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Via Federal eRulemaking Portal

Roxanne Rothschild, Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Re: Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. 49691 (Sept. 23, 2019), RIN 3142-AA15

The Attorneys General of New Jersey, Connecticut, Delaware, the District of Columbia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, Pennsylvania, and Rhode Island, write to oppose the National Labor Relations Board's ("Board") proposed rule depriving student teaching and research assistants ("student workers") at private colleges and universities of their legal protections for organizing and bargaining collectively under the National Labor Relations Act ("NLRA"). *See* Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. 49691 (Sept. 23, 2019) ("Proposed Rule"). The Proposed Rule rolls back hard-won labor rights for the sake of private colleges and universities' bottom line. As the Board itself recognized just three years ago in *Columbia University*, 364 NLRB No. 90 (2016), denying student workers the right to organize and bargain collectively runs counter to the text and statutory purposes of the NLRA, ignores half a century of successful collective bargaining at public colleges and universities, and encourages the exploitation of a vulnerable work force. The Board undertakes this assault on workers' rights in violation of the Administrative Procedure Act, which demands that the Board faithfully apply the NLRA and consider the available empirical data and evidence. The Board does neither.

As state attorneys general, we are charged with protecting the rights of our states' residents. Together, our states' colleges and universities employ more than 42,000 graduate teaching assistants,[1] as well as thousands more graduate research assistants and undergraduate student

[1] *See* Bureau of Labor Statistics, U.S. Department of Labor, *May 2018 State Occupational Employment and Wage Estimates* (May 2018), *available at* https://www.bls.gov/oes/current/oessrcst.htm. This statistic encompasses graduate teaching assistants at both private and public colleges and universities. As explained below, because state courts and

workers. For student workers struggling to make ends meet on meager salaries as they balance their teaching and research duties with their coursework and family commitments, the right to organize and bargain collectively is essential to securing fair pay and working conditions.[2] These protections have become all the more crucial as tuition and living costs skyrocket, the market for stable academic employment shrinks, and universities shift research and teaching burdens from full-time professors to graduate students.

We write to oppose the Proposed Rule not only to defend the rights of student workers in our states, but also to protect the interests of our states' businesses, non-profit organizations, and governmental institutions that depend on student workers for innovative teaching and research. An exhausted and underpaid student workforce not only imperils the well-being of student workers themselves. It also threatens to compromise the quality of academic research and deter promising students from pursuing academic careers—to the detriment of all of our states' residents. Furthermore, while the Proposed Rule would only directly govern private colleges and universities, state courts and labor relations boards often look to federal law when interpreting state labor relations statutes.[3] Thus, the Proposed Rule may have implications for student workers at public—as well as private—colleges and universities.

The Board need not continue down this misguided path. Instead, it should withdraw the Proposed Rule and allow the process of collective bargaining at private colleges and universities to continue unimpeded.

I. THE PROPOSED RULE IS CONTRARY TO THE TEXT AND PURPOSES OF THE NATIONAL LABOR RELATIONS ACT

In the decades leading to the enactment of the NLRA in 1935, workers struggled to organize without legal protections, as employers clamped down on organizing efforts and enjoyed free rein over the terms and conditions of employment.[4] When employers punished workers for attempting to form or join a union, the law offered no recourse.[5] When employers abruptly slashed

administrative agencies often turn to the NLRA when interpreting state labor relations statutes, the Proposed Rule could affect student workers at public—as well as private—colleges and universities.

[2] Annual salaries for student workers range from $13,000 to $34,000. Colleen Flaherty, *Grad Students' 'Fight for $15'*, INSIDE HIGHER ED (Oct. 26, 2018), available at https://www.insidehighered.com/news/2018/10/26/graduate-student-assistants-campuses-across-us-are-pushing-15-hour-what-they-call.

[3] *See, e.g.*, *American Fed'n of State, County, and Mun. Employees, Council 31 v. State Labor Relations Board*, 216 Ill.2d 569, 579 (2005); *Troy v. Rutgers*, 168 N.J. 354, 373 n. 3 (2001); *Regents of Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 125 N.M. 401, 408 (1998); *Gibraltar School Dist. v. Gibraltar MESPA-Transportation*, 443 Mich. 326, 335 (1993); *Town of Windsor v. Windsor Police Dep't Emp. Ass'n, Inc.*, 154 Conn. 530, 536, 227 A.2d 65, 67-68 (Conn. 1967) (noting that "[t]he Connecticut Municipal Employee Relations Act, like the Connecticut Labor Relations Act originally enacted in 1945, is closely patterned after the National Labor Relations Act," and that "the judicial interpretation frequently accorded the federal act is of great assistance and persuasive force in the interpretation of our own act").

