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February 26, 2016

VIA ELECTRONIC FILING

Mr. Gary Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: The Trustees of Columbia University in the City of New York
Case No. 02-RC-143012

Dear Mr. Shinners:

We write on behalf of the American Council on Education, the Association of American Medical Colleges, the Association of American Universities, the Association of Jesuit Colleges and Universities, the College and University Professional Association for Human Resources, and the National Association of Independent Colleges and Universities (collectively, the "*amici*") in response to the National Labor Relations Board's ("Board") January 13, 2016 Notice and Invitation to File Briefs in the above-referenced matter.

We respectfully request that the Board accept this letter motion and the attached *Amici Curiae* brief previously submitted by the *amici* in *The New School*, Case No. 02-RC-143009, in response to the Notice and Invitation dated January 13, 2016. The brief urges the Board to affirm *Brown University*, 342 NLRB 483 (2004) as correctly decided, and argues -- consistent with Board authority -- that graduate students engaged in research, including graduate students who are funded by external grants, are not statutory employees within the meaning of the National Labor Relations Act ("NLRA"). *See, e.g.*, *New York University*, 332 NLRB 1205, 1209 n.10 (2000) and *Leland Stanford Junior University*, 214 NLRB 621 (1974).

No compelling reason to deviate from *Brown*'s ruling is presented by the facts of *Columbia*. Rather, here, as in *Brown*, graduate students are admitted into Columbia based on consideration of prior academic performance. They are not hired by the university. In addition, graduate students must be enrolled to receive an instructional or research appointment; students' principal time commitment is to obtain a degree, not to "work"; teaching is a central element, if not a requirement, of most of the Ph.D. programs; all doctoral students are offered the same financial package upon admission, and fellows without instructional or research appointments receive the same financial aid

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as students holding the petitioned for positions. *See, e.g.*, *Brown*, 342 NLRB at 488-89; *see also*, *generally*, Regional Director's Supplemental Decision and Order Dismissing Petition; *id.* at 5, 28.

Finally, that the record facts differ markedly in *The New School* and *Columbia* underscores the compelling need for the Board to engage in case specific adjudication tailored to the facts before it, and to avoid making a broad pronouncement of policy regarding graduate students generally. A sweeping, across-the-board ruling that teaching assistants and research assistants at Columbia or at any other university, without a close examination of the facts in each case, is inappropriate, unwarranted on the instant record, and is inconsistent with the policies and purposes of the NLRA.

Very truly yours,

SEYFARTH SHAW LLP

Marshall B. Babson

MBB
Attachment
cc: All case participants (w/attachment)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

---x

THE NEW SCHOOL,

Employer,

- and

Case No. 2-RC-143009

STUDENT EMPLOYEES AT
THE NEW SCHOOL-SENS, UAW,

Petitioner.

---x

TO: Mr. Gary Shinners
Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
gary.shinners@nlrb.gov

REQUEST FOR PERMISSION TO FILE A BRIEF *AMICI CURIAE*

On behalf of the American Council On Education ("ACE"), the Association of American Medical Colleges ("AAMC"), the Association of American Universities ("AAU"), the Association of Jesuit Colleges and Universities ("AJCU"), the College and University Professional Association for Human Resources ("CUPA-HR"), and the National Association of Independent Colleges and Universities ("NAICU"), we respectfully request permission to file an *amici curiae* brief in the above-captioned matter.

ACE is a non-profit, national educational association that represents all sectors of American higher education. Its approximately 1,700 members reflect

the extraordinary breadth and contributions of degree-granting colleges and universities in the United States. Founded in 1918, ACE seeks to promote high standards in higher education, believing 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.

AAMC is a non-profit association representing all 145 accredited U.S. medical schools, nearly 400 major teaching hospitals and health systems, and more than 80 academic 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 of leadership in biomedical science research training units to promote quality in the graduate programs of accredited medical schools in the United States.

AAU is an association of 62 leading public and private research universities in the United States and Canada. Founded in 1900 to advance the international standing of U.S. research universities, AAU today focuses on issues that are important to research-intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education. The 60 AAU universities in the United States award more than one-half of all U.S. doctoral degrees and 55 percent of those in the sciences and engineering.

AJCU represents all 28 Jesuit institutions in the U.S. and is affiliated with over 100 Jesuit institutions worldwide. The first Jesuit institution opened in 1548 in Messina, Sicily, and Jesuit institutions remain committed to academic rigor, with a focus on quality teaching, learning, and research to educate the whole person.

