



BILLING CODE 754501

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

RIN 3142-AA15

Jurisdiction---Nonemployee status of university and college students working in connection with their studies.

AGENCY: National Labor Relations Board

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: In order to more effectively administer the National Labor Relations Act (Act or NLRA) and to further the purposes of the Act, the National Labor Relations Board (the Board) proposes a regulation establishing that students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are not “employees” within the meaning of Section 2(3) of the Act. The Board believes that this proposed standard is consistent with the purposes and policies of the Act, which contemplates jurisdiction over economic relationships, not those that are primarily educational in nature. This rulemaking is intended to bring stability to an area of federal labor law in which the Board, through adjudication, has reversed its approach three times since 2000.

DATES: Comments regarding this proposed rule must be received by the Board on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments replying to comments submitted during the initial comment period must be received by the Board on or before [INSERT DATE 67 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Reply comments should be

limited to replying to comments previously filed by other parties. No late comments will be accepted.

ADDRESSES:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through <http://www.regulations.gov>. Follow the instructions for submitting comments.

Delivery—Comments should be sent by mail or hand delivery to: Roxanne Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570-0001. Because of security precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. The Board encourages electronic filing. It is not necessary to send comments if they have been filed electronically with [regulations.gov](http://www.regulations.gov). If you send comments, the Board recommends that you confirm receipt of your delivered comments by contacting (202) 273-1940 (this is not a toll-free number). Individuals with hearing impairments may call 1-866-315-6572 (TTY/TDD).

Only comments submitted through <http://www.regulations.gov>, hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at <http://www.regulations.gov> and during normal business hours (8:30 a.m. to 5 p.m. EST) at the above address.

The Board will post, as soon as practicable, all comments received on <http://www.regulations.gov> without making any changes to the comments, including any

personal information provided. The website <http://www.regulations.gov> is the Federal eRulemaking portal, and all comments posted there are available and accessible to the public. The Board requests that comments include full citations or internet links to any authority relied upon. The Board cautions commenters not to include personal information such as Social Security numbers, personal addresses, telephone numbers, and email addresses in their comments, as such submitted information will become viewable by the public via the <http://www.regulations.gov> website. It is the commenter's responsibility to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter's email address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT: Roxanne Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570-0001, (202) 273-1940 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION

The National Labor Relations Board is proposing a jurisdictional rule excluding undergraduate and graduate students who perform services for some form of financial compensation at a private college or university in connection with their studies from coverage as employees under Section 2(3) of the Act. This proposed rule will overrule extant precedent and return to the state of law as it existed from shortly after the Board first asserted jurisdiction over private colleges and universities in the early 1970s to 2000 and, with brief exceptions, for most of the time since then.

I. Background

Under Section 2(3) of the Act, “the term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter [of the Act] explicitly states otherwise” This statutory definition of “employee” neither expressly includes nor excludes students who perform services at a private college or university in connection with their studies. Consequently, the Board is tasked with addressing the jurisdictional implications of asserting or denying statutory employee status for these students in light of the underlying purposes of the Act. The Supreme Court has made clear that “when reviewing the *Board’s* [as opposed to a lower court’s] interpretation of the term ‘employee’ as it is used in the Act, we have repeatedly said that ‘[s]ince the task of defining the term employee is one that has been assigned primarily to the agency created by Congress to administer the Act, . . . the Board’s construction of that term is entitled to considerable deference’” *NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995) (emphasis in original) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (internal quotation marks omitted) (citations omitted)). Thus, the Supreme Court “will uphold any interpretation [of ‘employee’] that is reasonably defensible.” *Sure-Tan*, supra at 891 (citations omitted).

In Section 1 of the Act, Congress found that the “strikes and other forms of industrial strife or unrest” that preceded the Act were caused by the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership” In order to eliminate the burden on interstate commerce caused by this industrial unrest, Congress extended to employees the right “to organize and bargain collectively” with their employer, encouraging the “friendly adjustment of industrial

disputes arising out of differences as to wages, hours, or other working conditions”

Id.¹ In applying this “central policy of the Act,” the Board has emphasized that “[t]he vision of a fundamentally economic relationship between employers and employees is inescapable.” *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999). The Supreme Court has similarly observed that “[t]he Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry,”² and that, accordingly, “principles developed for use in the industrial setting cannot be ‘imposed blindly on the academic world.’”³

The Board first asserted jurisdiction over private colleges and universities in *Cornell Univ.*, 183 NLRB 329 (1970).⁴ Shortly thereafter, in *Adelphi University*, 195 NLRB 639 (1972), the Board held that graduate student assistants are primarily students and should be excluded from a bargaining unit of regular faculty. The graduate students were working toward their advanced academic degrees, and the Board noted that “their employment depends entirely on their status as such.” Id. at 640. Further, the Board emphasized that graduate student assistants “are guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned.” Id. In *The Leland Stanford Junior University*,

¹ 1 Leg. Hist. 318 (NLRA 1935). See also *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965) (stating that a purpose of the Act is “to redress the perceived imbalance of economic power between labor and management”); 1 Leg. Hist. 15 (NLRA 1935) (remarks of Sen. Wagner, 78 Cong. Rec. 3443 (Mar. 1, 1934)).

² *NLRB v. Yeshiva University*, 444 U.S. 672, 680 (citing *Adelphi University*, 195 NLRB 639, 648 (1972)).

³ Id. at 681 (quoting *Syracuse University*, 204 NLRB 641, 643 (1973)).

⁴ Subsequent to issuance of the decision in *Cornell*, the Board engaged in notice and comment rulemaking to establish the discretionary minimum jurisdictional standard for colleges and universities. Based on comments in response to a notice of proposed rulemaking, 35 FR 11270, the Board issued a final rule, codified as 29 CFR 103.1, setting a gross annual revenue of \$1 million as the minimum standard. 35 FR 18370.

214 NLRB 621, 623 (1974), the Board went further, holding that graduate student research assistants “are not employees within the meaning of Section 2(3) of the Act.” The Board found that the research assistants were not statutory employees because, like the graduate assistants in *Adelphi University*, supra, they were “primarily students.” Id. In support of this conclusion, the Board cited the following: (1) the research assistants were graduate students enrolled in the Stanford physics department as Ph. D. candidates; (2) they were required to perform research to obtain a degree; (3) they received academic credit for their research work; and (4) while they received a stipend from Stanford, funded by external sources, the amount was not dependent on the nature or intrinsic value of the services performed or the skill or function of the recipient, but instead was determined by the goal of providing the graduate students with financial support. Id. at 621-623. The Board distinguished the graduate student research assistants from employee “research associates” who were “not simultaneously students,” having already completed their graduate degrees. Id. at 623.

