

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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POLYTECHNIC INSTITUTE OF NEW YORK :  
UNIVERSITY, :  
Employer, :  
-and- : Case No. 29-RC-12054  
INTERNATIONAL UNION/UAW, :  
Petitioner :  
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**BRIEF ON REVIEW OF**  
**POLYTECHNIC INSTITUTE OF NEW YORK UNIVERSITY**

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	iii
PRELIMINARY STATEMENT .....	1
FACTS .....	2
A. Polytechnic is an Educational Institution.....	2
B. Graduate Education at Polytechnic.....	3
1. PhD Degree Programs at Polytechnic.....	3
2. Master’s Degree Programs at Polytechnic.....	4
C. Financing Graduate Education at Polytechnic.....	5
1. Financial Support for PhD Students .....	5
(a) Teaching Assistants .....	5
(b) Research Assistants.....	7
2. Financial Support for Master’s Students – The GSET Program.....	9
D. Graduate Students Are Subject to Different Policies than Polytechnic Employees .....	13
E. The Petition and Regional Director’s Decision .....	14
ARGUMENT .....	15
I. <i>BROWN</i> REQUIRES THE DISMISSAL OF THE PETITION IN ITS ENTIRIETY .....	15
A. TAs, RAs and GAs Must be Enrolled as Students at Polytechnic.....	16
B. The Financial Support Provided to TAs, RAs and GAs Is Not Compensation For Work.....	16
C. The Duties Performed By TAs, RAs and GAs Are Directly Related to Their Education .....	16
D. TAs, RAs and GAs Are Often Supervised by Faculty in Their Departments .....	18
E. The Record Evidence Provides No Basis on which to Modify or Overrule <i>Brown</i> .....	19
II. EVEN IF <i>BROWN</i> IS REVERSED, RAs ARE NOT STATUTORY EMPLOYEES UNDER LONG-TERM BOARD PRECEDENT THAT SHOULD CONTINUE TO BE FOLLOWED.....	20
A. RAs at Polytechnic Are Not Statutory Employees under <i>Leland Stanford</i> and <i>NYU I</i> .....	20
B. <i>Leland Stanford</i> Remains Valid and Should be Upheld as Long-term Precedent.....	24

III. TAs AND GAs ARE TEMPORARY EMPLOYEES AND THEREFORE ARE EXCLUDED FROM BARGAINING .....	25
IV. THE BOARD DOES NOT HAVE A QUORUM TO DECIDE THIS CASE .....	28
CONCLUSION.....	29

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Brown University</i> , 342 NLRB 483 (2004) .....	passim
<i>Ctr. for Soc. Change, Inc.</i> , 358 NLRB No. 24 (Mar. 29, 2012).....	29
<i>Juilliard School</i> , 208 NLRB 153 (1974) .....	28
<i>Kansas City Repertory</i> , 356 NLRB No. 28 (Nov. 16, 2010) .....	27, 28
<i>Leland Stanford Junior University</i> , 214 NLRB 621 (1974) .....	passim
<i>New Process Steel, L.P. v. NLRB</i> , 130 S. Ct. 2635 (2010).....	28
<i>New York University</i> , 332 NLRB 1220 (2000) .....	passim
<i>Saga Food Service</i> , 212 NLRB 786 (1974) .....	25, 26, 27
<i>San Francisco Article Institute</i> 226 NLRB 1251 (1976) .....	26, 27, 28
<i>Trump Taj Mahal Assocs.</i> , 306 NLRB 294 (1992) .....	25
<i>University of West Los Angeles</i> , 321 NLRB 61 (1996) .....	26, 27
<b>STATUTES</b>	
I.R.C. § 117.....	24
<b>OTHER AUTHORITIES</b>	
1986 Tax Reform Act .....	24

## PRELIMINARY STATEMENT

Graduate students in the engineering and applied science PhD programs at Polytechnic Institute of New York University (“Polytechnic”) receive financial aid through appointments as Teaching Assistants (“TAs”) and Research Assistants (“RAs”) as an integral part of their academic programs. Masters students similarly are supported by working as Graduate Assistants (“GAs”) on a variety of specially-designed projects related to their studies. The Regional Director dismissed the Petition filed by the International Union/UAW seeking to represent Polytechnic’s graduate students in these positions because he found that they have a primarily academic relationship with the university and, therefore, are not statutory employees under the Board’s holding in *Brown University*, 342 NLRB 483 (2004) (“*Brown*”). Furthermore, even if *Brown* were to be overruled, the Regional Director held that RAs would still not be considered statutory employees under *Leland Stanford Junior University*, 214 NLRB 621 (1974) (“*Leland Stanford*”), as they are not performing work for Polytechnic, but are doing research required for their degrees, and for which they receive academic credit.

In granting the Request for Review of the Regional Director’s decision, the Board has asked the parties and interested amici to address whether it should modify or overrule its decision in *Brown* and, if so, whether it nevertheless should continue to adhere to the holding in *Leland Stanford*. Nothing in the record of this case supports such changes in Board precedent. To the contrary, this case confirms the fundamental soundness of those decisions in holding that the economic model of collective bargaining under the National Labor Relations Act cannot properly be applied to graduate students, such as Polytechnic’s TAs, RAs and GAs, whose teaching, research, or other work is inseparable from their academic programs.

The Board also asks the parties and amici to address two additional questions in the event that *Brown* is modified or overruled – relating to the scope of an appropriate bargaining unit

including students and whether students should be treated as temporary employees. As there was no issue raised below regarding the scope of the petitioned-for-unit of Polytechnic graduate students, that question is not before the Board in this case. With respect to temporary employees, the Regional Director erroneously found that TAs and GAs should be included in a bargaining unit, contrary to Board precedent that these short-term student positions, typically lasting no more than one academic year, should be excluded from collective bargaining.