[4] *See* Ahmed A. White, *Industrial Terrorism and the Unmaking of New Deal Labor Law*, 11 NEV. L. J. 561, 562-63 (2011) (describing pre-NLRA conditions for workers and labor organizers).

[5] *See id.* at 563.

wages or laid off workers, workers' only leverage was their capacity to disrupt production through strikes, work stoppages and slowdowns, and other forms of protest.[6] To counter such actions, employers enlisted state and private militias, leading to bloody confrontations.[7]

With the passage of the NLRA, Congress sought to end this dysfunctional system by empowering workers and establishing an orderly process for resolving disputes between labor and management. The NLRA guaranteed workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. By conferring these long-sought protections, Congress aimed to rectify the "inequality of bargaining power" that stymied the demands of workers who lacked "full freedom of association or actual liberty of contract . . . ." *Id.* § 151. This "inequality of bargaining power[,]" Congress concluded, had "depressed wage rates" and engendered "strikes and other forms of industrial strife or unrest" that "substantially burden[ed] . . . the flow of commerce . . . ." *Id.*

In addition to strengthening workers' bargaining position and securing their right to free association, Congress sought to replace the ad hoc disruption that had convulsed the nation's industries with a system of orderly negotiation and adjudication. Thus, the NLRA mandated collective bargaining "with respect to wages, hours, and other terms and conditions of employment," and empowered the newly constituted National Labor Relations Board to adjudicate unfair labor practice claims. *See* 29 U.S.C. §§ 153-155, 158(a)(5), (d), 160. Crucially, the NLRA's coverage was sweeping, extending to "*any* employee . . . *unless this [statute] explicitly states otherwise*," with certain limited exceptions. 29 U.S.C. § 152(3) (emphasis added).

The Proposed Rule runs counter to the text and purpose of the NLRA. Despite the NLRA's capacious definition of "employee," the Proposed Rule limits the NLRA's scope to relationships that are "primarily economic"—a limitation with no basis in the text or history of the NLRA. 84 Fed. Reg. at 49693. The Board further exceeds its authority by adding to the NLRA's limited exceptions without any compelling justification. Moreover, by discouraging collective bargaining and forcing student workers to resort to strikes and other disruptive forms of protest, the Proposed Rule undermines the NLRA's commitment to resolving labor disputes through negotiation and adjudication. Finally, the Proposed Rule compounds the "inequality of bargaining power" that motivated Congress to enact the NLRA and subverts the "full freedom of association" that Congress sought to protect.

a. The Proposed Rule Is Contrary to the Text of the NLRA

The Proposed Rule takes liberties with the text of the NLRA and infringes on Congress's legislative power. First, in a break with the statutory text, the Board limits the NLRA's application to employment relationships that are "primarily economic." Proposed Rule, 84 Fed. Reg. at 49693.

[6] *See id.* at 562-63.

[7] *See id.* at 563 (explaining that "labor disputes . . . claimed several thousand lives and left countless others maimed and traumatized[,]" and that "[g]overnments at all levels lent their police and militias to the cause of intimidating, assaulting, and arresting strikers").

But the NLRA's expansive coverage admits of no such limitation. Second, the Proposed Rule further invades Congress's sphere of authority by adding to the NLRA's enumerated exceptions without a compelling justification. Thus, the Proposed Rule, if finalized, would not survive judicial review under the Administrative Procedure Act ("APA"), as it exceeds the Board's "statutory jurisdiction, authority, or limitations . . . ." 5 U.S.C. § 706(2)(C).

The NLRA covers "any employee . . . unless this [statute] explicitly states otherwise . . . ." 29 U.S.C. § 152(3). As the Board concluded just three years ago, this sweeping definition extends to *any* employment relationship.[8] Nowhere does the statutory text even hint at the exclusion of employment relationships that are not "primarily economic."[9] The Congress that enacted the NLRA was surely aware of the existence of employment relationships that were partly "educational" as opposed to solely "economic." For centuries, apprentices had worked for and studied under tradesmen, honing their craft at the same time that they earned a living. Yet Congress did not exclude apprentices from the NLRA or carve out an exception for relationships that are not "primarily economic," and the Board has long held that the NLRA's protections extend to apprentices.[10] Like apprentices, student workers learn a discipline under the tutelage of an expert, while simultaneously earning a wage to support themselves and their families.[11] Thus, they deserve the same treatment under the NLRA.