CUPA-HR, the voice of human resources in higher education, represents more than 19,000 human-resources professionals at over 1,900 colleges and universities. Its membership includes 91 percent of all United States doctoral institutions, 77 percent of all master's institutions, 57 percent of all bachelor's institutions, and 600 two-year and specialized institutions.

With more than 1,000 member institutions and associations, NAICU serves as the unified national voice of independent higher education, reflecting the diversity of private, nonprofit higher education in the United States. NAICU's 964 member institutions, which reflect the diversity of private, nonprofit higher education in the United States, include major research universities, church-related colleges, historically black colleges, art and design colleges, traditional liberal arts and science institutions, women's colleges, two-year colleges, and schools of law, medicine, engineering, business, and other professions.

The *amici* respectfully request that the National Labor Relations Board ("NLRB") grants the instant request and accepts this brief for consideration

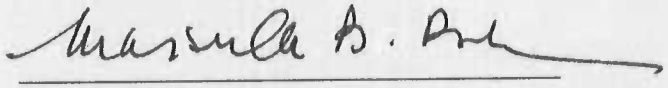
because the issues raised in the above-captioned matter are of paramount importance to higher education in the United States, and therefore, are of significant interest to the *amici* and their member institutions.

In asking the NLRB to reconsider *Brown University*, 342 NLRB 483 (2004) ("*Brown*"), and to revisit *Leland Stanford Junior University*, 214 NLRB 621 (1974) ("*Leland Stanford*"), Petitioner Student Employees at The New School-SENS, UAW seeks to undo decades of well-reasoned and settled NLRB precedent and policy. A decision by the NLRB to overturn *Brown* and *Leland Stanford*, particularly on the record before it, will unsettle fundamental relationships in higher education in the U.S. and adversely impact 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 *Leland 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
December 16, 2015

Respectfully submitted,

SEYFARTH SHAW LLP



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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THE NEW SCHOOL,

Employer,

- and

Case No. 2-RC-143009

STUDENT EMPLOYEES AT
THE NEW SCHOOL-SENS, UAW,

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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 ASSOCIATION OF JESUIT COLLEGES AND 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 1,700 members reflect the extraordinary breadth and contributions of degree-granting colleges and universities in the United States. Founded in 1918, ACE seeks to promote high standards in higher education, believing 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.

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private, nonprofit higher education in the United States. NAICU's 964 member institutions, which reflect the diversity of private, nonprofit higher education in the United States, include major research universities, church-related colleges, historically black colleges, art and design colleges, traditional liberal arts and science institutions, women's colleges, two-year colleges, and schools of law, medicine, engineering, business, and other professions.

In asking the National Labor Relations Board ("NLRB" or "Board") to reconsider *Brown University*, 342 NLRB 483 (2004) ("*Brown*"), Petitioner Student Employees at The New School-SENS, UAW ("Petitioner") seeks to contravene decades of well-reasoned and settled Board precedent and policy. A reversal by the NLRB of its decision in *Brown* and a repudiation of the principles underlying *Leland Stanford Junior University*, 214 NLRB 621 (1974) ("*Leland Stanford*") and *New York University*, 332 NLRB 1205 (2000) ("*NYU I*") with respect to research assistants, will have deleterious implications that are both extensive and far reaching. Such a reversal will adversely impact fundamental, core aspects of the manner in which higher education institutions across the country structure and deliver graduate education. It will intrude unnecessarily upon academic freedom and the relationship among our nation's universities, professors and their graduate students.

SUMMARY OF ARGUMENT

Petitioner asks the Board to stray from its statutory mandate by reversing its decision in *Brown* with respect to graduate students who as part of their academic program assist faculty in the teaching of courses and to implicitly overrule *Leland Stanford* and *NYU I*, with respect to graduate students who are also research assistants. Petitioner's unabashed purpose is to extend its reach by intruding collective bargaining as broadly as possible into academic matters at the expense of the student-teacher relationship at the penultimate level of higher education in the United States.

Echoing the dissent in *Brown*, Petitioner argues that *Brown* represents a distinct departure from existing Board precedent and is inconsistent with the language of the National Labor Relations Act (the "Act" or "NLRA") and Supreme Court precedent. In advancing this argument, Petitioner offers a wholesale misinterpretation of the relevant authority, as until *NYU I*, the Board maintained an unbroken policy, consistent with the Act, of denying collective bargaining rights to graduate students. The Board in *Brown*, and cases relied on therein, recognized that the "academic reality" for graduate students has not materially changed and emphasized the importance of the university's academic freedom to make decisions affecting the relationship between students and faculty. This freedom of the university and its faculty 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. *See Brown*, 342 NLRB at 492 ("the broad power to bargain over all Section 8(d) subjects would, in the case of graduate student assistants, carry with it the power to intrude into areas that are at the heart of the educational process.").