### FACTS

#### A. Polytechnic is an Educational Institution

Polytechnic is the second oldest private engineering school in the country and has been in existence for over 150 years. Its stated mission is “[t]o excel as a leading high-quality research university engaged in education, discovery and innovation with social, intellectual and economic impact in the New York Region, the nation and the world.” (Decision at 3) To this end, Polytechnic offers degrees, both undergraduate and graduate, in eleven academic departments, and, at the time of the hearing, had a total of approximately 4,000 students, including about 1,700 undergraduates and 2,300 graduate students, and employed approximately 155 full-time faculty members, including some 100 tenured and tenure-track faculty. (*Id.*)

On or about July 1, 2008, Polytechnic entered into an affiliation agreement with New York University (“NYU”), the ultimate goal of which is for Polytechnic to become the School of Engineering and Applied Science of NYU within the next five to ten years. (Decision at 4) It is not certain that Polytechnic will become a school of NYU, however, and Polytechnic currently remains independent of NYU with its own sources of funding, administrative and academic structure, and tax identification numbers. (*Id.*, Tr. 333-35)<sup>1</sup>

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<sup>1</sup> Transcript references are indicated as “Tr.” followed by the page number. Employer Exhibits are referred to herein as “EX”, Petitioner Exhibits as “PX” and Board Exhibits as “BX”.

## B. Graduate Education at Polytechnic

Of Polytechnic's almost 2,300 graduate students, approximately 200 are full time PhD students, and the balance are enrolled in Master's programs in "a variety of engineering, science, management, and technically related areas." (Tr. 329, 341, 423, 425)

### 1. PhD Degree Programs at Polytechnic

The PhD degree is a research degree that culminates in the submission and defense of an original research thesis. (Decision at 10) A student must complete a total of 75 credits to obtain a PhD degree through a combination of coursework and research, including a minimum of 21 research credits. (Decision at 3; Tr. 336-39, 426-27; EX. 8 at 30) Some departments require more research credits; for example, the Chemical and Biological Engineering Department requires PhD students to complete 45 research credits. (Tr. 337, 426; EX 8 at 142) Once students have completed their first 30 credits, which consist primarily of coursework in the selected field of study, they must pass a PhD qualifying exam, which usually occurs at the end of their first year of study. (Decision at 3; Tr. 337, 342, 471) The exam traditionally has several components, including both written and oral, and, once a student has passed it, he or she has "demonstrated a mastery of the basic knowledge of that field to the point where [Polytechnic feels it can] pair up that student with a faculty advisor and let the student embark on . . . guided thesis research." (Tr. 343)

After successfully completing the qualifying exam, PhD students dedicate the majority of the duration of the PhD program to performing the research necessary for completing their thesis. (Decision at 3, 10; Tr. 187, 337, 339, 343, 428, 477) The first step in this process is giving an oral presentation on the proposed topic to a dissertation committee which tests the student's knowledge of the proposed topic. (Decision at 10) Students who pass this oral examination, usually continue with their thesis research as an RA. (*Id.*)

Students do not complete their theses alone, but with the guidance and mentorship of a faculty advisor whose research interests align with their own. (Tr. 340) The process of selecting a faculty advisor occurs naturally as “[d]octoral applicants to a PhD program typically don’t select a university because of the university. They select it because of a PhD program. And even more specifically because of a particular faculty member that they would like to work with.” (*Id.*) Therefore, doctoral students generally enter Polytechnic with a particular thesis advisor in mind. (Tr. 340, 469)

The thesis, the publication of an original piece of research, is the culmination of the PhD program. All PhD candidates must submit a written thesis, often referred to as a dissertation, based on the research that they conduct as part of their studies. (Tr. 337) This thesis must be published in a peer reviewed journal and approved by a thesis committee before which the student publicly defends his or her thesis. (Tr. 337, 429) Students who successfully complete their thesis and obtain PhDs from Polytechnic pursue careers in both academia and industry. (Tr. 407, 482)

## 2. Master’s Degree Programs at Polytechnic

The Master’s degree programs at Polytechnic are designed for students who are seeking to specialize in a particular field before entering an industry or government position. (Tr. 424) A Master’s degree typically requires two years of coursework, representing 30 credits, and may also include the option to complete a Master’s thesis. (Tr. 423; *see also* Tr. 278, 464) While the Master’s programs are terminal programs, some students do apply to and enter PhD programs either at Polytechnic or another institution after completing the Master’s program. (Tr. 424-25)

## C. Financing Graduate Education at Polytechnic

### 1. Financial Support for PhD Students

Polytechnic provides support to its PhD students through two primary mechanisms – externally funded research assistantships (RAs) and teaching assistantships (TAs). (Tr. 341) Some students may have other sources of funding such as foreign governments. (Tr. 352, 356-57)<sup>2</sup>

Students generally are supported as TAs in their first year and are supported as RAs once they pass their PhD qualifying exams and begin their thesis research in their second year.

(Decision at 10)

Students supported as TAs and RAs receive a standard financial aid package that consists of a stipend for the nine-month academic year, up to 18 credits per year of tuition remission and fees and health insurance.<sup>3</sup> (Tr. 348-49, 353) Polytechnic provides two levels of stipends to its doctoral students: one for students who have not yet completed their qualifying exam (approximately \$2,125 per month) and one for students who have successfully completed their qualifying exam and are admitted into PhD candidacy (approximately \$2,450 per month). (Tr. 353) These stipend levels do not vary based on an individual student's skill, time spent performing tasks related to the appointment, or other differences in responsibilities. (Tr. 348, 353-54)

#### (a) Teaching Assistants

Each year, Polytechnic supports approximately 25 students with appointments as TAs. (Tr. 341) Teaching assistantships generally last for just one year. (Decision at 10) When

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<sup>2</sup> Polytechnic generally discourages unfunded students from entering its PhD programs, although there may be a small number of unfunded students utilizing personal funds at any given time. (Tr. 342)

<sup>3</sup> RAs often also receive a stipend to cover the summer months. (Tr. 349)

students pass their qualifying exams, they begin their dissertation research, usually as an RA.

*(Id.)*

TAs typically are assigned to work in undergraduate teaching labs, and may also perform some grading. (Decision at 9) TAs supervise various groups of students in conducting experiments. Within the laboratories, each TA assumes responsibility for several groups of undergraduate students, ensuring that the correct equipment is available and in working order, guiding the students in setting up the experiments and verifying that the appropriate steps have been completed before turning on certain pieces of equipment. (Decision at 9; Tr. 346, 374, 488; *see also* Tr. 147) The TAs also answer general questions about the experiments, and the science behind those experiments, and may administer a short quiz at the beginning of an experiment to confirm that the students are properly prepared. (Tr. 346) Finally, TAs also may grade the written laboratory reports submitted at the end of each experiment, which are often quite lengthy and demanding. (Tr. 346-47, 375; *see also* Tr. 151, 431-32)

An individual must be a graduate student in order to serve as a TA and the experience as a TA is an important aspect of doctoral students' education that "sharpen[s] both their laboratory skills and teaching skills." (Decision at 8-9, 14) They provide students with a new vantage point for learning their chosen field, broadening their knowledge of the subject matter. (Tr. 347, 432, 489; *see also* Decision at 10) Moreover, serving as a TA directly prepares students for careers in academia or other research positions. Students who will work in academia are receiving training needed to teach undergraduates in laboratory courses similar to those they are helping to run at Polytechnic. Those who go into careers in government or private industry similarly are learning invaluable communications skills. (Decision at 10; Tr. 432-33, 489)

These sentiments were consistently echoed throughout the hearing. As Kurt Becker, Associate Provost of Polytechnic, noted, TA positions:

really broaden the students' expertise and experience in a particular field. It is one thing to study from a book. It's a different thing to actually take this book knowledge and turn it into a practical experiment. So it gives them an added dimension to their mastery of the field. Even though they are basic experiments, it still gives them an added component in their educational breadth.