Nevertheless, the Board insists that confining the NLRA to relationships that are "primarily economic" "is more consistent with the overall purposes of the Act . . . ." *See* Proposed Rule, 84 Fed. Reg. at 49693. For the reasons explained in section I.b. below, the Board's interpretation of "employee" is fundamentally opposed to the "overall purposes" of the NLRA. *See id.* Yet even if the Board's understanding of the NLRA's "overall purposes" were defensible, basic principles of statutory construction would forbid the Board from substituting its own view of the statute's purpose for the text itself. Indeed, as the Board observed in *Columbia*, "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Columbia University*, 364 NLRB No. 90, slip op. at 6 (2016) (emphasis in original) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993)). And while the NLRA does not precisely define "employee," the Board is not without guideposts. As the Board noted in *Columbia*, "when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute must infer . . . that Congress means to incorporate the established meaning of the term, with reference to common-law agency doctrine." *Id.* at 4-5 (quotation marks omitted) (quoting *NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995)).

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[8] *Columbia University*, 364 NLRB No. 90, slip op. at 2 (2016) (holding that "student assistants who have a common-law employment relationship with their university are statutory employees under the Act").

[9] *Id.* at 5 (describing it as a "fundamental error" to "frame the issue of statutory coverage not in terms of the existence of an employment relationship, but rather on whether some other relationship between the employee and the employer is the primary one—a standard neither derived from the statutory text . . . nor from the fundamental policy of the Act").

[10] Matthew Wesley, *Reconsidering Brown University More Than a Decade Later*, 43 J.C. & U.L. 99, 121-23 (2017).

[11] *See id.*; Adrienne E. Eaton, Sean Rogers, and Paula B. Voos, *Effects of Unionization on Graduate Student Employees: Faculty-Student Relations, Academic Freedom, and Pay*, 66(2) INDUSTRIAL AND LABOR RELATIONS REVIEW 487, 493 (2013) (likening doctoral students to apprentices).

Drawing on common law principles and the NLRA's plain meaning, the *Columbia* Board held that "the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for purposes of the Act." *Id.* at 6. This construction hews to the plain meaning of the text, understood through the prism of the common law. The Proposed Rule, by contrast, is unmoored from the statutory text, effectively jettisoning "any employee" in favor of "any employee whose relationship with an employer is primarily economic." The power to amend legislation in this fashion belongs exclusively to Congress.

That the NLRA explicitly exempts certain categories of workers underscores the Board's invasion of Congressional prerogatives. The NLRA's definition of "employee" expressly excludes certain classes of workers—including agricultural and domestic workers, independent contractors, and supervisors. 29 U.S.C. § 152(3). Student workers are not among these excluded categories, and the Board should not read additional exceptions into the NLRA absent "compelling statutory and policy considerations." *See Columbia*, 364 NLRB at 6. No compelling reasons justify the Proposed Rule's departure from the statutory text. To the contrary, preserving the right of student workers to organize and bargain collectively serves the NLRA's core objectives.

b. The Proposed Rule Is Contrary to the Purposes of the NLRA

Congress enacted the NLRA to bolster workers' bargaining power, safeguard their free association rights, and channel their grievances into a structured process of negotiation and adjudication. The exclusion of student workers from the NLRA would undermine these goals, for it would reinforce universities' superior bargaining position and leave student workers with no recourse but to engage in the very disruptive actions that the NLRA was designed to avoid.

The Board's 2016 *Columbia* decision set off a wave of peaceful student organizing at private colleges and universities across the country.[12] In the nine months following the *Columbia* decision, the Board certified seven bargaining units representing 7,439 student workers.[13] This rise in student organizing has led to increased cooperation between universities and student workers—just as the NLRA intended. Prior to the *Columbia* decision, only one private university had entered into a collective bargaining agreement with its student workers.[14] Today, five have done so.[15] This post-*Columbia* groundswell of student organizing speaks to the desire of student workers to ameliorate their often desperate financial circumstances—and to the pre-*Columbia* legal regime's failure to offer any structured outlet for that desire.[16]

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[12] *See* Teresa Kroeger, Celine McNicholas, Marni von Wilpert, and Julia Wolfe, *The state of graduate student employee unions: Momentum to organize among graduate student workers is growing despite opposition*, ECONOMIC POLICY INSTITUTE, at 1 (Jan. 11, 2018), *available at* epi.org/138028.

[13] Eleanor J. Bader, *Graduate Student Unions Are Growing—and Fighting for Social Justice*, TRUTHOUT (Jan. 26, 2018), *available at* https://truthout.org/articles/graduate-student-unions-are-growing-and-fighting-for-social-justice/.

[14] David Yaffe-Bellany, *Graduate Students, After Gains in Union Efforts, Face a Federal Setback*, THE NEW YORK TIMES (Sept. 20, 2019), *available at* https://www.nytimes.com/2019/09/20/business/economy/grad-students-labor.html.

[15] *Id.*

[16] As the Board acknowledged in *Columbia*, "[t]he eagerness of at least some student assistants to engage in bargaining suggests that the traditional model of relations between university and student assistants is insufficiently responsive to student assistants' needs." *Columbia*, *supra* note 8, at 12.