For over 25 years, the Board adhered to the *Leland Stanford* principle.⁵ Then, in *New York University*, 332 NLRB 1205 (2000) (“*NYU*”), the Board reversed course and

⁵ In *St. Clare’s Hospital*, 229 NLRB 1000 (1977), and *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), the Board reaffirmed its treatment of students who “perform services at their educational institutions [that] are directly related to their educational program” and stated that the Board “has universally excluded students from units which include nonstudent employees, and in addition has denied them the right to be represented separately.” *St. Clare’s Hospital*, 229 NLRB at 1002. The Board emphasized the rationale that such students are “serving primarily as students and not primarily as employees . . . [and] the mutual interests of the students and the educational institution in the services being rendered are predominately academic rather than economic in nature.” Id. The Board later overruled *St. Clare’s Hospital* and *Cedars-Sinai* in *Boston Medical Center*, 330 NLRB 152 (1999), and asserted jurisdiction over the interns, residents, and fellows who had already completed their formal studies and received their academic degrees. The Board in *Boston Medical Center* did not

held for the first time that certain university graduate student assistants were statutory employees. The Board reviewed the statutory language of Section 2(3) and applied the common-law agency doctrine of the conventional master-servant relationship, which establishes that such a “relationship exists when a servant performs services for another, under the other’s control or right of control, and in return for payment.” *Id.* at 1206 (citations omitted). The Board concluded that “ample evidence exists to find that graduate assistants plainly and literally fall within the meaning of ‘employee’ as defined in Section 2(3)” and by the common law. *Id.* This interpretation was based on the breadth of the statutory language, the lack of any statutory exclusion for graduate student assistants, and the “uncontradicted and salient facts” establishing that the assistants in that case performed services under the control and direction of the university for which they were compensated. *Id.* The *NYU* Board also relied on *Boston Medical Center*, *supra*, to support its policy determination that collective bargaining was feasible in the university context. *Id.* However, citing *Leland Stanford*, *supra*, the Board concluded that certain externally-funded graduate and research student assistants did not “perform a service” for their university and therefore were not statutory employees. *Id.* at 1209 fn. 10.

Four years later, the Board in *Brown University*, 342 NLRB 483 (2004), reconsidered and overruled *NYU*,⁶ holding that graduate student teaching assistants, research assistants, and proctors in the petitioned-for bargaining unit were not statutory employees. The Board reasserted the “principle . . . that graduate student assistants

address the status of graduate assistants who have not received their academic degrees.

⁶ The *Brown University* Board “express[ed] no opinion” regarding *Boston Medical Center*, *supra*. 342 NLRB at 483 fn. 4.

are primarily students and not statutory employees.” *Id.* (citing *Leland Stanford*, *supra*). Consistent with that principle, the Board found that “graduate student assistants, who perform services at a university in connection with their studies, have a predominately academic, rather than economic, relationship with their school” and therefore “[are] not employees within the intendment of the Act.” *Id.* In support of this conclusion, the Board cited the following: (1) the petitioned-for individuals were students; (2) their ability to serve as teaching assistants, research assistants, or proctors, and receipt of a stipend and tuition remission for doing so, depended on continued enrollment as a student; (3) their principal time commitment at Brown University was focused on obtaining a degree and, thus, being a student; and (4) the act of serving as a teaching assistant, research assistant, or proctor was part and parcel of the core elements of the Ph. D. degree, teaching and research. *Id.* at 488, 492.

In addition, as a policy matter, the Board determined that collective bargaining “would unduly infringe upon traditional academic freedoms.” *Brown University*, *supra* at 490. Specifically, the Board concluded that “[i]mposing collective bargaining [between graduate student assistants and private universities] would have a deleterious impact on overall educational decisions . . . includ[ing] broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants’ duties, hours, and stipends.” *Id.* The Board also found that the collective-bargaining obligation “would intrude upon decisions over who, what, and where to teach or research,” all of which constitute “the principal prerogatives of an educational institution.” *Id.*

A decade later, a Board majority in *Columbia University*, 364 NLRB No. 90 (2016), reconsidered and overruled *Brown University*. The *Columbia* decision, however, went

much further than reinstating the statutory employee holding in *NYU*. Whereas *NYU* had applied exclusively to certain graduate student assistants and had acknowledged the continuing viability of *Leland Stanford*, *supra*, the *Columbia* decision overruled *Leland Stanford* and expanded Section 2(3) of the Act and the rationale of *NYU* to cover—for the first time since the Board asserted jurisdiction over colleges and universities—both externally-funded graduate research assistants and undergraduate university student assistants.

Specifically, the Board determined that an employment relationship can exist under the Act between a private college or university and its employee, even when the employee is simultaneously a student. The Board observed that “[s]tatutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.” *Id.*, slip op. at 2. Thus, an individual “may be both a student *and* an employee; a university may be both the student’s educator *and* employer.” *Id.*, slip op. at 7 (emphasis in original). Concluding that both Section 2(3) of the Act and the common law of agency support a finding of employee status, the Board cited the Supreme Court’s observations that the breadth of the definition of “employee” in Section 2(3) is “striking”⁷ and “seems to reiterate the breadth of the ordinary dictionary definition of the term, a definition that includes any person who works for another in return for financial or other compensation.”⁸ Moreover, the Board stressed that Congress chose not to list student assistants among the Act’s enumerated exclusions from the statutory definition of

⁷ *Id.*, slip op. at 4 & fn. 32 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 891).

⁸ *Id.*, slip op. at 4 & fn. 33 (quoting *Town & Country Electric*, 516 U.S. at 90 (internal quotations omitted)).

employee, which “is itself strong evidence of statutory coverage.” *Id.* (citing *Sure-Tan*, supra at 891-892). The Board concluded that university student assistants meet the common-law definition of *employee* establishing that an employee “relationship exists when a servant performs services for another, under the other’s control or right of control, and in return for payment.” *Id.*, slip op. at 3 (quoting *NYU*, 332 NLRB at 1206). Additionally, the Board explained that in past cases, the broad language in Section 2(3) had been interpreted to cover categories of workers that included paid union organizers (salts), undocumented workers, and confidential employees. *Id.*, slip op. at 5.