(Tr. 347) Similarly, Walter Zurawsky, Head of Chemical and Biological Engineering

Department, testified that TAs in Chemical Engineering laboratories:

...are studying chemical engineering and this is a chemical engineering laboratory, and it's very hands-on, very applied chemical engineering experience. So in going through that process of being at TA, one learns an awful lot about some of the things that you should have learned when you were an undergraduate and you become much sharper and better at a lot of these things. So, yes, it improves and broadens their background in fundamental education and chemical engineering.

(Tr. 432; *see also* Tr. 489) Petitioner's own witness Harold Han confirmed that his experience as a TA in an organic chemistry laboratory course helped prepare him for a career in academia teaching organic chemistry, where he would have to know how to instruct students in the type of laboratory he ran as a TA. (Tr. 155)

Finally, TAs often develop close and invaluable relationships with the faculty member leading a course, who mentors the TAs. (*See* Decision at 9) This can serve as the basis for future mentoring relationships while also providing the TA with an opportunity to receive critical assistance in preparing and presenting material to students. (Tr. 375-76) Faculty members also attend portions of the laboratory sessions, working with the TAs as well as the undergraduates in the course. (Tr. 347-48, 376, 487-88)

(b) Research Assistants

The "vast majority" of PhD students at Polytechnic support their study through RA positions in which they perform research in association with a research grant that is "funded not

by the university itself but by outside sources, particularly the federal government.” (Decision at 16) The external grants that provide funding for RA positions are obtained by individual faculty members who serve as the Principal Investigator (“PI”) on the grant and who supervise the research performed in connection with it. (Decision at 11; Tr. 384)

When a student is appointed to a research assistantship, he or she receives an appointment letter. Although the appointment letter for RAs states that they are expected to “allocate approximately 20 hours per week to the performance of assigned tasks,” there is no specific number of hours that RAs work on their research, and students typically spend much more than 20 hours per week working on their research. (Decision at 11 n. 18; Tr. 363; EX 9) In order to hold a position as an RA, an individual must be registered as a full-time PhD student at Polytechnic. (EX 8 at 48; *see also* EX 9)

These formalities aside, it is near universal that the ultimate purpose and day to day work involved in a research assistantship for PhD students is nothing more than the completion of the doctoral thesis. First, as conceded by Petitioner, the research performed by RAs is almost always identical to their thesis research. (*See* Decision at 11, 14; Pet. Request for Review at 17; Tr. 115, 121-22, 136, 138, 433, 436, 475-76)

Second, a student’s thesis advisor is also the PI on the grant for which he or she serves as an RA. (Tr. 120, 427, 475) Students meet with their thesis advisors on a regular basis, weekly, if not daily, to discuss the progress of their thesis research and any issues that may have arisen. (Tr. 129-30, 478-79)

Third, in addition to receiving a stipend and tuition remission for their role as an RA, RAs also receive academic credit for performing their RA duties that does not reflect *anything other than the work on their thesis that the student is doing as an RA*. (Decision at 11; Tr. 356,

434) As the Regional Director found, the research work “is required for receipt of their degree and they receive academic credit for engaging in this research.” (Decision at 16) Students register and pay for these research courses as they would any other course and receive grades based solely on their research from the PI on the grant, who is also their thesis advisor. (Tr. 88, 138-39, 434-35) Thus, a student’s research assistantship constitutes his or her required coursework to receive a PhD. (Tr. 356)

Fourth, in the research laboratory, there is no difference between what RAs are doing and what PhD students without RA appointments are doing; “they are all pursuing their thesis work. They are all doing their dissertation work.”<sup>4</sup> (Tr. 434)

As the Regional Director found, it is clear that RAs at Polytechnic are conducting research that is “required in order to receive their doctorate.” (Decision at 14)

## 2. Financial Support for Master’s Students – The GSET Program

Polytechnic supports its Master’s students primarily through appointments as graduate assistants (“GAs”) under the Graduate Student Employment and Training (“GSET”) Program. The GSET program seeks out projects that enrich the students’ courses of study and then offers them positions as GAs performing these activities. (Decision at 14)

The goal of the GSET Program is to serve the academic and career needs of its students by providing them with a real-life experience within the academic setting that prepares them for their future careers. (Decision at 5, 14; Tr. 177, 178, 200, 248, 255)

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<sup>4</sup> This same lack of distinction between students who are RAs and PhD students without RA appointments applies to responsibilities for equipment in the laboratories. (Tr. 357-59; 483)

GA appointments are in academic and administrative departments throughout the school and are each supervised by a specific faculty or staff member<sup>5</sup> who “sponsors” the position and ensures that the student and project meet specific academic requirements. (Decision at 5-6; Tr. 178, 202-04, 215; PX 15) Because more than 90 percent of the students in the GSET Program are international students, the program is specifically geared toward this student population. (Tr. 276-77)

All GA projects must be academically meaningful. Juan Carlo Bonilla, the Director of the Graduate Center and Abudi Pai, the academic advisor for GSET, review all GA positions prior to funding them to ensure that they meet this criteria; those that do not are rejected.<sup>6</sup> (Decision at 6, 14; Tr. 178, 195, 201, 236) Since GAs have their own “special assignment[s]” and are not performing the same work as Polytechnic employees, if a proposed position is rejected the contemplated project typically is not completed. (Tr. 250, 260-62, 623; Decision at 6)