The Proposed Rule would extinguish this trend toward negotiation and compromise. Universities have already signaled their intention to re-evaluate ongoing negotiations in light of the Proposed Rule. Indeed, one university recently announced that it is "reviewing the proposed rule to assess what implications it may have on the University's ongoing negotiations with the [graduate student union]."[17] Tellingly, that same university is currently in the midst of a student worker strike.[18] Furthermore, the Proposed Rule may embolden universities to refuse to renew or re-negotiate existing collective bargaining agreements when they expire.[19] This would mark a lamentable—and avoidable—regression in relations between student workers and their employers. It would also represent a major defeat for the principles that animate the NLRA. And given many universities' strenuous resistance to collective bargaining, it is fair to assume that they will seize any opportunity to reverse the post-*Columbia* progress.[20]

II. THE PROPOSED RULE IGNORES A HALF CENTURY OF SUCCESSFUL COLLECTIVE BARGAINING AT PUBLIC UNIVERSITIES AND WRONGLY ASSUMES THAT COLLECTIVE BARGAINING THREATENS ACADEMIC FREEDOM AND THE STUDENT-MENTOR RELATIONSHIP

For fifty years, student workers have organized and bargained for better pay and working conditions at public universities across the country.[21] Indeed, there is a rich history of collective bargaining at public universities—which, unlike private universities, are governed in this context by state rather than federal law.[22] This history began in 1969 with graduate students at the University of Wisconsin-Madison, and it has since become "a fact of American university life[,]" as the Board recognized in *Columbia*.[23] At the time of the Board's *Columbia* decision in 2016, student worker unions represented more than 64,000 teaching and research assistants at 28 public universities nationwide.[24]

The experience of public universities with collective bargaining provides ample evidence against which to measure the Board's claims. Yet the Board ignores this evidence, preferring to speculate about threats to "academic freedom" and the student-faculty relationship as if it were operating in an empirical vacuum. The Board's refusal to reckon with the evidence is indefensible. The public sector evidence demonstrates that the Board's professed fears are illusory. Indeed, the

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[17] Danielle Douglas-Gabriel, *Harvard graduate students strike after year-long contract negotiations with the university*, WASH. POST (Dec. 3, 2019), *available at* https://www.washingtonpost.com/education/2019/12/03/harvard-graduate-students-strike-after-year-long-contract-negotiations-with-university/

[18] *Id.*

[19] *See Columbia*, *supra* note 8, at 12 n. 91 (noting that NYU withdrew recognition for its student worker union after the Board's decision in *Brown University*, 342 NLRB 483 (2004), which reversed a previous decision recognizing student workers as employees under the NLRA).

[20] *See* Kroeger, *supra* note 12, at 8-9 (describing resistance to student worker unions at several private universities).

[21] *See id.* at 2.

[22] *See* Wesley, *supra* note 10, at 104.

[23] Neil H. Hutchens and Melissa B. Hutchens, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 GONZ. L. REV. 105, 106 (2004); *Columbia*, *supra* note 8, at 9 (quoting *Brown University*, 342 NLRB No. 42 at 493 (Members Liebman and Walsh, dissenting)).

[24] *Columbia*, *supra* note 8, at 9.

Board's failure to grapple with the evidence is a prime example of arbitrary and capricious rulemaking under the APA. *See* 5 U.S.C. § 706(2)(A).

a. Guaranteeing Student Workers the Right to Organize and Bargain Collectively Does Not Threaten Academic Freedom

According to the Board, collective bargaining "uniquely imperils" the academic prerogatives of colleges and universities, threatening such "traditional academic freedoms" as the right to determine course content, student body composition, and graduation standards. 84 Fed. Reg. at 49694. The experience of public universities with collective bargaining flatly contradicts this claim. Contrary to the Board's vision of student worker unions usurping the authority of university faculty and administrators, student worker unions at public universities have focused on traditional subjects of collective bargaining, such as wages, working conditions, leave time, and employee benefits.[25] Indeed, some collective bargaining agreements even incorporate provisions expressly reserving to the university authority over academic decision-making.[26] Faculty unions likewise have negotiated with universities for decades without infringing on the prerogatives of administrators.[27]

Furthermore, the evidence amply demonstrates that student worker unions coexist with traditional academic freedoms both at the bargaining table and in the classroom. Indeed, according to one authority on this subject, "no academic union has ever sought to bargain over these issues [*i.e.*, grades, course requirements, or other traditional academic issues.]"[28] In a survey of faculty at five major public universities with student worker unions, ninety-five percent of respondents reported that collective bargaining did not "inhibit the free exchange of ideas" between faculty and graduate students.[29]

The post-*Columbia* surge in collective bargaining at private universities has conformed to the pattern at public universities, with student workers emphasizing traditional subjects of collective bargaining without encroaching on the university's academic prerogatives. *See* 84 Fed. Reg. at 49696-97 (Member McFerran, dissenting). The Board thus has no reason to conclude that student worker unions represent a greater threat to "traditional academic freedoms" at private universities than they do at public universities. *See* 84 Fed. Reg. at 49694.

