brown* and *Stanford,* it would be left to apply the common law rule of agency, which is unworkable in an academic context. The Board's construction of the term "employee" is entitled to considerable deference where it is consistent with the common law of agency. *See NLRB v. Town & Country Electric, Inc.* 516 U.S. 85, 93-94 (1995). However, that deference is necessarily limited where, as here, application of the common law agency test "would thwart the congressional design or lead to absurd results." *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318, 323 (1992).

Application of the common law of agency to the academic realm of graduate assistants would, in fact, lead to results that are inconsistent with the national labor policy and would unnecessarily cause the Board to intrude into matters that are fundamentally academic, far outside of its expertise and its congressional charge. *See Brown,* 342 NLRB 483, 491-493. At the core of the common law of agency test lies the right of control which, if present, would result in a finding of an employment relationship. *Nationwide Mutual Insurance Company v. Darden,* 503 U.S. 318, 323. But applying a right of control test in the academic context would entirely misconstrue the source, and therefore the meaning, of the control generally exercised over graduate assistants by their institutions. *See Brown,* 342 NLRB 483, 488-491. At institutions of higher education, the source of that control is primarily educational rather than economic. [*Id.*] As a result, application of the common law test in this context would simply lead to an unreliable and unworkable conclusion. The approach of the Board in *Brown* and the *Stanford* factors do not suffer the same defect and have been applied since the Board initiated their use in 1974. The *Stanford* factors properly distinguish between the exercise of academic versus economic control. Just as the Board relied on *Stanford* in *Brown* and in *NYU I,* the Board should continue to use the *Stanford* factors going forward to test whether graduate assistants are employees for purposes of the Act and should not simply rely upon the receipt of external grant funding as a bright-line test. As the Board properly recognized in *Brown*, the "issue of employee status under the Act turns on

whether Congress intended to cover the individual in question. The issue is not to be decided purely on the basis of older common-law concepts." *Brown* 342 NLRB at 491. Just as disabled employees who are part of a rehabilitative occupational program are not statutory employees because their relationship with their employer is primarily rehabilitative, not economic, *Sheltered Workshops of San Diego,* 126 NLRB 961 (1960), *Goodwill of Denver*, 304 NLRB 764 (1991), graduate students who have a primarily academic, rather than economic, relationship with their institution should not be considered statutory employees under the NLRA.

IV. CONCLUSION

Based on the foregoing, there is no reasoned justification for the Board to modify or overrule its *Brown* decision, and the Board should not do so. If the Board does overturn *Brown,* the Board should nevertheless continue to hold that graduate student assistants engaged in research funded by external grants and other graduate students who satisfy the *Stanford* factors, are not statutory employees.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 23rd day of July, 2012, I caused the following *Amicus Brief* to be filed using the National Labor Relations Board's E-Filing Program. The foregoing brief was also served by e-mail upon the following counsel:

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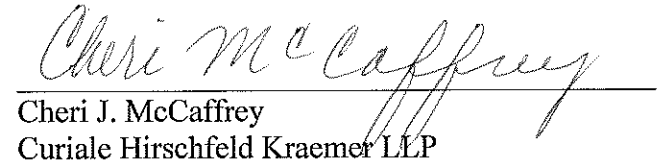

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