The *Columbia* Board concluded that asserting jurisdiction over university student assistants who meet the common-law definition of employee furthers the Act’s policies of encouraging collective bargaining and employees’ freedom to express a choice for or against a bargaining representative. *Id.*, slip op. at 6-7. Further, the Board rejected the “theoretical” claims in *Brown University* that classifying university student assistants as statutory employees and permitting them to bargain collectively would have a detrimental impact on the educational process, explaining, *inter alia*, that there is no empirical support for the proposition that collective bargaining cannot successfully coexist with a student-teacher relationship. *Id.*, slip op. at 7.⁹

⁹ The *Columbia* Board also summarily overruled *San Francisco Art Institute*, 226 NLRB 1251 (1976), as incompatible with the holding that student employees were entitled under Section 2(3) to engage in collective bargaining. 364 NLRB No. 90, slip op. at 24 fn. 130. The Board in *San Francisco Art Institute* had held that it would not effectuate the policies of the Act to direct an election in a unit consisting only of student janitors. Without expressly deciding the status of the student janitors under Sec. 2(3), the Board reasoned that this unit would not be appropriate for purposes of collective bargaining because of the “the very tenuous secondary interest that these students have in their part-time employment.” *Id.* at 1252. In reaching this conclusion, the Board

II. The Proposed Rule

Under the proposed rule, students who perform services at a private college or university related to their studies will be held to be primarily students with a primarily educational, not economic, relationship with their university, and therefore not statutory employees. See *Brown University*, 342 NLRB at 487.¹⁰ The Board believes, subject to potential revision in response to comments, that the proposed rule reflects an understanding of Section 2(3) that is more consistent with the overall purposes of the Act than are the majority opinions in *NYU* and *Columbia University*. Thus, the proposed rule is based on the view that the common-law definition of employee is not conclusive because the Act, and its policy promoting collective bargaining, “contemplates a primarily economic relationship between employer and employee, and provides a mechanism for resolving economic disputes that arise in that relationship.” *Brevard Achievement Center*, 342 NLRB 982, 984-985 (2004).

The Supreme Court has recognized the importance of these Congressional policies in determining whether individuals are statutory employees. For example, in *NLRB v. Bell Aerospace Corp.*, 416 U.S. 267 (1974), the Court held that although managerial employees are not explicitly excluded from the definition of an employee in Section 2(3), they nevertheless fall outside the Act’s coverage. As the Court explained:

was influenced by the “brief nature of the students' employment tenure, by the nature of compensation for some of the students, and by the fact that students are concerned primarily with their studies rather than with their part-time employment,” as well as the concern 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.*

¹⁰ The students at issue in *Brown University* were graduate student assistants. The proposed rule contemplates both graduate and undergraduate student assistants.

[T]he Wagner Act was designed to protect ‘laborers’ and ‘workers,’ not vice presidents and others clearly within the managerial hierarchy. Extension of the Act to cover true ‘managerial employees’ would indeed be revolutionary, for it would eviscerate the traditional distinction between labor and management. If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly. [Id. at 284 fn. 13.]¹¹

The Board has similarly held that individuals without a sufficient economic relationship to an employer are not statutory employees. See, e.g., *Toering Electric Co.*, 351 NLRB 225, 228 (2007) (finding applicants for employment are not statutory employees if they lack a genuine interest in working for the employer as this is “not the economic relationship contemplated and protected by the Act”); *Brevard Achievement Center*, 342 NLRB at 984 (finding individuals with disabilities are not statutory employees if the relationship to their employer is “primarily rehabilitative” rather than “typically industrial”); *WBAI Pacifica Foundation*, 328 NLRB at 1275 (finding unpaid staff are not statutory employees as the Act contemplates “a fundamentally economic relationship between employers and employees”).

The holding in *Brown University* that the student teaching assistants and research assistants had a primarily educational, not economic, relationship with their school appears to fit comfortably with this line of decisions. For example, students who assist faculty members with teaching or research generally do so because those activities are vital to their education; they gain knowledge of their discipline and cultivate relationships with faculty. See *Brown University*, 342 NLRB at 489 (“[T]he role of teaching assistant

¹¹ See also *NLRB v. Yeshiva University*, 444 U.S. at 689 (1980) (in finding the faculty of Yeshiva University to be “managerial employees” outside the Act’s coverage, observing that “the analogy of the university to industry need not, and indeed cannot, be complete”).

and research assistant is integral to the education of the graduate student . . .”).¹² In fact, performing such services is often a prerequisite to obtaining the student’s degree.

Another consideration is that students spend a limited amount of time performing these additional duties because their principal time commitment is focused on their coursework and studies. See *id.* at 488. Further, with regard to remuneration, students typically receive funding regardless of the amount of time they spend researching or teaching, and only during the period that they are enrolled as students. See *id.* at 488-489. Therefore these funds, which are provided to help pay the cost of students’ education, are better viewed as financial aid than as “consideration for work.” *Id.*

Additionally, the goal of faculty in advancing their students’ education differs from the interests of employers and employees engaged in collective bargaining, who “proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.” *Id.* at 488 (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960)). Faculty members educate, evaluate, and mentor students. Collective bargaining over those matters appears to be inappropriate given that faculty and students are engaged in an individualized learning experience.

Finally, a statutory construction of Section 2(3) consistent with the Board’s “longstanding rule that it will not assert jurisdiction over relationships that are ‘primarily educational’” advances the important policy of protecting traditional academic freedoms. See *Brown University*, *supra* at 488, 490. These freedoms include both free speech rights in the classroom and several matters traditionally in the domain of academic

¹² See also *The Leland Stanford Junior University*, 214 NLRB at 623 (research assistants that “are seeking to advance their own academic standing and are engaging in research as a means of achieving that advancement” do not constitute statutory employees).

decision-making, including those concerning course content and length; class size and location; who, what, and where to teach or research; university student assistants' educational and service responsibilities; and standards for advancement and graduation. *Id.* at 490.¹³ Subjecting these important academic freedoms to traditional collective bargaining would necessarily and inappropriately involve the Board in the academic prerogatives of private colleges and universities as well as in the educational relationships between faculty members and students. See *Brown University*, *supra* at 492 (“[T]he broad power to bargain over all Section 8(d) subjects would, in the case of graduate student assistants, carry with it the power to intrude into areas that are at the heart of the educational process.”). Indeed, the nature of the general duty to bargain under the Act uniquely imperils the protection of academic freedoms.

As noted above, the proposed rule would exclude from Section 2(3)'s coverage of employees those students who perform any services in connection with their undergraduate or graduate studies at a private college or university, including, but not limited to, teaching or research assistance. However, the Board also invites comments on whether the rule should also apply to exclude from Section 2(3) coverage students employed by their own educational institution in a capacity unrelated to their course of study due to the “very tenuous secondary interest that these students have in their part-time employment.” *San Francisco Art Institute*, *supra* at 1252.

III. Validity and Desirability of Rulemaking

¹³ See also *Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J, concurring) (Academic freedom includes the right of a university “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”) (citation omitted).