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 positions provide exposure to members of an institution's community of scholars and learners, other disciplines (often crossing disciplines) and experiences which are integral to and characterize doctoral education in the United States. These are quintessentially academic concerns. An improvident exercise of the NLRB's jurisdiction over these matters would inevitably harm the university's core educational mission and cause irreparable damage to the student-teacher relationship.

In recognition of this, the Supreme Court and the NLRB have repeatedly 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, 680 (1980), citing *Adelphi Univ.*, 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); *see also*, *Northwestern Univ.*, 362 NLRB No. 167, fn. 7 (2015). 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 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.

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, in *Brown* 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. Petitioner presents no compelling reason to depart from this long-standing precedent.

Moreover, and importantly, administrative jurisprudence compels the Board to proceed on a case-by-case basis, issuing decisions tailored to the facts and circumstances before it, and not to use the facts of one case as an expedient to reverse a factually distinguishable case. As the record currently before the Board in *The New School* ("*New School*") differs from *Brown*, the facts here present no opportunity to reconsider *Brown* or its core underpinnings. Indeed, a sweeping reversal of *Brown* on the present record would constitute impermissible rule-making under the guise of adjudication.

ARGUMENT

I. *BROWN* WAS CORRECTLY DECIDED.

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

Brown was correctly decided and should not be overruled. Since *Brown*, the landscape of higher education has not changed in any way that warrants a departure from its holding that graduate students are not employees within the meaning of the Act. Now, just as before, 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 student-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 are furthering their own learning and are developing the skills necessary for them to become teachers in their own right.

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 40 years.[1] There is no compelling basis, much less the record in the case *sub judice*, to overrule *Brown* and disturb this well-settled view, which 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 students' graduate school education and the cost of living while they are 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 Leland Stanford*, 214 NLRB at 621. Fellowship stipends provide students with financial support, enabling them to pursue an advanced course of study whose cost would otherwise be prohibitive for most students.

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[1] *See e.g., Leland Stanford*, 214 NLRB at 621; *Adelphi Univ.*, 195 NLRB at 639.

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. 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.

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 present in universities

across the country 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. *See, e.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 at n. 48 ("a great deal of learning occurs informally. It occurs through interactions among students. . . In the nature of things, it is hard to know how, and when, and even if, this informal [learning] actually occurs"). This model is emulated in countries worldwide that aspire to achieve that which U.S. universities have provided for this nation. To regulate these central academic relationships by industrial procedures designed to govern the relations between labor and management would result in deleterious consequences in the academic setting.

B. Graduate Students Are Not "Employees" Consistent With The Commonly Understood Meaning.

Ignoring the caveat of the Supreme Court in *Yeshiva University*, 444 U.S. at 680-681, that principles applicable to an industrial setting cannot be "imposed blindly on the academic world," Petitioner overlooks the fundamentally educational nature of graduate students' relationship with the university. Petitioner's characterization of graduate students engaged in teaching and research as "employees" under Section 2(3) — merely because on the record in this case,

they apply for the positions, are directed 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 urged by Petitioner.

In *Goodwill Indus. of Denver & United Food & Commercial Workers Int'l Union, Local No. 7, AFL-CIO-CLC*, 304 NLRB 764, 765 (1991), for example, the NLRB held that disabled individuals who work for Goodwill maintained a "clearly rehabilitative" relationship, "not [one] primarily guided by economic or business considerations." Accordingly, the Board found the disabled workers did not fit into the meaning of "employee" under the Act. Similarly, in *Brevard Achievement Center, Inc.*, 342 NLRB 982, 984 (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 at 765.

Invoking the principle of "*expressio unius est exclusio alterius*," Petitioner argues for an interpretation of Section 2(3) on the grounds that Section 2(3) does not expressly exclude graduate students. *See* Petitioner's Request For Review Of Supplemental Decision and Order Dismissing Petition ("Pet. Br.") at 27. 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*

Co. Div. of Textron, Inc., 416 U.S. 267(1974) (affirming the Second Circuit's reversal of Board's holding that managerial employees were "employees" under the Act). "Managerial employees" therefore are not truly "employees" nor treated as such, although a blindly literal interpretation of Section 2(3) might suggest otherwise.