The Board, however, fails to grapple with this empirical evidence. Instead, it is content to theorize about the "unique []peril[]" collective bargaining poses to "academic freedoms." *See id.*

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[25] *See* 84 Fed. Reg. at 49697-98; *Columbia*, *supra* note 8, at 10 n. 83; Eaton, *et al.*, *supra* note 11, at 495.

[26] *See Columbia*, *supra* note 8, at 9 (noting that several public universities "include language in their graduate-assistant collective-bargaining agreements giving management defined rights concerning courses, course content, course assignments, exams, class size, grading policies and methods of instruction, as well as graduate students' progress on their own degrees").

[27] *See id.* (observing that "faculty members have successfully negotiated collective-bargaining agreements that address terms and conditions of employment . . . while contractually ensuring academic freedom for decades").

[28] Gordon Lafer, *Graduate Student Unions: Organizing in a Changed Academic Economy*, 28(2) Labor Studies Journal 25, 160 (2003).

[29] Gordon J. Hewitt, *Graduate Student Employee Collective Bargaining and the Educational Relationship Between Faculty and Graduate Students*, 22(2) JOURNAL OF COLLECTIVE NEGOTIATIONS IN THE PUBLIC SECTOR 153, 161 (2000).

The *Columbia* Board, however, cogently rebutted the claim that student worker unions threaten academic freedom, and Member McFerran supplements that rebuttal in her dissent from the Proposed Rule. Rather than consult the evidence directly before it, however, the Board chooses to avert its eyes and advance theories that lack any empirical support.

Plainly, the evidence shows that student worker unions are not demanding control over academic programs. Instead, they are seeking better pay and working conditions, more leave time to care for themselves and their families, and more generous healthcare packages—all squarely within the domain of traditional collective bargaining. Yet even if the "unique []peril[]" the Board imagines were suddenly to materialize, and student worker unions were—for the first time—to begin pressing academic concerns at the bargaining table, *the NLRA would not permit them to force universities to bargain over purely academic concerns*.[30] The NLRA requires employers to bargain with employee representatives over "wages, hours, and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d). It does not require universities to negotiate over purely academic matters, such as curriculum content, methods of instruction or evaluation, or criteria for advancement toward a degree.[31] That the Board disregards this fundamental feature of its enabling statute testifies to the Proposed Rule's slipshod reasoning.

To be sure, there is room for debate over the scope of mandatory collective bargaining under the NLRA. But the Board provides no evidence that student workers have sought to bargain over academic concerns, and the mere fact that the NLRA is subject to interpretation cannot justify the Board's misguided effort to deprive student workers of basic labor protections. In this context, as in many others, case-by-case adjudication would help clarify the matters subject to mandatory negotiation, with the Board carefully balancing the university's prerogatives against the rights of student workers in individual cases.[32]

b. Guaranteeing Student Workers the Right to Organize and Bargain Collectively Does Not Compromise the Student-Mentor Relationship

According to the Board, guaranteeing student workers the right to organize and bargain collectively would threaten the relationship between student workers and their faculty mentors. 84 Fed. Reg. at 49694. Yet again, the Board fails to test its claims against the readily available evidence. Furthermore, it ignores the crucial fact that student unions bargain collectively with university administrators—not with their faculty mentors.[33] Thus, collective bargaining does not pit student workers against their faculty advisors.

[30] *See* Eaton *et al.*, *supra* note 11 at 495; Grant M. Hayden, *"The University Works Because We Do": Collective Bargaining Rights for Graduate Students*, 69 FORDHAM L. REV. 1233, 1262 (2001).
[31] *See id.*
[32] Leslie Crudele, *Graduate Student Employees or Employee Graduate Students? The National Labor Relations Board and the Unionization of Graduate Student Workers in Postsecondary Education*, 10 WM & MARY BUS. L. REV. 739, 775-77 (2019) (noting that "[c]oncern over the scope of bargainable issues can be addressed on a case-by-case basis").
[33] *See* Hayden, *supra* note 30, at 1263.