Section 6 of the Act provides that “[t]he Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of this Act.” The Board interprets Section 6 as authorizing the proposed rules and invites comments on this issue. Although the Board historically has made most substantive policy determinations through case adjudication, the Board has, with Supreme Court approval, engaged in substantive rulemaking. *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991) (upholding Board’s rulemaking on appropriate bargaining units in the healthcare industry); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“[T]he choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”). Indeed, although the Board first asserted statutory jurisdiction over private colleges and universities in case adjudication,¹⁴ it subsequently established the discretionary minimum standard for asserting jurisdiction through notice and comment rulemaking, and the proposed rule excluding student assistants from the Act’s coverage would be incorporated as an amendment to the jurisdictional standard set forth in 29 CFR 103.1.¹⁵

The Board finds that informal notice-and-comment rulemaking is preferable to adjudication with respect to the industry-wide determination whether students who perform services in connection with their studies are “employees” within the meaning of Section 2(3) of the Act. The rulemaking process provides the opportunity for broader public input than in case adjudication and, consequently, for Board consideration of a record of any variations in student assistant and other academic work-related programs

¹⁴ *Cornell University*, supra.

¹⁵ See fn. 4, supra.

than might not exist in any single educational institution. It also does not depend on participation and argument by parties in a specific case, and it cannot be mooted by developments in a pending case. In this regard, we note that the student employee issue has been raised recently by requests for review in several cases pending before the Board, but in each of those cases the issue was mooted by withdrawal of the underlying representation petition. Finally, the Board believes that rulemaking will enable students, unions, and private colleges and universities to plan their affairs with greater predictability and certainty than has existed during the recent history of adjudicatory oscillation.

IV. Response to the Dissent

Our dissenting colleague is not surprisingly of the opinion that the *Columbia University* majority, of which she was a member, has made the only rational interpretation of a statutory provision that is silent on the issue of whether paid student assistants are employees under the Act. This is so in spite of the fact that different Boards composed of different members have on multiple occasions reached different and conflicting conclusions for varying reasons on that issue. Further, our colleague apparently believes that the finality that should be assigned to the *Columbia* majority decision justifies her departure from a frequently-voiced complaint that we are required and have failed to invite public input before overruling precedent.

We emphatically reject our colleague's offensive claim that we propose to reverse progress made by student employees with respect to improved working conditions "in the name of preserving higher education." We do not aim in this process to reverse that progress. Our goal is simply to determine whether the Board has statutory jurisdiction

over student employees in private colleges and universities. As our colleague surely knows, if we do not have jurisdiction, then we lack the authority to protect student employees' union and other concerted activities to secure or retain improved terms and conditions of employment, however worthy those activities may be. Of course, that is undisputedly the case with respect to the experiences at many public institutions of higher learning that our colleague cites as examples of how collective bargaining can work.

Moreover, while not determinative, we note that almost all of the progress our colleague refers to at private universities and colleges has been secured through voluntary collective bargaining and/or the use of traditional economic weapons without invoking the Board's jurisdiction. In fact, unions seeking to represent student employees at private universities have on numerous occasions since *Columbia* withdrawn election petitions. Through the notice and comment process we initiate today, we will have the opportunity to hear directly from those involved about their experiences and how they relate to the jurisdictional issue before us.

V. Dissenting View of Member Lauren McFerran

In the wake of the Board's 2016 *Columbia University* decision,¹⁶ which held that students who work for their universities are protected by the National Labor Relations Act, student employees across the country have been seeking – and often winning – better working conditions: better pay, better health insurance, better child care, and more.¹⁷ Today, the majority proposes to reverse this progress, in the name of

¹⁶ 364 NLRB No. 90 (2016).

¹⁷ See 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->

preserving higher education. While student employees clearly see themselves as workers, with workers' interests and workers' rights, the majority has effectively decided that they need protecting from themselves. I disagree.

There is no good basis – in law, in policy, or in fact – to take these workers' rights away. Instead, the majority revives tired old arguments rightly rejected by the Board in *Columbia* – and, even before that, in the Board's 2000 decision in *New York University*,¹⁸ which first found student employees protected. Today's proposal – like the view of the dissenting Board member in *Columbia* and the position taken by the Board in its misguided *Brown University* decision¹⁹ – reflects a deep misunderstanding of our statute, as interpreted by the Supreme Court, which broadly protects private-

students-win-significant-gains-union-contract-even-trump (noting substantial economic gains in newly-negotiated contract for student employees at Brandeis); David Ludwig, *Why Graduate Students of America Are Uniting*, *The Atlantic*, Apr. 15, 2015, available at <https://www.theatlantic.com/education/archive/2015/04/graduate-students-of-the-world-unite/390261/>; Rachel Bernstein, *Ivy League Graduate Students Push for Unionization*, *Science*, Apr. 28, 2015, available at <https://www.sciencemag.org/careers/2015/04/ivy-league-graduate-students-push-unionization> (“Graduate students' concerns include inadequate health insurance, high prices for dependent coverage on student health insurance policies, and insufficient child care and family leave support.”); Daniel Moattar, *How Graduate Unions Are Winning—and Scaring the Hell out of Bosses—in the Trump Era*, *In These Times*, Nov. 29, 2018, available at https://inthesetimes.com/working/entry/21602/graduate_student_unions_trump_nlr_b_columbia_brown (according to labor law professor and advocate Risa Lieberwitz, “More and more, we see the growth in the ranks of administrators, the shrinking of the ranks of tenured- and tenure-track faculty, and a lot of the shifting of the work of faculty to TAs [teaching assistants] and RAs [research assistants][,]” making graduate students and adjuncts “a body of very low-wage employees.”).

¹⁸ 332 NLRB 1205 (2000).

¹⁹ As scholars have pointed out, the *Brown University* decision offered “no empirical support” for its claims even though the “assertions are empirically testable.” Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 *Duke L. J.* 2013, 2076-2077 (2009).

sector employees and which has no special exception for working students. At bottom, the majority relies on speculative claims about the harm collective bargaining supposedly will do to the students themselves, as well as to their universities. But those claims are not only unsupported, they are refuted by what has happened in the real world. The majority has chosen to address this issue via rulemaking, but in rulemaking empirical evidence must govern. The *Brown University* view, the *Columbia* dissenter's view, and the majority's view today, will all be put to a test that they cannot survive. There is no need to proceed this way, when the Board can and should adhere to the *Columbia* decision and affirm the right of student employees to engage in collective bargaining.

A.