Similarly, Petitioner's reliance on *Boston Medical Center Corp.*, 330 NLRB 152 (1999), holding interns, residents and fellows (collectively, "residents") to be employees, 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 basis for that decision from the case of graduate students. *See also, e.g., St. Barnabas Hospital*, 355 NLRB No. 39 (2010) (observing "[i]t is apparent that the role[s] of [Teaching Assistants ("TAs")] and [Research Assistants ("RAs")] at universities is different from that of house staff at medical centers").

For example, residents "had already completed and received their academic degrees." *Brown*, 342 NLRB at 487. Also, 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. *See New School* R.D. at 4 (positions require between 10 and 20 hours per week).

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 TAs and RAs, noting that "while [residents] possess certain attributes of student status, they are unlike many others in the traditional academic setting." 330 NLRB at 161. The Board articulated a series of factors which distinguish residents from students; each such factor that is indicative of "student" status applies to graduate students in higher education generally. *Id.* Specifically, 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 receive 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.*

Moreover, *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 heavily relies, only serve to differentiate the nature of "apprentices" from that of 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; *see also Newport News Shipbuilding*, 57 NLRB at 1059 (apprentices "have interests akin to those of production and maintenance employees in selecting a collective bargaining representative").

Finally, each of the remaining cases Petitioner cites in support of the argument that graduate students "are 'employees' within the literal language of section 2(3)" involves an inherently commercial or economic relationship and is thus inapposite here. *See generally,* Pet's. Br. at 38; *see* e.g., *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (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 with boilermaker and/or welder positions); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-186 (1941) (addressing discrimination against employees for union membership).

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

Petitioner contends that the 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.*, Pet. Br. at 34-36. 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 are 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 purely pedagogical relationship. Rather, the breadth of mandatory subjects of bargaining goes far beyond any limited "employee-like" role that the Petitioner 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. For example, graduate students at Southern Illinois University sought to bargain for the "freedom to create syllabi, select course materials and to determine grades," topics at the core of university instruction.[2] At Temple University, 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," notwithstanding that who shall be admitted and under what circumstances goes to the heart of graduate and undergraduate education.[3] Similarly, graduate students at the University of Wisconsin bargained for provisions that prevent faculty from evaluating student teachers through unannounced visits, and graduate students at the University of Michigan sought a contract provision that non-native English speakers who passed a qualifying test would "not be pulled from their teaching assignment on the grounds that they lack English language proficiency[,]" even if class room performance was inconsistent with the test results.[4]

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[2] *See* http://laborrelations.siu.edu/_common/documents/labor-contracts/2010-2014-gau.pdf.
[3] *See The New School*, 2-RC-143009, Opposition to Petitioner's Request For Review ("Emp. Br.") at 36, fn. 5.
[4] *See* http://tugsa.org/wordpress/wp-content/uploads/2010/08/contract2010.pdf (last visited on Dec. 15, 2015); http://oser.state.wi.us/docview.asp?docid=7113 (last visited on Dec. 15,

Even at New York University ("NYU"), while initially recognizing "certain issues involving the academic mission of the University lie outside the scope of bargaining as defined by the National Labor Relations Act,"[5] the graduate students instigated arbitration over the contention that bargaining unit members should be assigned to teach certain recitation discussions or lab sections instead of other individuals that the department had assigned. The union similarly filed grievances over issues that NYU found to threaten "academic decision-making authority of the faculty" such as the "staffing of the undergraduate curriculum," "appropriate measures of academic progress of students" and "optimal design of support packages for graduate students." *See* Recommendation from the Faculty Advisory Committee on Academic Priorities.[6] Finally, just last year, in the University of California system ("UC"), graduate students went on strike, in part, due to the administration's refusal to bargain over class sizes and student-teacher ratios,

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2015).; "GEO Bargaining Platform," at http://www.umgeo.org/bargaining-2010-11/bargaining-platform-2010-11/ (last visited on Dec. 15, 2015).