For fifty years, collective bargaining at public universities has coexisted with productive and amicable relations between students and their faculty mentors.[34] Experience has not borne out the Board's fear that student worker unions undercut this important relationship. The academic literature strongly attests to the compatibility of student worker unions with vibrant and harmonious student-mentor relationships. In the survey of faculty at unionized public universities cited above, ninety percent of respondents reported that collective bargaining had not diminished their ability to advise or instruct graduate students.[35] In another study, researchers examined every existing collective bargaining agreement covering student workers and interviewed doctoral students to gauge the impact of student worker unions on student-mentor relationships.[36] They concluded that the fear that collective bargaining would damage the student-mentor relationship "appear[s] to be foundationless."[37] A study comparing student perceptions of their relationships with faculty at unionized universities with those at non-unionized universities found that perceptions were *better* at unionized universities.[38]

The Board offers no evidence that recognizing the rights of student workers will alter the student-mentor relationship. Nor does it acknowledge that student worker unions bargain not with their faculty mentors but with university administrators—an elementary fact of collective bargaining in the university setting that the Board simply ignores.[39] In fact, faculty tend to view their interests as aligned with those of student worker unions, as both seek better pay, benefits, and working conditions for similar work.[40] The Board's failure to engage with even the most basic features of collective bargaining in the university context underscores its arbitrary and capricious decision-making.

III. THE PROPOSED RULE ENCOURAGES THE EXPLOITATION OF STUDENT WORKERS IN OUR STATES.

Student workers lead financially precarious lives, balancing teaching and research duties with their coursework and family commitments on a subsistence-level stipend. The experience would be difficult enough even if it came with a guarantee of a stable and fulfilling future academic career. But with universities increasingly turning to adjunct and temporary labor to cut costs, student workers often emerge with a degree that ensures neither financial nor professional stability.[41] Between 2005 and 2015, the ranks of graduate student workers swelled by 16.7 percent.[42] By contrast, the number of tenure-track positions—traditionally the surest path to

[34] *See* Lafer, *supra* note 28, at 160 (noting that "[b]oth graduate student and faculty unions have been conducting negotiations for decades; in all this time, there has never been a suggestion that academic freedom was compromised").
[35] Hewitt, *supra* note 29, at 159.
[36] Daniel J. Julius and Patricia J. Gumport, *Graduate Student Unionization: Catalysts and Consequences*, 26(2) REVIEW OF HIGHER EDUCATION 187, 188-89 (2003).
[37] *Id.* at 209.
[38] *See* Eaton, *et al.*, *supra* note 11, at 500 (finding that "[o]nce program, region, and other controls are introduced, unionization becomes a significant positive predictor of both the personal support and professional support dimensions of student-teacher relationships").
[39] Hayden, *supra* note 30, at 1263.
[40] *See id.* at 492 (describing a study showing that "[p]rofessors viewed themselves as part of . . . [a] community of instructors, rather than considering themselves 'management'").
[41] *See* Kroeger, *supra* note 12, at 4 (noting that "[t]hose graduates who do manage to find a faculty position are more likely to end up in a non-tenure-track position that therefore be paid less on average than their tenured/tenure-track counterparts").
[42] *Id.*

professional and financial security for aspiring academics—*declined* by 1.3 percent.[43] At the same time, ballooning tuition and living costs have saddled student workers with ever-larger debt burdens, and universities have shifted much of the teaching and research load from full-time faculty to graduate students.[44] Overworked and underpaid, student workers have felt the pinch from all corners, just as the light at the end of the tunnel has grown dimmer.[45]

These deteriorating conditions have spurred the growth of student worker activism in recent years.[46] The resulting increase in collective bargaining at private universities has been a modest step in the right direction—and a necessary one if academia is to remain a viable path for low- and middle-income students. Indeed, for students without strong systems of financial support, rising living costs and the pressures of a changing academic market exact a particularly heavy toll. In the New York City metropolitan area, for example, the annual mean wage for a graduate teaching assistant is $38,370.[47] According to the Economic Policy Institute, however, maintaining an adequate standard of living in that area requires an annual salary of $51,323.[48] For two adults with a child, that number rises to $91,936.[49] This chasm between wages and living costs has forced many student workers—especially those with families and limited financial resources—to rely on debt and outside employment.[50] And working additional jobs to make ends meet diverts time and energy from an already demanding teaching, research, and class schedule.

Student workers have been resisting these trends by forming unions, demanding recognition from their employers, and pressing their demands for better wages, benefits, and working conditions at the bargaining table.[51] Despite the opposition of some of the country's most prestigious universities, these efforts have yielded meaningful progress, particularly since the Board's *Columbia* decision.[52] Nevertheless, the continuing financial and professional squeeze threatens to deter promising students and compromise the quality of academic teaching and research.[53] The consequences are far-reaching. The primary victims are student workers

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[43] *Id.*

[44] *Id.* at 1, 6 (noting that "among the 73.3 percent of graduate students enrolled during the 2011-2012 school year who were carrying education debt, the average amount borrowed so far was equivalent to $77,700 in 2014-2015 school year dollars[,] . . . one-third more than graduate students in 2000 reported having borrowed").