The Board's decision in *Columbia* (not to mention its earlier *New York University* decision) has already rebutted the legal premises the majority now relies on. As the *Columbia* Board explained, the "broad language" of the National Labor Relations Act – the Act covers "any employee," subject to certain exceptions, "none of which address students employed by their universities" – coupled with the "unequivocal policy of the Act" to encourage collective bargaining, means that the Board should "extend statutory coverage to students working for universities ... unless they are strong reasons *not* to do so."²⁰ There are no such reasons, and there never have been.²¹

²⁰ 364 NLRB No. 90, slip op. at 1-2 (emphasis in original), citing National Labor Relations Act, Sec. 1, 29 U.S.C. §151, and Sec. 2(3), 29 U.S.C. §152(3).

²¹ Rather than acknowledge the uphill challenge that the Act's language and policy present, the majority notes that the Sec. 2(3) definition of "employee" "neither expressly includes nor excludes" student employees, suggesting that the absence of a specific

Recycling a made-up distinction, the majority argues that only employees whose relationship with their employer is “primarily economic” (as opposed to “primarily educational”) should be covered.²² But as the *Columbia* Board explained, the Act clearly contemplates coverage of any common-law employment relationship; it does not care whether the employee and the employer also have some *other* non-economic relationship, beyond the reach of the Act.²³ The *Columbia* Board went on to explain

exclusion allows the Board to exclude any category of workers not specifically included. That notion – that whatever Congress may have said, the Board is free to narrow the coverage of the Act – is simply wrong, as the Supreme Court’s decisions make clear. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91, 94 (1995) (“[B]road, literal interpretation of the word ‘employee’ is consistent with several of the Act’s purposes, such as protecting the right of employees to organize for mutual aid without employer interference ...; and encouraging and protecting the collective-bargaining process. And, insofar as one can infer purpose from congressional reports and floor statements, those sources too are consistent with the Board’s broad interpretation of the word. It is fairly easy to find statements to the effect that an ‘employee’ simply means someone who works for another for hire, and includes every man on a payroll.... [W]hen Congress uses the term ‘employee’ in a statute that does not define the term, courts interpreting the statute must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of that term.”); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–92 (1984) (“Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of ‘employee.’”). See generally *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616–17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”).

²² The majority points to the fact that the Board has reached “conflicting conclusions” on whether the Act should be read to include student employees as a self-reinforcing basis to assume that there are multiple valid interpretations thereof. As I have discussed herein and as *Columbia* goes to great lengths to address, the legal analysis in *Brown* and earlier decisions, finding that student employees are not statutory employees, cannot be reconciled with the language of the Act and with binding Supreme Court law. But even assuming that it were permissible for the Board to exercise its discretion to return to the pre-*Columbia* approach, any such shift would have to be reconciled with the real-world evidence that collective bargaining in this industry has proven both feasible and successful.

²³ *Columbia University*, supra, 364 NLRB No. 90, slip op. at 5-6. See *Town & Country Electric*, supra, 516 U.S. at 88, 95 (chief purpose of union salts was to organize and form a union, not to benefit economically, yet they were nonetheless employees);

why covering student employees promoted the goals of federal labor policy, why it did not infringe on First Amendment academic freedom, and why empirical evidence (as well as the Board's experience) demonstrated that coverage was appropriate.²⁴ As the *Columbia* Board correctly concluded, "there is no compelling reason – in theory or in practice – to conclude that collective bargaining by student assistants cannot be viable or that it would seriously interfere with higher education."²⁵

Seattle Opera Assn., 331 NLRB 1072, 1073 (2000) (while auxiliary choristers received nonmonetary benefit in the form of personal satisfaction at their involvement in the opera, their relationship had features of common-law employment and therefore they were statutory employees), *enfd.* 292 F.3d 757 (D.C. Cir. 2002).

The lone case where the Supreme Court has excluded a class of common-law employees who were not among the Act's enumerated exceptions offers no support for the majority's effort here. In endorsing the exclusion of managerial employees, *Bell Aerospace* sets a high bar. The recognized exception for managerial employees was firmly rooted in specific, demonstrable legislative policies: the Court pointed to "the House Report and the Senate Report," both of which "voiced concern over the Board's broad reading of the term 'employee' to include those clearly within the managerial hierarchy," as well as "legislative history strongly suggesting" that managerial employees were "regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 281, 283 (1974) (internal quotations and brackets omitted); see also *Sure-Tan*, *supra*, 467 U.S. at 892-93 (looking for identifiable statutory text or policies concerning coverage of undocumented workers under the Act and further examining, to the extent any policies exist, whether there would be any specific conflict).

The majority also cites *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) for the proposition that the Act recognizes the absence of "pyramidal hierarchies" in an educational setting that might make the application of the Act inapt. But there the Court was referring very specifically to the collective "*faculty governance*" that had historically characterized relationships between the faculty at issue in *Yeshiva*, and their employer. Indeed, it was in light of this particular shared control that the Court analyzed the question of whether faculty members could be deemed managerial employees. The case said nothing at all concerning student employees, who obviously are not in the same position as faculty members and who plainly are in a hierarchical relationship to the university.

²⁴ 364 NLRB No. 90, slip op. at 6-12.

²⁵ *Id.* at 12. As the *Columbia* Board pointed out, to support any argument that student employees should *not* be covered by the Act, there must be both identifiable congressional policies that coverage would implicate and empirical data that coverage

B.

The empirical evidence relied on by the *Columbia* Board came from private-sector experience during the brief, prior period (2000-2004) when the Board had protected the rights of student employees and from experience in public universities, where collective bargaining by student employees has long been common.²⁶ Following *Columbia*, of course, student employees at private universities have exercised their labor-law rights, continuing to organize unions, win representation, and secure collective-bargaining agreements – all without any apparent damage to higher education. The majority ignores this development, although it must be aware of it – otherwise, the impetus for this entire project would be a mystery.

In the private sector, there are at least five executed collective bargaining agreements between student employee unions and universities: New York University

would harm those policies – elements that are both absent from the majority’s proposal. See *id.* at 7-12. Indeed, there is no logical basis to presume, as the majority does here in the absence of data, that covering student employees will affect any academic concerns. The *Columbia* Board correctly observed that “[d]efining the precise contours of what is a mandatory subject or bargaining for student assistants is a task that the Board can and should address case by case.” *Id.* at 8 (footnote omitted). Where a question arises whether bargaining rights might infringe on academic matters, an “employer is always free to persuade a union that it cannot bargain over matters in the manner suggested by the union because of these restrictions. But that is part of the bargaining process: the parties can identify and confront any issues of academic freedom as they would any other issue in collective bargaining.... If the parties cannot resolve their differences through bargaining, they are free to seek resolution of the issues by resort to [the Board’s] processes, and [the Board] will address them [by, for example, delineating between what is a mandatory or permissive subject of bargaining] at the appropriate time.” *Boston Med. Ctr. Corp.*, 330 NLRB 152, 164 (1999).