[5] *See* 2001 Letter of Agreement Between NYU and Local 2110, UAW, attached to Petitioner's Request For Review Of Supplemental Decision and Order Dismissing Petition in *New York University*, 02-RC-23481 ("*NYU II* Pet. Br."), as Employer's Exhibit ("Exh.") 38. Included among issues Petitioner initially 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 NYU II* Pet.'s Br. at Employer's Exh. 39.

despite language in their collective bargaining agreement preserving the administration's discretion over academic issues.[7]

This experience only confirms — if further confirmation were needed — that collective bargaining over graduate students assigned to teaching and research inevitably encroaches on academic matters that should remain outside the ambit of the Act. *See, e.g.*, the Final Report of the Senate Academic Affairs Committee and the Senate Executive Committee attached to *NYU II* Pet.'s Br. as Employer's Exh. 38; Recommendation From the Faculty Advisory Committee on Academic Priorities attached to *NYU II* Pet.'s Br. as Employer's Exh. 39.[8] To avoid this result, in the case of public institutions subject to state laws that impose collective bargaining on universities, the scope of collective bargaining is often limited by

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[7] *See* https://urldefense.proofpoint.com/v2/url?u=http-3A__www.sacbee.com_news_politics-2Dgovernment_article2590789.html&d=CwIFAw&c=fMwtGtbwbi-K_84JbrNh2g&r=65cNl7NeB6lE6J6nnW9HQiwDz4ZajGobw7Yyl6iq9qA&m=_zym6ioSSGrP8xuyVrQ_NxALAX5bngSz4oj3DBMaLkE&s=8FONBlv2V_ouSFfAwe2PbvX9pxhrCc9oK359cdpaHdk&e= (last visited on Dec. 15, 2015); https://urldefense.proofpoint.com/v2/url?u=http-3A__dailybruin.com_2014_04_03_ucla-2Dtas-2Dstrike-2Dover-2Dalleged-2Dunfair-2Duc-2Dlab&d=CwIFAw&c=fMwtGtbwbi-K_84JbrNh2g&r=65cNl7NeB6lE6J6nnW9HQiwDz4ZajGobw7Yyl6iq9qA&m=_zym6ioSSGrP8xuyVrQ_NxALAX5bngSz4oj3DBMaLkE&s=3_KZjPGxAV9CnFE_IKK_c0xi79ny1SPm1MQtAVZDHYA&e=or-practices/ (last visited on Dec. 15, 2015).

[8] Despite Petitioner's suggestion, the conclusions advanced in Sean E. Rogers, et al., "*Effects of Unionization on Graduate Student Employees: Faculty - Student Relations, Academic Freedom, and Pay*," 66 ILR Review 485 (2013), do not contradict the foregoing experiences and the authors themselves warn against reliance on the conclusions in a legal setting. *Id.* at 508. ("[l]ike graduate student unionization itself, the nuances of the[] differing contexts [present in the study] deserve empirical investigation before they are given weight in any legal decisions.").

law with respect to academic and curriculum-related matters. There are no such limitations on the duty to bargain under the NLRA. *See, e.g., NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342 (1958).

Thus, the Board properly recognized in *Brown* that none of the subjects of collective bargaining which Petitioner would characterize as 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 489.

II. RESEARCH ASSISTANTS ARE NOT EMPLOYEES UNDER THE ACT.

In seeking to include RAs in the collective bargaining unit, Petitioner asks the Board to overrule its holdings in *NYU I* and *Leland Stanford*, decisions which still correctly reflect the nature of RAs in higher education after over 40 years.

In *Leland Stanford*, the Board found that RAs 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 the assistants' research "is part of the course of instruction, a part of the learning process ... [T]he doctorate is a research degree, and independent investigation is required in order to earn it." *Leland Stanford,* 214 NLRB at 621-22. In particular, 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. Petitioner oversimplifies the Board's holding in *Leland Stanford* by arguing that the decision was driven by the mere fact that the graduate students in question were not paid by the university, but rather outside funding sources. *See* Pet. Br. at 32-33.

Consistent with the Board's holding in *Leland Stanford*, in *NYU I* the Board similarly found that ". . . 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. . ." 332 NLRB at n. 10. This conclusion was based on the findings that (i) 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; (ii) RAs did not work a specific amount of hours, but worked for as much time as the research required;

(iii) the funding for the RAs was therefore "more akin to a scholarship"; and (iv) RAs frequently worked under external grants, such as National Institute of Health or the National Science Foundation 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.* at 1220.

Consistent with this decades old precedent, even the dissent in *Brown* noted that the rationale in *Leland 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*. *Brown*, 342 NLRB at 495 (dissent).

As evidenced by the findings of the Regional Director here, *New School* R.D. at 7-10, there has been little or no change in the circumstances pertaining to RAs since *Leland 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. The NLRB has never held otherwise.