The funding for each GA position comes out of the GSET Program budget, not the budgets of the individual departments in which the positions are housed.<sup>7</sup> (Decision at 7) This ensures that GSET has control over the positions and that the positions are created principally for the enrichment of the students. The GSET Handbook specifically reminds members of the Polytechnic community who work with GAs of their “responsibility to assist the student in

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<sup>5</sup> During the hearing, the parties agreed to refer to all non-faculty full-time employees of Polytechnic as “staff” to avoid any confusion with the students who the Petitioner claims to be “employees” under the NLRA. (See Tr. 606)

<sup>6</sup> As part of his role, Pai also holds office hours to determine the particular academic and career goals of each student, and works with Bonilla to match students’ academic programs and career goals as well as their strengths and weaknesses with possible projects. (Tr. 192, 196-97)

<sup>7</sup> In contrast, staff are paid out of their respective departmental budgets. (Tr. 253-54)

leveraging this employment opportunity for the betterment of their educational experience and career.” (EX 5)

Only full-time Master’s students at Polytechnic are eligible to be appointed as GAs. (Decision at 7; Tr. 258, 279) Students are appointed to GA positions for a single semester. (Decision at 8; Tr. 682) They may be appointed to a GA position for additional semesters provided that they maintain a cumulative grade point average of at least 3.0. (Tr. 209, 258-59, 620; PX 14; Decision at 7) The overwhelming majority of students hold GA appointments for just one or two semesters. (Decision at 8) Indeed, a study of Masters’ students enrolled in 2008 and 2009 shows that 36 percent held a GA position for only one semester and an additional 38 percent held a GA position for a second semester. (Decision at 8 n.12; EX 25)

The GSET Program offers two separate tracks – the Graduate Academic Experience and the Graduate Service Experience. (Decision at 5; Tr. 252; EX 4 at 2) The Graduate Academic Experience provides students with opportunities in academic departments while the Graduate Service Experience provides students with opportunities to assist in non-academic units of the University. (Tr. 252-53) Nearly 75 percent of students in the GSET Program choose the Graduate Academic Experience. (Tr. 599; EX 21) GA positions offered in both of these tracks focus on the students’ academic goals. (Decision at 14; EX 4 at 1)

Students in the Graduate Academic Experience “work on research and other academics-related projects,” usually within their own academic departments. (Decision at 5-6) These projects include assisting in research or as laboratory instructors. (Decision at 5, 8; Tr. 562, 595, 599; EX 6, EX 21) The research positions provide the students with hands-on experience in performing research in their chosen field. (EX 4 at 3; *see also* Decision at 8) The instructor positions afford the GAs the same educational benefits received by TAs, specifically the

“educational experience” of teaching other students in one’s own field of study, which requires a student to learn the material in a new and more in-depth manner. (Tr. 489) Finally, these students are often taking courses from the same professors for whom they are performing these duties and, in many instances, their duties as GAs directly complement their coursework. (Tr. 315)

Students with GA positions on the Graduate Service Experience track also perform duties related to their own areas of study and work on projects specifically tailored to their academic programs. (Tr. 262-4; EX 21; *see also* Decision at 8) For example: Computer Science students have introduced document imaging technology so applicant materials can be viewed electronically (Tr. 270, 313, 571); students studying Industrial Engineering have conducted lean manufacturing studies to assist the graduate school streamline its admissions processes. (Decision at 8; Tr. 572-73); and a Technology Management student designed initiatives for greater efficiency in the Human Resources department. (Tr. 640) Finally, as with RAs and TAs, students in the GSET program develop mentoring relationships with their supervisors. (Tr. 640-41)

In addition to being geared toward each student’s individual academic goals, the GSET Program also provides all GAs with the opportunity to participate in both mandatory and optional training programs and workshops designed to further complement their courses of study. (Decision at 7; Tr. 247-48, 556-57; EX 13 - EX 15) These include a mandatory workshop in communications skills, as well as optional seminars in library and on-line research as well presentation skills. (Tr. 277-79, 542, 544-45, 553-54, 590-91; EX 13 - EX 15) These workshops are only available to GAs; Polytechnic staff and faculty are not permitted to participate. (Tr. 550, 591, 592) GSET also offers programs run by Polytechnic faculty members that focus on their

research and how to engage in research activities, and which are structured to provide a classroom-like experience. (Tr. 558)

D. Graduate Students Are Subject to Different Policies Than Polytechnic Employees

Graduate students appointed as TAs, RAs and GAs are treated differently than Polytechnic staff in almost every significant respect. While the Polytechnic Human Resources department is responsible for overseeing all aspects of the employment relationship for Polytechnic's staff, it has very little responsibility for TAs, RAs or GAs. (Decision at n.10) For the staff and faculty, Human Resources administers recruiting programs, ensures compliance with employment laws, issues offers of employment, establishes compensation levels, develops job descriptions, conducts orientation, and administers performance evaluations. (Tr. 607-08, 617, 653) Human Resources has no such responsibilities with respect to TAs, RAs or GAs. (Tr. 607-09, 617, 653)

In addition, Polytechnic has an Employee Handbook, applicable to Polytechnic faculty and staff. The Handbook contains rules of conduct, which set forth disciplinary procedures, and other employment policies and procedures, including benefits, leave and time off policies. (Tr. 610-14, 662, 664-65; EX 22) These policies are administered by Human Resources. (Tr. 616) The Employee Handbook is distributed to all faculty and staff at the time of their hire and is available on the University's intranet, which is not accessible by students. (Tr. 615; EX 22) In addition, Polytechnic employees are also subject to a probationary period, which does not apply to TAs, RAs or GAs. (Tr. 653)

While all these policies apply to all Polytechnic staff and faculty, none of them apply to students appointed as TAs, RAs or GAs. (Decision at fn. 10; Tr. 611, 613-14, 616) TAs, RAs and GAs do not receive paid holidays, vacation or sick leave as staff and faculty do and are not covered by workers' compensation or unemployment insurance. (Decision at n.10; Tr. 621, 628)

Students with academic appointments at Polytechnic, including GAs, undergraduates and those students with federal work study positions, have their own handbook and Code of Conduct that apply only to students. (Tr. 611, 616; EX 5) Human Resources is not involved in any way in the administration of the student handbook or Code of Conduct. (Tr. 616)

Finally, staff and faculty at Polytechnic are treated separately from TAs, RAs, and GAs for identification purposes. Staff and faculty e-mail addresses at the University contain the suffix “@poly.edu” while student email addresses, including those of TAs, RAs and GAs contain the suffix “@student.poly.edu.” (Tr. 618-19) In addition, the identification cards for faculty and staff differ from those for students in that they identify the status of the holder. (Tr. 619) While Human Resources has responsibility for creating identification badges for faculty, staff, contractors and visitors to Polytechnic, Student Affairs is responsible for creating identification badges for students. (Tr. 637-38)

E. The Petition and Regional Director’s Decision

On May 5, 2011, Petitioner filed a Petition with the Regional Director seeking to represent graduate students at Polytechnic who serve as “Research Assistants, Teaching Assistants and Graduate Assistants . . . at its New York City metropolitan area facilities.” (BX 1) By letter dated May 12, 2011, Polytechnic requested that the petition be administratively dismissed in accordance with *Brown*, in which the Board explicitly excluded graduate students in such positions from the definition of an employee under the Act. The Regional Director, however, decided to create a record in this matter. A hearing commenced on May 24, 2011 and concluded on June 7, 2011, after five days of testimony.