²⁶ See *Columbia*, 364 NLRB No. 90, slip op. at 9 (“Recent data show that more than 64,000 graduate student employees are organized at 28 institutions of higher education, a development that began at the University of Wisconsin at Madison in 1969 and that now encompasses universities in California, Florida, Illinois, Iowa, Massachusetts, Michigan, Oregon, Pennsylvania, and Washington.”).

(NYU),²⁷ The New School,²⁸ American University,²⁹ Tufts University,³⁰ and Brandeis University.³¹ Several other schools are currently in negotiations for an agreement.³² Of the contracts that have been executed, all but the NYU agreement (which was negotiated pursuant to voluntary recognition) involved unions certified in Board elections after *Columbia* issued.³³ The striking thing about these contracts is the focus on

²⁷ Available at https://makingabetternyu.org/app/uploads/GSOCNYU_2015contract_searchable.pdf.

²⁸ Available at https://sensuaw.org/app/uploads/2019/01/SENS-UAW-CBA-_Executed_01232019.pdf.

²⁹ Available at https://www.american.edu/provost/academicaffairs/graduate_student_employees/upload/au-graduate-employees-cba.pdf.

³⁰ Available at <https://as.tufts.edu/sites/default/files/2018-2023-GSAS-CBA-Signed.pdf>.

³¹ Available at <https://www.brandeis.edu/humanresources/CollectiveBargainingAgreement/documents/Brandeis-Graduate-Assistant-CBA.pdf>.

³² Shera S. Avi-Yonah and Molly C. McCafferty, *Grad Unionization Movement Sees Successes Nationwide As Harvard Begins Bargaining*, *The Harvard Crimson*, Nov. 27, 2018, available at <https://www.thecrimson.com/article/2018/11/27/union-efforts-peer-institutions/> (student employee unions recognized and bargaining underway at Harvard, Georgetown, Brown, Columbia Universities). Notably, where there has been majority support for student employee unions but universities have refused to bargain, this has typically resulted in continuing demonstrations and other forms of student pressure to achieve bargaining. See Lee Harris, *Graduate Student Workers Across Chicago Ramp Up Unionization Efforts*, *The Chicago Maroon*, Apr. 26, 2019, available at <https://www.chicagomaroon.com/article/2019/4/26/graduate-student-unions-loyola-arrests-northwestern-uchicago-gsu/> (at University of Chicago and Loyola University Chicago, students have had pro-union votes but universities have declined to recognize them, leading to demonstrations, sit-ins, and even arrests).

³³ The majority claims that the economic progress by student employees has been achieved largely through voluntary recognition and mechanisms outside the Board procedures. The evidence suggests, however, that the Board's establishment of legal procedures for recognition and bargaining has played an outsized role. In fact, since *Columbia* issued, student-employee unions have won numerous NLRB-supervised elections, including at Columbia, The New School, Brandeis, Tufts, the University of Chicago, Loyola University Chicago, Boston College, and American University. NLRB elections at these schools involved a combined approximate number of 10,000 eligible voters per the NLRB's own tally sheets, leading to six Board certifications of representative and at least four contracts. At the University of Chicago and Boston

traditional subjects of collective bargaining, such as compensation, leave time, and health care.

Against the backdrop of these agreements, the majority's factual assertions – for which it offers no empirical evidence – ring especially hollow. The majority claims that student employees should not be allowed bargaining rights because, through their employment, they “gain knowledge of their discipline and cultivate relationships” and “assist faculty members ... because those activities are vital to their education.”³⁴ My colleagues also express concern that, in addition to harming the education of the graduate employees, allowing graduate employees to bargain will affect universities'

College – as well as in several units at Yale, which involved multiple, smaller academic units – the unions prevailed, but withdrew their petitions after the universities appealed the results, out of concern that they would be used by the Board as a vehicle to reverse *Columbia*. See Colleen Flaherty, *Realities of Trump-Era NLRB*, Inside Higher Ed, Feb. 15, 2018, available at <https://www.insidehighered.com/news/2018/02/15/blow-graduate-student-union-movement-private-campus-three-would-be-unions-withdraw>; Jingyi Cui, *Will grad students ever get their union?*, Yale Daily News, Feb. 15, 2018, available at <https://yaledailynews.com/blog/2018/02/15/will-grad-students-ever-get-their-union/>. Elsewhere, the change in Board law that required bargaining with a student-employee union was a likely impetus for voluntary recognition: Harvard, Georgetown, and Brown all agreed to recognize unions based on non-NLRB elections – *after Columbia issued*. See, e.g., News From Brown, *Brown University, graduate student organizers finalize terms for Nov. 14-19 unionization vote*, Nov. 8, 2018, available at <https://www.brown.edu/news/2018-11-08/election>.

³⁴ The majority also asserts that student employees' “principal time commitment is focused on their coursework and studies. But what portion of their time is spent working for the universities makes no difference to whether they should be treated as statutory employees. That student employees are seeking union representation and pursuing collective bargaining should tell the Board all it needs to know: their work and their working conditions matter to them.

The majority asserts that student-employee compensation is not directly tied to the time spent at tasks and that compensation is more akin to financial aid. But salaried employees are covered by the Act, just as hourly or piece-rate employees are. Nor does the nature of compensation matter, so long as it is compensation for work.

academic prerogatives, such as directing the content, methods, and standards of education.

These assertions do not stand up to scrutiny. As the *Columbia* Board observed:

[C]ollective bargaining and education occupy different institutional spheres.... [A] graduate student maybe both a student *and* an employee; a university may both the student's educator *and* employer. By permitting the Board to define the scope of mandatory bargaining over "wages, hours, and other terms and conditions of employment," the Act makes it entirely possible for these different roles to coexist – and for genuine academic freedom to be preserved.

364 NLRB No. 90, slip op. at 7 (emphasis in original), quoting Act, Sec. 8(d), 20 U.S.C.

§158(d). The evidence demonstrates that student employees are organizing not to interfere with their educations, but to improve their working conditions and to provide for themselves and their families.³⁵ There is nothing illegitimate about that. As the *Brown* Board did before, today's majority "errs in seeing the academic world as somehow removed from the economic realm that labor law addresses – as if there were no room in the ivory tower for a sweatshop."³⁶

Unsurprisingly, then, evidence from contemporary bargaining shows that student employees are not trying to alter aspects of their own educational experience, nor to

³⁵ See *Columbia.*, supra, 364 NLRB No. 90, slip op, at 15, 16 (student employees at Columbia may work 20 hours a week and may teach undergraduate "core curriculum," indicating a role "akin to that of faculty" and involving routine elements of educating undergraduates). See also Ben Kessler, *The latest campus battle: Graduate students are fighting to unionize*, NBC News, June 8, 2019, available at <https://www.nbcnews.com/news/us-news/latest-campus-battle-graduate-students-are-fighting-unionize-n1015141> ("At some universities, more than 15 percent of courses list graduate students as primary instructors and some undergraduates spend half of their instruction hours with graduate teaching assistants.").