[45] *See id.* at 4 (observing that "[b]etween the 2005-2006 and 2015-2016 school years, the number of doctoral degrees conferred increased by 29.3 percent, while the number of faculty positions [tenured, tenure-track, and non-tenure-track] increased by only 15.3 percent from Fall 2005 to Fall 2015").

[46] *See* Crudele, *supra* note 32, at 741-43.

[47] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment and Wages, Graduate Teaching Assistants* (May 2018), *available at* https://www.bls.gov/oes/current/oes251191.htm.

[48] Economic Policy Institute, Family Budget Calculator, *available at* https://www.epi.org/resources/budget/.

[49] *Id.*

[50] *See* Kroeger, *supra* note 12, at 6.

[51] *See id.* at 7.

[52] *See id.* at 7-9; 84 Fed. Reg. at 49695; Colleen Flaherty, *A TA Union Contract, 2 Years Later*, INSIDE HIGHER ED (Sept. 5, 2018), *available at* https://www.insidehighered.com/news/2018/09/05/brandeis-grad-students-win-significant-gains-union-contract-even-trump.

[53] *See* Robert A. Epstein, *Breaking Down the Ivory Tower Sweatshops: Graduate Student Assistants and Their Elusive Search for Employee Status on the Private University Campus*, 20 St. John's J. Legal Comment. 157, 197 (2005); Colleen Flaherty, *Rise of the Science Ph.D. Dropout: New study says scientists are leaving academic work at unprecedented rate*, INSIDE HIGHER ED (Dec. 11, 2018), *available at* https://www.insidehighered.com/news/2018/12/.11/new-study-says-scientists-are-leaving-academic-work-unprecedented-rates.

themselves, but the effects ripple throughout a society and an economy that depend on student workers for effective teaching and innovative research.

A vulnerable and exhausted academic underclass serves no one—not the students who need engaged and capable teachers; not the businesses, governments, and public interest organizations that rely on academic research; and not even the universities themselves, whose long-run success depends on a steady influx of graduate students with the time and resources to contribute to their disciplines. The sole beneficiaries of this cheap and exploitable workforce may be university administrators, whose numbers and salaries have grown substantially in recent years. Annual salaries for student workers range from $13,000 to $34,000.[54] A full-time assistant professor at a private doctorate-granting institution, by comparison, earns $103,873 per year on average.[55] With universities increasingly transferring teaching and research burdens from full-time faculty to graduate students, the savings are enormous.[56] Meanwhile, from 1987 to 2012, colleges and universities *doubled* the number of administrative and non-academic professional staff—an increase that far outstripped the growth in the number of students and faculty, more than doubling the ratio of nonacademic employees to faculty.[57] And salaries for university presidents have risen dramatically, with presidents at 61 private colleges and universities taking in more than $1 million per year.[58] As one expert observed, "[t]here has never been as great a discrepancy in higher education between those who are the highest paid and those who are the lowest paid."[59] "What higher education is doing[,]" he continued, "is mirroring the behaviors of the corporate world."[60]

Plainly, the relationship between universities and student workers is inextricably bound up with economics. The Board's insistence to the contrary reflects its failure to engage with the realities of contemporary academia. Its unsupported description of the student worker experience—as a kind of genteel introduction to academic life, only sporadically interrupted by teaching or research duties—is out of step with today's academic business model. *See* 84 Fed. Reg. at 49694. The Board casually asserts, for instance, that student workers devote only limited time to teaching or research obligations. *Id.* It offers no evidence for this claim. Nor does it consider the impact of universities' increasing tendency to shift teaching and research burdens to graduate

[54] Colleen Flaherty, *Grad Students' 'Fight for $15'*, Inside Higher Ed (Oct. 26, 2018), *available at* https://www.insidehighered.com/news/2018/10/26/graduate-student-assistants-campuses-across-us-are-pushing-15-hour-what-they-call.

[55] Colleen Flaherty, *Faculty Salaries Up 3%*, INSIDE HIGHER ED (Apr. 11, 2018), *available at* https://www.insidehighered.com/news/2018/04/11/aaups-annual-report-faculty-compensation-takes-salary-compression-and-more.

[56] *See* Kroeger, *et al.*, *supra* note 12, at 1; Lafer, *supra* note 28, at 154.

[57] New England Center for Investigative Reporting, *New Analysis Shows Problematic Boom in Higher Ed Administrators* (Feb. 6, 2014), *available at* https://www.huffpost.com/entry/higher-ed-administrators-growth_n_4738584.