On August 30, 2011, the Regional Director issued a decision dismissing the Petition as to all the petitioned-for individuals in accordance with the holding in *Brown* that graduate assistants are primarily students and not statutory employees. (Decision at 13) In doing so, he found that

the TAs, RAs and GAs at Polytechnic must be students and perform work related to their respective courses of study and have “more of an academic relationship to the university than economic.” (Decision at 15)

He went on to find that should the Board decide to overrule *Brown*, the RAs at Polytechnic still would not be employees. Like the RAs in *Leland Stanford* and *New York University*, 332 NLRB 1220 (2000) (“*NYU I*”), the research work performed by Polytechnic’s RAs is funded “not by the university itself, but by outside sources, particularly the federal government.” (Decision at 16) The Regional Director held that the RAs do not perform work for Polytechnic as “the research they perform is required for receipt of their degree, and they receive academic credit for engaging in this research.” (*Id.*)

He found, however, that the TAs and GAs would be employees under the Act, and included in a putative bargaining unit, despite the fact that students in both positions typically hold these positions for a year or less. (Decision at 17)

## ARGUMENT

### I. BROWN REQUIRES THE DISMISSAL OF THE PETITION IN ITS ENTIRETY

In *Brown*, the Board held that “graduate student assistants are not employees within the meaning of Section 2(3) of the Act.” *Id.* at 490. As found by the Regional Director, that decision is squarely applicable to the TAs, RAs and GAs covered by the Petition in this case, and requires the Petition to be dismissed.

In *Brown*, the petitioner sought to represent TAs as well as RAs in certain social sciences and humanities departments and graduate students serving as proctors, contending that they were employees under the Act. *Brown* reversed *NYU I* and found that such graduate student assistants are not statutory employees because the relationship between them and the University was “primarily an educational one, rather than an economic one.” *Id.* at 489. The Board’s

determination emphasized several important factors, all of which are satisfied by the TAs, RAs and GAs at Polytechnic.

A. TAs, RAs and GAs Must be Enrolled as Students at Polytechnic

The record evidence demonstrates that, as in *Brown*, “the first prerequisite to becoming a graduate student assistant is being a student.” *Id.* at 488. All TAs, RAs and GAs at Polytechnic must be enrolled as students to obtain their appointments. (Decision at 14; EX 8 at p. 48, EX 9, EX 26, PX 14) In fact, in order to remain eligible for a GSET position as a GA, students must not only be enrolled but maintain a minimum GPA of 3.0. (Decision at 7)

B. The Financial Support Provided to TAs, RAs and GAs Is Not Compensation For Work

The financial support that TAs, RAs and GAs receive is “not dependent on the nature or intrinsic value of the services performed or the skill or function of the recipient” and is provided to them solely because they are students. *Brown*, 342 NLRB at 487, 489. Polytechnic provides TAs and RAs with uniform stipends that do not vary based on the type of tasks performed or the number of hours a student spends performing those tasks (Decision at 9, 12; Tr. 95-96, 348, 354, 411) Nor does the individual’s skill in performing the tasks affect the stipend levels. As the Regional Director noted, any difference in pay is related to whether or not a TA or RA has finished his or her academic qualifying exams. (Decision at 9, 12) Likewise, the hourly rate paid to GAs is largely the same regardless of the task they are performing. (Tr. 178-79)

C. The Duties Performed By TAs, RAs and GAs Are Directly Related to Their Education

As in *Brown*, all graduate assistants’ duties at Polytechnic are “integral to the education of the graduate student.” *Id.* at 489. Just as the Board found in *Brown*, TAs at Polytechnic lead laboratory sections and “typically demonstrate experiments and the proper use of equipment, and answer questions.” (342 NLRB at 485; Decision at 9; Tr. 146-47, 345-46, 374, 430, 446, 488)

As Petitioner’s witness Han explained, when serving as a TA he often had to carefully study a laboratory guide and spend substantial time preparing for the experiments. (Tr. 153-54) In addition, the TA must review relevant literature on subjects regarding the experiments to ensure he/she has the requisite knowledge to lead the experiment. (Tr. 431-32)

The Regional Director correctly concluded that “working as a TA in a lab as opposed to being a student in the lab, gives the TA a new vantage point from which to view the experiment and thereby broadens their educational background. Working as a TA also prepares students for careers in academia.” (Decision at 10; *see also* pp. 5-7, above)

The duties performed by RAs are so intertwined with their doctoral research as to be wholly indistinguishable from their academic study. (*See* pp. 7-9, above) As the Regional Director found, the research conducted by RAs is required in order to receive their doctoral degree and it almost always identical to the research performed for a student’s thesis. (Decision at 11, 14; Tr. 115, 121-22, 136, 138, 351, 433, 436, 472-77).<sup>8</sup> Students register for the credits obtained through such research just as they would any other course in their programs and RAs also receive grades from their thesis advisors (who also almost always serve as the PIs) for these credits. (Tr. 88, 138-39, 356, 434-35) Thus, the research RAs conduct for the grant “fulfills the thesis requirement of the graduate curriculum in which they matriculate.” (EX 8 at p. 48)

Even the granting agencies focus on the educational aspect of the RA position. The National Science Foundation – the primary federal agency providing grants to Polytechnic – expressly requires that every grant application includes a description of how the proposed