³⁶ *Brown University*, supra, 342 NLRB at 494 (dissenting opinion of Member Liebman and Member Walsh).

exert control over academic matters, but instead have focused on bread-and-butter issues – while accepting efforts to preserve universities’ control over academic matters. The New School agreement, for example, included a broad management rights provision, which notes that “[m]anagement of the University is vested exclusively in the University” and in which the union “agrees that the University has the right to establish, plan, direct and control the University’s missions, programs, objectives, activities, resources, and priorities,” including (among many other specified prerogatives) the right “to determine or modify the number, qualifications, scheduling, responsibilities and assignment of ASWs [Academic Student Workers]” and the right “to exercise sole authority on all decisions involving academic matters.” Such a clause preserves a university’s academic freedom and prerogatives.³⁷ It also sets a foundation for

³⁷ Relatedly, the Brandeis agreement management rights clause provides, inter alia, that management shall:

- Exercise sole authority on all decisions involving academic matters, including:
 - a) any judgments concerning academic programing, including (i) courses, curriculum and instruction; (ii) content of courses, instructional materials, the nature and form of assignments required including examinations and other work; (iii) methods of instruction; (iv) class size; (v) grading policies and practices; and (vi) academic calendars and holidays;
 - b) the development and execution of policies, procedures, rule and regulations regarding the Graduate Assistants' status as students, including but not limited to all questions of academic standing and intellectual integrity; and
 - c) any evaluations and determinations of Graduate Assistants progress as students, including but not limited to the completion of degree requirements.

The Tufts and NYU agreements contain similar language. Meanwhile, at Harvard, the University has insisted that negotiations only cover employment issues and not academic matters. See Harvard Univ. Office of the Provost, *FAQs about Graduate Student Unionization*, available at <https://provost.harvard.edu/unionization-faqs> (“To the extent that policies and benefits are tied to the educational relationship between the University and its students, rather than an employment relationship, they would not be mandatory subjects of bargaining under the NLRA. For example, grades and grade appeals would not be topics of negotiations because they fundamentally involve the assessment of students as students, not as employees.”). Similarly, the Columbia

continuing mentorship and cultivation of the educational features of assistantships, by leaving evaluation and direction of academic work in control of the university. In fact, the Tufts agreement outright encourages such mentorship:

Supervisors shall provide regular feedback to Graduate Assistants on the work they perform, including advice, guidance, and support on how to improve their performance. Flexibility in such feedback is encouraged, so as to address the broad nature of work performed by Graduate Assistants and their individual needs.

Thus, while preserving the educational facets of the student employees' relationship to a university and its faculty, these recent collective-bargaining agreements instead focus on core economic issues that are faced by employees and employers everywhere.³⁸

Relatedly, in bargaining that is still underway at other schools, such as Columbia, Harvard, Brown, and Georgetown, it appears that bread-and-butter issues have also been at the fore.³⁹ To the extent that agreements have not been reached, it appears to be because of disagreement over such economic subjects. For example, at Columbia,

bargaining framework states: "The GWC-UAW and CPW-UAW agree that any collective bargaining agreement to be negotiated with Columbia must not infringe upon the integrity of Columbia's academic decision-making or Columbia's exclusive right to manage the institution consistent with its educational and research mission." See Columbia Framework Agreement, available at <https://columbiagradunion.org/app/uploads/FrameworkAgreement20181119.pdf>. Such management rights provisions, defining management control over academic prerogatives, are common in the public sector as well. See *Columbia*, supra, 364 NLRB No. 90, slip op. at 9.

³⁸ See also Teresa Kroeger et al., *The state of graduate student employee unions*, Economic Policy Inst., Jan. 11, 2018, available at <https://www.epi.org/publication/graduate-student-employee-unions/> (noting massive amounts of debt grad student must occur and that this is driving unionization efforts).

³⁹ See Georgetown Alliance of Graduate Employees, Contract Working Groups, available at <http://www.wearegage.org/issues>; [Brown University Graduate Student Employees, Opening Statements for Bargaining](#), available at <https://brownsugse.com/2019/04/08/read-sugses-opening-statement-for-the-first-day-of-bargaining/>.

traditional economic issues seem to predominate the union's bargaining agenda.⁴⁰ Meanwhile, at Harvard, issues directly involving financial well-being loomed large in the union's description of its bargaining experiences. At one point the bargaining team's update states: "With childcare costs \$2000/month, dependent insurance at \$300/month, rent upwards of \$2000 for a one-bedroom apartment, how can student parents afford to work on this campus?"⁴¹ Even a cursory examination of the agreements and bargaining progress of student-employee unions leaves little doubt: the issues animating student employees' efforts are genuine concerns over their needs and interests as employees – issues that the Act is intended to allow employees to bargain over.⁴²

Notably, Harvard's administration has effectively acknowledged that bargaining over terms and conditions of employment can occur without affecting issues that a university feels are central to its academic mission. The University president noted, "We will be very adamant about differentiating between matters that are appropriate for academic decision making from matters that are concerns of a labor or employment situation."⁴³

⁴⁰ See GWC-UAW, Overview of Initial Bargaining proposals, available at https://columbiagradunion.org/app/uploads/InitialBargainingGoals_highlights.pdf.

⁴¹ Harvard Graduate Student Union, Bargaining Updates, available at <http://harvardgradunion.org/members/bargaining-updates/>.

⁴² Bargaining at Georgetown University illustrates how student employees share a serious and timely concern with workers across the country: There, remedies for discrimination and harassment were also a major issue at bargaining. The union's website noted that: "In our bargaining survey last spring, *1 in 5 grad workers reported that they had experienced discrimination or harassment* in the workplace. Less than half of respondents said that they had reported the incidents and only 44 percent of those who reported it felt the university had responded appropriately." Georgetown Alliance of Graduate Employees, Bargaining Updates, July 24, 2019, available at <http://www.wearegage.org/news>.