III. THE FACTS OF THIS CASE DO NOT PROVIDE AN ADEQUATE BASIS TO OVERRULE OR RECONSIDER *BROWN* AND UNDERSCORE THE IMPORTANCE OF CASE-BY-CASE DETERMINATIONS BY THE BOARD.

The factual circumstances unique to the *New School* are dissimilar from the facts of *Brown*, and so provide no opportunity for the Board to overrule or reconsider *Brown*. For example, unlike in *Brown*, at The New School holding the

petitioned for positions is not a degree requirement, graduate students are required to engage in an extensive job application procedure, and students holding the petitioned for positions receive compensation that is not available to students who do not hold such positions. *See* Regional Director's Decision Supplemental Decision and Order Dismissing Petition ("*New School* R.D.") at 4, 9, 13-15, 18. While these facts are hardly indicative of employee status, they also are not closely tied to the record in *Brown*. *See generally, e.g., Brown*, 342 NLRB 483.

That the records differ from each other in *Brown*, *The New School*, and in other matters, such as in *The Trustees of Columbia in the City of New York*, 02-RC-143012, highlights the need for the Board to engage in case specific adjudication tailored to the facts before it, and to avoid affirmatively searching for an opportunity to overrule *Brown* on a unique, materially distinct set of facts. Just as courts adjudicating cases would follow this approach, so too should the Board refrain from setting out to make a broad pronouncement of policy regarding graduate students, generally. *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). While the NLRB 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, it may not take a rule-making approach in the guise of adjudication. *See Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. at

293. The Board's "administrative flexibility" does not allow it to use the facts of one case as an expedient to reverse a factually distinguishable case. Just as the dissent in *Brown*, commenting on the application of the Supreme Court's decision in *Yeshiva University*, 444 U.S. at 672, noted that "not all faculty members at every university would fall into the same category," *Brown*, 342 NLRB at 500 fn. 6, and opined that the Board should proceed on a case-by-case analysis, so too, the Board should proceed on a case-by-case basis here. A sweeping, across-the-board pronouncement that TAs and RAs are employees, without a close examination of the record facts in each case, is wholly inappropriate and is unsupportable on the record before the Board.

The present record is an inadequate vehicle for the Board to rely upon in reconsidering *Brown*. Such a ruling on this record would tend to give credence to the views of certain of the Board's critics 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 3, 4 (2010) (dissent). Administrative jurisprudence demands more of NLRB decision-making, and this Board has a statutory obligation to ensure that its decision-making is so principled.

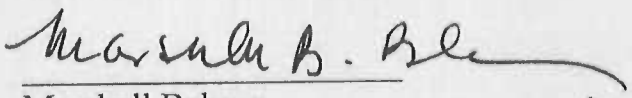
CONCLUSION

For the foregoing reasons, the Board should affirm the Regional Director's decision in *The New School* and dismiss the petition for review.

Dated: New York, New York
December 16, 2015

Respectfully submitted,

SEYFARTH SHAW LLP



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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2015, I caused a true and correct copy of the foregoing *Amici Curiae* Brief of the American Council On Education, the Association of American Medical Colleges, the Association of American Universities, the Association of Jesuit Colleges and Universities, the College and University Professional Association for Human Resources, and the National Association of Independent Colleges and Universities to be filed electronically using the National Labor Relation Board's Electronic Filing System, and that I caused the same to be served electronically via e-mail, upon the following:

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I further certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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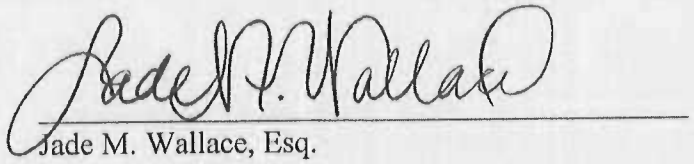

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I hereby certify that on February 26, 2016, I caused a true and correct copy of the foregoing Letter Motion and attached *Amici Curiae* Brief of the American Council On Education, the Association of American Medical Colleges, the Association of American Universities, the Association of Jesuit Colleges and Universities, the College and University Professional Association for Human Resources, and the National Association of Independent Colleges and Universities to be filed electronically using the National Labor Relation Board's Electronic Filing System, and that I caused the same to be served electronically via e-mail, upon the following:

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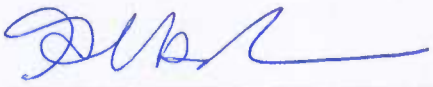

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