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<sup>8</sup> The only exception identified at the hearing to this uniform evidence that RAs work on their dissertation research was the unusual case of Sujit Purushothaman, a PhD student in Electrical Engineering. Purushothaman testified that he was working on two research projects as an RA that are unrelated to his thesis work. (Tr. 82-83) However, as the Regional Director explained, this was extremely uncommon and due to the fact that Mr. Purushothaman published the results of his dissertation work early on in his PhD studies and took on these additional research projects in order to diversify his research and satisfy his remaining research credit requirements. (Decision at 11 n.19)

research and education are linked and to identify all mechanisms in place to mentor the PhD students performing such research. (Tr. 354; Tr. 527; PX 20 at 15)

Finally, as found by the Regional director, the tasks that GAs perform are “specifically designed to enrich the student’s overall educational experience.” (Decision at 14) The GSET program was created for the sole purpose of serving the academic and future professional needs of Polytechnic’s Master’s students by offering them positions that provide both financial aid as well as the opportunity to further their course of study and career goals. (Tr. 177, 200, 248, 255, 629) This is true both for positions in the Graduate Academic Experience (in which approximately three-quarters of the GAs participate) and the Graduate Service Experience. (*See* pp. 9-13, above)

#### D. TAs, RAs and GAs Are Often Supervised by Faculty in Their Departments

As in *Brown*, TAs, RAs and GAs typically work with faculty from their home academic departments. (Decision at 14; Tr. 315, 376, 427) For TAs, this includes meeting with the professor to review the experiments that will be conducted, discussing how to resolve any issues the students are having with the experiments and receiving additional guidance relating to the TAs’ performance. (Tr. 150-51, 348, 376)

With respect to RAs, the faculty member serving on the research grant is almost always the RA’s thesis advisor and is the instructor for the RA’s associated research credits. (Tr. 120, 427, 475) Therefore, as in *Brown*, the faculty member supervises not only the RA’s work on the grant, but his or her academic and professional development as well. 342 NLRB at 489; (*see also* Tr. 129-30, 161-62, 478-79)

Finally, as most of the GAs have positions in their own academic departments they are working with the same professors who also oversee their academic development. *See* 342 NLRB at 489; (*see also* Tr. 315). This allows the GAs to learn research techniques from a professor who

can assist them in becoming experts in their field and provides them with knowledge that is complementary to that learned in the classroom. (Tr. 568, 596) This mentoring relationship between GA and professor is so important to the GSET Program that it will only approve the number of GA positions in a given department that it believes will allow the available faculty to properly mentor each GA. (Tr. 305, 566)

The GAs who have positions in administrative departments develop a mentor-mentee relationship with their supervisors who provide a vantage point of how the student's academic knowledge can be translated into the professional world. (Tr. 640-41) These GAs are similar to the proctors in *Brown*, who performed a variety of duties for university departments or administrative offices, including "working in Brown's museums or libraries, editing journals or revising brochures, working in the office of the dean, advising undergraduate students, and working in various university offices" and who were found not to be employees under the Act. 342 NLRB at 485, 484, 493.

Given this overwhelming evidence of the academic nature of RA, TA and GA appointments, the Regional Director correctly dismissed the petition, holding "that the petitioned-for unit has more of an academic relationship to the university than economic." (Decision at 15)

E. The Record Evidence Provides No Basis on which to Modify or Overrule *Brown*

The Board's June 22, 2012 Notice and Invitation to File Briefs asks the parties and interested *amici* to address whether the Board should modify or overrule *Brown*. The record of this case provides no basis for the Board to do so.

There is no evidence that invalidates the holding of *Brown* or even suggests that it was wrongly decided. Nor have there been any changed circumstances presented that merit reconsidering *Brown*. To the contrary, as found by the Regional Director and discussed above,

the graduate student positions at issue fall squarely within the holding of *Brown*. This case demonstrates the continuing validity of the Board’s view in *Brown* that the Act was not intended to apply to graduate student assistants whose relationship to Polytechnic is primarily educational, rather than economic.

As in *Brown*, the Act cannot properly be interpreted to compel collective bargaining between a school and students regarding the terms and conditions of positions that are an integral part of the students’ academic program. In addition, the concerns expressed in *Brown* that such collective bargaining would “unduly infringe on traditional academic freedom” and “have a deleterious impact on overall educational decisions by *Brown* faculty and administration,” (*Brown* at 490), remain valid and real based on the record of this case. Mere disagreement with the majority opinion in *Brown* does not present any reason to modify or overrule that decision. Changing precedent based solely on the Board’s changed composition would result in a loss of stability and predictability in the law that private universities, and the public in general, expect and depend on, as well as damage to the Board’s own credibility in interpreting and enforcing the Act based on its expertise rather than a partisan political agenda.

## II. EVEN IF *BROWN* IS REVERSED, RAs ARE NOT STATUTORY EMPLOYEES UNDER LONG-TERM BOARD PRECEDENT THAT SHOULD CONTINUE TO BE FOLLOWED

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### A. RAs at Polytechnic Are Not Statutory Employees under *Leland Stanford* and *NYU I*

Even if *Brown* were to be reversed, the Regional Director correctly concluded that that the almost 40-year-old precedent of *Leland Stanford* requires dismissal of the petition with respect to Polytechnic’s RAs. The Regional Director’s holding that the RAs are substantially the same as the Physics RAs held not to be employees in *Leland Stanford* is plainly supported by the record.

In *Leland Stanford*, the Board reasoned that even though doctoral students in the Physics Department serving as RAs received stipends for their work that were processed through the University's payroll system, such payments did not reflect wages as they were in the form of financial aid and were "not based on the skill or function of the particular individual or the nature of the research performed" and there was "no correlation between what [was] being done and the amount received by the student. . ." *Id.* at 621-22.

Further, although the students may have participated in research that did not always fit into their ultimate thesis, it was "clear, however, that all steps lead to the thesis and [were] toward the goal of obtaining the Ph.D. degree . . . the policy of Stanford is to provide financial aid for its graduate students by means of a stipend for doing what is required of them to earn their degrees." *Id.* at 622. The Board emphasized that "[a]ll the research they are doing as RA's is accepted in partial satisfaction of their degree requirements, and the same research is required whether they receive financial aid as RA's or no financial assistance at all." *Id.* Based on these factors, the Board determined that the RAs were "primarily students" and, as such, were "not employees" within Section 2(3) of the Act. *Id.* at 623.