[58] Allana Akhtar, *15 college presidents who've been paid millionaire salaries*, BUSINESS INSIDER (May 22, 2019), *available at* https://www.businessinsider.com/the-highest-paid-us-college-and-university-presidents-2019-5; Dan Bauman, Tyler Davis, and Brian O'Leary, *Executive Compensation at Public and Private Colleges*, THE CHRONICLE OF HIGHER EDUCATION (July 14, 2019), *available at* https://www.chronicle.com/interactives/executive-compensation#id=table_private_2016.

[59] Akhtar, *supra* note 58.

[60] *Id.*

students.[61] Yet again, the Board fails to engage in the evidence-driven rulemaking that the APA demands, and it evinces no understanding of the changing academic business environment.

The Board further illustrates its lack of engagement with real-world evidence when it argues that the harmony of interests between student workers and their faculty advisors justifies denying student workers the protections of the NLRA. 84 Fed. Reg. at 49694. Yet again, the Board ignores the fact that student worker unions bargain with university administrators—not with faculty. Its focus on the relationship between student workers and their faculty mentors is therefore misplaced. Keeping to the pattern, moreover, the Board does not substantiate its rosy conception of student-faculty relations, and the reality is far more complicated than the Board's simplistic portrayal. As the market for stable academic employment shrinks, achieving even a modicum of financial and professional security increasingly turns on enthusiastic recommendations from faculty advisors.[62] This dependency—the very "inequality of bargaining power" that the NLRA was meant to address—can give rise to exploitation, as student workers may choose to stifle legitimate grievances for fear of alienating their advisors. *See* 29 U.S.C. § 157.

Were the Board sincere in its desire to protect academic freedom, it might inquire as to the effect of student workers' precarious financial and professional circumstances—and their concomitant dependence on faculty advisors—on intellectual autonomy. To avoid the frustrations of adjunct or contingent academic employment, it is critical that student workers secure favorable recommendations and produce broadly palatable research that will appeal to as many potential employers as possible. These imperatives, in turn, can suffocate intellectual diversity and creativity. Far from threatening academic freedom, student worker unions help to ensure the financial and professional independence that is essential to it.[63] The Board, however, maintains a narrow focus on the prerogatives of university administrators, turning a blind eye to the influence of financial and professional insecurity on the intellectual climate for aspiring academics.

Furthermore, student workers often do not have the luxury of simply leaving their current employment if they are unsatisfied with their working conditions. For professional, financial, or geographic reasons, transferring to another program often carries enormous risks.[64] Thus, contrary to the Board's suggestion, student workers are not immune from the pressures that beset subordinates in other sectors. To the contrary, they are often the least able to defend their rights—and most in need of the NLRA's guarantees. The Board, however, prefers myth to reality and proceeds as if "the academic world . . . [were] somehow removed from the economic realm that labor law addresses—as if there were no room in the ivory tower for a sweatshop." *See* 84 Fed. Reg. at 49697 (Member McFerran, dissenting) (quoting *Brown University*, 342 NLRB 483, 494 (2004) (Members Liebman and Walsh, dissenting)).

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[61] *See* Kroeger, *et al.*, *supra* note 12, at 1; Lafer, *supra* note 28, at 154.

[62] *See* DeWitt Scott, *Choosing the Right Advisor*, INSIDE HIGHER ED (Nov. 8, 2016) (noting that "[t]here is no relationship that will be more pivotal to [a graduate student's] doctoral success, completion, and post-graduation prospects"), *available at* https://www.insidehighered.com/blogs/gradhacker/choosing-right-advisor.

[63] Not surprisingly, researchers comparing doctoral students' perceptions of academic freedom at unionized universities with those at non-unionized universities found that student worker unions had a slight *positive* effect on perceptions of academic freedom. Eaton, *et al.*, *supra* note 11, at 507.

[64] *See* Charlena Michelle Wynn, *To Transfer or Not to Transfer, That Is the Question*, INSIDE HIGHER ED (Nov. 8, 2017), *available at* https://www.insidehighered.com/blogs/gradhacker/transfer-or-not-transfer-question.

IV. CONCLUSION

The Proposed Rule is contrary to the text and purposes of the NLRA; to a half century's worth of empirical evidence; and to the interests not only of student workers themselves, but also to those of a society and an economy that depend on student workers for innovative teaching and research. Since the Board's *Columbia* decision in 2016, universities and student workers have made impressive strides toward a fairer and more sustainable arrangement—just as the NLRA envisaged. The Board now has a choice: fulfill its role as a guarantor of workers' right to organize and bargain collectively, or abandon its commitment to the principles underlying the NLRA. We urge the Board to withdraw the Proposed Rule.

Sincerely,

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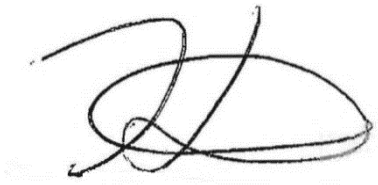

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