Notwithstanding the Board's decision in *NYU I* finding certain other graduate student assistants to be employees, it followed *Leland Stanford* and affirmed the Regional Director's decision excluding the Sackler Institute GAs and science department RAs funded by external grants because the evidence failed to demonstrate "that the research assistants perform a service for the Employer and, therefore, they are not employees as defined in Section 2(3) of the Act." *NYU I* at 1209, n. 10.

Specifically, the Regional Director found that "students classified as RAs in these departments are performing the research required for their dissertations, which is the same

research for which the professor has obtained an outside grant.” *Id.* at 1214. He stated that “[n]o specific services are required of these RAs – the students are simply expected to progress towards their dissertations” and emphasized that “RAs in these departments do not specifically apply for these positions (these departments are fully funded); instead, the positions are awarded to them.” *Id.* In concluding that these RAs were like the RAs found not to be employees in *Leland Stanford*, the Regional Director explained:

These ... RAs have no expectations placed upon 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.

Finally, the Regional Director rejected the assertion that RAs performed services for NYU by helping the University fulfill its obligations under the research grants, or by helping to increase the University’s and faculty members’ stature and reputation. *Id.* at 1220 n.50.

The record evidence in this case shows no changed circumstances that would justify overturning the long-standing precedent articulated in *Leland Stanford* and *NYU I*. As the Regional Director found, in order to fulfill their obligations as RAs, students at Polytechnic are expected to do only one thing: perform the research necessary to complete their doctoral thesis. The record demonstrates that: (i) the research performed as an RA is almost always identical to the research performed for a student’s thesis research (Decision at 11; Tr. 115, 121-22, 136, 138, 351, 433, 436, 472-77); (ii) RA’s receive academic credit toward their degree for the research they perform as an RA (Decision at 11; Tr. 138, 163, 167-68, 356, 434); (iii) RAs receive grades from their thesis advisors, who also are the PIs on the research grant (Tr. 88, 120, 138-39, 427,

434-35); and (iv) all students in the research laboratory, RA or not, are performing the same task, completing their thesis research. (Tr. 434)

Nor do the RAs receive any compensation for the performance of their duties. As in both *Leland Stanford* and *NYU I*, the financial support received by RAs does not vary based on the number of hours a student spends conducting his or her research or the results of that research. (Tr. 95-96, 354) The only differences in the level of financial support are determined by academic criteria – support is increased when a student passes his/her qualifying exams and officially becomes a PhD candidate and the tuition remission portion is decreased slightly as a student progresses and no longer needs to take, or pay for, as many credits as he/she did in the past. (Decision at 12) Therefore, such support is “not based on the skill or function of the particular individual or the nature of the research performed” and as such provides “no correlation between what [is] being done and the amount received” by the student. *Leland Stanford* at 621-22. Even though RAs’ stipends are processed through payroll and are designated as a salary by the granting agency, their compensation is provided exclusively in the form of financial aid, just as in *Leland Stanford* and *NYU I*. (Decision at 7, 10; Tr. 341)

The Regional Director relied directly on the Board’s decisions in *Leland Stanford* and *NYU I* in finding that Polytechnic’s RAs are not employees under the Act because, like the RAs at issue in those cases, they do not “perform work” – *i.e.*, do not perform services – for Polytechnic. (Decision at 16) Petitioner seeks to distinguish the Polytechnic RAs in just two ways: (i) that unlike the students at Stanford, Polytechnic RAs generally pay taxes on their stipends; and (ii) that Polytechnic receives some benefits from the RA’s research. Although it is true that the RAs in *Leland Stanford* did not pay taxes on the remuneration they received and RAs at Polytechnic do, this reflects nothing more than a change in the tax law, not a change in

the nature of the RA position. *See* The 1986 Tax Reform Act amending I.R.C. § 117. As the tax code was modified in 1986, the RAs in *NYU I* were deemed not to be employees despite paying taxes on their stipends. Also, as the Regional Director held and the Board affirmed in *NYU I*, the fact that the University received the same types of benefit from RAs relied on by Petitioner here is “not directly relevant to the inquiry of whether an individual is providing services to the Employer under its control in exchange for compensation.” *NYU I*, 332 NLRB at 1220 n.50, 1221. Here, as in *NYU I*, RAs perform research associated with external grants, which may provide indirect benefits to Polytechnic both by helping to fulfill the University’s obligations under the external grants and by increasing the University and faculty’s standing and reputation in the research community. (*See* Decision at 15) However, this does not change the nature of the academic relationship between RAs and Polytechnic. Indeed, universities have always received similar benefits from graduate students’ research activities.

In short, consistent with the precedent of *Leland Stanford* and *NYU I*, the Regional Director correctly concluded that Polytechnic RAs are not employees under the Act.

B. *Leland Stanford* Remains Valid and Should be Upheld as Long-term Precedent

This case presents no possible basis for reversing the holding in *Leland Stanford*. Indeed, Petitioner did not ask the Board to reconsider that decision in its Request for Review, but only sought – without success – to distinguish the RAs in this case from those at issue in *Leland Stanford*.

*Leland Stanford* has withstood almost four decades of changes in the Board membership and disputes regarding the status of other graduate student positions. Notwithstanding the Board’s decision in *NYU I* finding a bargaining unit of graduate student assistants to be employees, it affirmed the Regional Director’s decision excluding the science department RAs funded by external grants in reliance on *Leland Stanford*.

The reasoning of *Leland Stanford* remains as sound and well-supported today as it was in 1974. As discussed above, students supported on grants while they perform research required for their advanced academic degrees are not performing work in exchange for compensation. They cannot be considered employees under any reasonable interpretation of the Act.

### III. TAs AND GAs ARE TEMPORARY EMPLOYEES AND THEREFORE ARE EXCLUDED FROM BARGAINING

Even if *Brown* did not bar TAs and GAs from inclusion in the bargaining unit, the Board should exclude Polytechnic's TAs and GAs from bargaining as temporary employees.

The TAs and GAs have no real continuing interest in the terms and conditions of the assistantships and are not eligible to participate in an election under the Act. *See Trump Taj Mahal Assocs.*, 306 NLRB 294, 296 (1992). Both groups of students are appointed for a limited duration and neither has any reasonable expectation of remaining in their positions for more than a year. As the Regional Director found, teaching assistantships generally last for just one year and graduate assistants are appointed on a semester by semester basis with the overwhelming majority of students holding graduate assistantships for two semesters or less. (Decision at 8, 10) The fact that a minority of students may receive an appointment as a TA for an additional year and appointments as a GA for an additional semester or two does not provide a reasonable expectation of continued "employment" beyond the one year that is typical for the vast majority of students.<sup>9</sup>

The Board first held that such student employment is insufficient to confer collective bargaining rights in *Saga Food Service*. In that case, the Board found that student and non-

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<sup>9</sup> A student may occasionally serve as a TA for a second year if there is no funding available to support them as a RA, and certain GAs may receive appointments for up to an additional year. The decision notes a single instance where this occurred for a TA. (Decision at 8, n. 17) It also states that 17 percent of GAs receive an appointment for a third semester and 8 percent of GAs receive an appointment for a fourth semester. (Decision at 8 n.12)

student food service employees did not share a community of interest sufficient enough to warrant their inclusion in the same bargaining unit. 212 NLRB 786, 787 (1974). However, the petitioner there also sought, in the alternative, a unit consisting solely of student food service workers. The Board denied that unit as well, stating:

[i]n view of the nature of [the students'] employment tenure and our conclusion that their primary concern is their studies rather than their part-time employment, we find that it would not effectuate the policies of the Act to direct an election among them as a separate unit for purposes of collective bargaining.

*Id.* at 787, n.9.

In *San Francisco Art Institute*, the Board again considered this issue when determining whether to include student janitors in a unit with non-student janitors. The Board first found no community of interest between full-time non-student janitors and student janitors who worked on a semester by semester basis. 226 NLRB 1251, 1251 (1976). In doing so, the Board specifically noted that no student had ever continued as a full-time janitor after graduation. *Id.*

When asked to consider certifying a student-only bargaining unit, the Board concluded that it would “not effectuate the policies of the Act to direct an election” among students only. *Id.* at 1252. The Board cited “the brief nature of the students’ employment tenure, [ ] the nature of compensation for some of the students, and [ ] the fact that students are concerned primarily with their studies rather than with their part-time employment[.]” *Id.* at 1252, adding that “owing to the rapid turnover that regularly and naturally occurs among student janitors, it is quite possible that by the time an election were conducted and the results certified the composition of the unit would have changed substantially.” *Id.*

In both *Saga Food Service* and *San Francisco Art Institute*, the Board held that the fact that the duration of the students’ employment was limited made it inappropriate to certify such a bargaining unit. In *University of West Los Angeles*, 321 NLRB 61 (1996), the Board

distinguished these earlier cases in finding that students working as clerks in the university law library were properly included in a non-student bargaining unit where the positions were not related to their enrollment as students and they did not have a certain end date to their position, evidenced by the fact that the students often continued in the same positions after their graduation. The facts regarding TAs and GAs at Polytechnic are consistent with the *Saga Food Service* and *San Francisco Art Institute* precedent, and distinguishable from *University of West Los Angeles*, as the positions are directly related to the students' enrollment at Polytechnic and are for a limited duration, which in no event can continue beyond graduation. Indeed, the temporary nature of TA and GA positions at Polytechnic is similar to that of the grader and tutor positions in *NYU I* which were excluded from the unit as temporary employees because they had no substantial expectancy of continued employment in those jobs. *NYU I*, 332 NLRB at 1221.

The Regional Director disregarded the Board's clear holdings in both *Saga Food Service* and *San Francisco Art Institute* that it would not effectuate the purposes of the Act to direct an election among a unit of student workers stating that "I find this statement was not intended to be considered as determinative of the efficacy of such a unit or the 2(3) status of the individuals involved." (Decision at 17) To the contrary, the Board's refusal to certify a separate unit of students in both cases was a direct holding that a bargaining unit of students in positions of limited duration at the school in which they are enrolled is inappropriate under the Act. *Saga Food Service*, 212 NLRB at 787 n.9 (1974), *see also San Francisco Art Institute* 226 NLRB at 1251.

In holding that the TAs and RAs are not temporary employees, the Regional Director relied on the Board's holding in *Kansas City Repertory*, 356 NLRB No. 28 (Nov. 16, 2010), that "musicians who worked intermittently, sometimes for just a matter of weeks in one year, are

entitled to collective bargaining rights.” (Decision at 18) The Board’s decision in *Kansas City Music Repertory*, however, was premised on the unique conditions in the entertainment industry and utilized the specific eligibility formula for that industry articulated in *Juilliard School*, 208 NLRB 153 (1974), in determining that the musicians had a sufficient continuing interest in the terms and conditions of their employment. As the Board explained, the musicians were hired whenever a musical show was performed and individuals were eligible to be hired for future shows indefinitely. See *Kansas City Repertory*, 356 NLRB No. 28, at \*4-5. Contrary to the Regional Director’s position, *Kansas City Repertory* does not support a finding that TAs and GAs, who have no expectation of continuing or repeated employment in the future, should be accorded collective bargaining rights.

*Saga Food Service* and *San Francisco Art Institute* govern the eligibility of students employed by the schools in which they are enrolled and whose positions are of a limited duration. These cases are guided by the specific facts relevant to the students in positions at educational institutions where, unlike in the entertainment industry, the students’ positions are limited in duration. Accordingly, *Saga Food Services* and *San Francisco Art Institute*, and not *Kansas City Repertory*, are the controlling precedents and require that part-time, hourly-paid student workers must be excluded from the petitioned-for unit.

#### IV. THE BOARD DOES NOT HAVE A QUORUM TO DECIDE THIS CASE

The current Board consists of only two members who were properly appointed and is not legally permitted to operate without the required quorum of at least three members. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Despite purporting to operate with four members,<sup>10</sup> Board members, Sharon Block and Richard Griffin were improperly appointed by President

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<sup>10</sup> Member Flynn, the Board’s fifth member, submitted his resignation on May 24, 2012 to be effective July 24, 2012 but has recused himself from all agency business.

Obama as “recess” appointments on January 4, 2012 even though the Senate was not in recess at the time. Therefore, these appointments were not valid and the Board only has two properly appointed members – Chairman Pearce and Member Hayes. We are aware that the Board previously has considered and rejected this argument. *See, e.g., Ctr. for Soc. Change, Inc.*, 358 NLRB No. 24 (Mar. 29, 2012). Polytechnic, however, requests that the Board reconsider this issue and find that it does not have the necessary quorum to decide this matter.

CONCLUSION

The Petition should be dismissed in its entirety.

New York, New York  
July 23, 2012

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that copies of the within Brief on Review of Polytechnic Institute of New York University in Case No. 29-RC-12054 has been served by electronic mail on this date on:

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