⁴³ Shera S. Avi-Yonah and Molly C. McCafferty, *Experts Say Harvard's Union Bargaining Terms Differ From Typical Labor Contract*, The Harvard Crimson, May 4,

Nor have student employees been pressing for influence on academic matters, in either the public or private sector. One labor law scholar pointed out that “[t]here is not a single case of an academic union insisting on bargaining over grades, letters of recommendation, awarding of honors, tenure criteria, what fields of specialization a department should concentrate in, admission criteria, or any other academic judgment.”⁴⁴

While unsuccessfully attempting to demonstrate how collective bargaining will harm education, the majority neglects the economic features of the relationship between universities and student employees – and how strained economic circumstances among student employees have generated labor unrest.⁴⁵ As the *Columbia* Board observed, “[i]n the absence of access to the Act’s representation procedures and in the face of rising financial pressures, [student employees] have been said to be ‘fervently lobbying their respective schools for better benefits and increased representation’ – entirely the benefits that would flow with respect to economic aspects of the relationship.”⁴⁶ Today’s proposal seems to disregard the genuine difficulties faced – whether working long hours and juggling research and coursework, or struggling to afford health care and child care – by student employees, and the obvious fact that they might benefit by exercising their rights under the National Labor Relations Act. Indeed, financial insecurity can certainly

2018, available at <https://www.thecrimson.com/article/2018/5/4/academic-versus-labor-bargaining-parameters/>

⁴⁴ Id. (quoting University of Oregon Professor Gordon Lafer).

⁴⁵ See, e.g., 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>.

⁴⁶ *Columbia*, supra slip op. at 12 (quoting David Ludwig, *Why Graduate Students of America Are Uniting*, The Atlantic, supra).

be an obstacle to academic achievement – the main concern the majority purports to protect.⁴⁷

Ironically, after the *Columbia* Board successfully opened the Act’s protection and procedures to student employees, today’s proposal will raise the specter of renewed unrest on campus. That result is directly contrary to the Act’s stabilizing purposes. The desire of student employees for union representation and for better working conditions will not go away simply because the Board has closed its doors. Instead, that desire will have no clear and appropriate outlet, especially in the face of universities’ resistance. For example, when Columbia initially refused to bargain in the hopes of succeeding in a legal challenge, student demonstrations and unrest followed.⁴⁸ Relatedly, University of Chicago students struck because the university refused to honor their vote to unionize.⁴⁹ Further, when schools have withheld voluntary recognition in light of the prospect of the Board reversing *Columbia*, this strategy has provoked further unrest.⁵⁰ Representation

⁴⁷ See Kessler, *The latest campus battle: Graduate students are fighting to unionize*, supra (“Almost one-third of doctoral students at the University of Chicago cited financial challenges as a roadblock to academic success, and seven percent reported running out of food without the ability to buy more....”).

⁴⁸ See Beryl Lieff Benderly, *The push for graduate student unions signals a deep structural shift in academia*, *Science*, June 6, 2018, available at <https://www.sciencemag.org/careers/2018/06/push-graduate-student-unions-signals-deep-structural-shift-academia>.

⁴⁹ See Dawn Rhodes, *'We wanted a union then, and we deserved a union then': University of Chicago grad student workers go on strike*, *Chicago Tribune*, June 4, 2019, available at <https://www.chicagotribune.com/news/breaking/ct-met-university-of-chicago-graduate-student-strike-20190604-story.html>.

⁵⁰ See Kate McGee, *Chicago Graduate Student Unions Face Roadblocks to Unionization*, *NPR*, Apr. 10, 2019, available at <https://www.npr.org/local/309/2019/04/10/711906242/chicago-graduate-student-unions-face-roadblocks-to-unionization>.

elections and collective bargaining under the Board's supervision is the far better alternative.

C.

In proposing to reverse the *Columbia* decision, the majority has shown little interest in the facts on the ground. But it is not too late for the Board to turn back. Perhaps robust public participation in the comment process will help create a rulemaking record that refutes, once and for all, the notion that the National Labor Relations Act cannot be appropriately and productively applied to student employees and their university employers. On that score, I urge my colleagues to hold public hearings on today's proposal, so that the Board can hear directly from the student employees affected by today's proposal. To strip away all labor-law rights from tens of thousands of student employees – including many who have already begun exercising those rights – would be a terrible mistake.⁵¹

As explained, the majority proposes to permanently exclude a class of employees from statutory coverage, in contravention of the law's language and its policies. There

⁵¹ The majority is "offen[ded]" that I characterize today's proposal as one that will reverse progress made by student employees with respect to their working conditions. The majority insists that the question here is simply whether the Board is statutorily permitted to exercise jurisdiction over student employees. Insofar as the Board has discretion to exclude student employees from coverage – despite the existence of a common-law employment relationship with their university and the lack of any basis in the Act's text for such an exclusion – then the Board surely must consider the successful adjustment of purely workplace issues through the peaceful process of collective bargaining as a factor weighing in favor of asserting jurisdiction. The majority's failure to do so betrays at least an indifference to the achievements of student-employee bargaining, if not an outright desire to reverse them.

is no reason to revisit the *Columbia* decision, now on the books for over three years, particularly in the absence of any empirical evidence that any educational interests have been harmed in any way. To the contrary, student employees have already succeeded in bargaining with their universities for better working conditions, the very interests that spurred their organizing movement – just as the National Labor Relations Act encourages. Because the proposed rule has no plausible foundation, I must dissent.

VI. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (“RFA”), 5 U.S.C. 601 et seq., requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis and to develop alternatives, wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The focus of the RFA is to ensure that agencies “review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].” E.O. 13272, Sec. 1, 67 FR 53461 (“Proper Consideration of Small Entities in Agency Rulemaking”). An agency is not required to prepare an initial regulatory flexibility analysis for a proposed rule if the Agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

The Board concludes that the proposed rule will not affect a substantial number of small entities. In any event, the Board further concludes that the proposed rule will not have a significant economic impact on such small entities. Accordingly, the Agency Chairman has certified to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”) that the proposed amendments will not have a

significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The NLRB is an agency within the meaning of the Paperwork Reduction Act (PRA), 44 U.S.C. 3502(1) and (5). This Act creates rules for agencies when they solicit a “collection of information.” 44 U.S.C. 3507. The PRA defines “collection of information” as “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format.” 44 U.S.C. 3502(3)(A). The PRA only applies when such collections are “conducted or sponsored by those agencies.” 5 CFR 1320.4(a).

The proposed rule does not involve a collection of information within the meaning of the PRA. Outside of administrative proceedings (discussed below), the proposed rule does not require any entity to disclose information to the NLRB, other government agencies, third parties, or the public.

The only circumstance in which the proposed rule could be construed to involve disclosures of information to the Agency, third parties, or the public is during the course of Board administrative proceedings. However, the PRA provides that collections of information related to “an administrative action or investigation involving an agency against specific individuals or entities” are exempt from coverage. 44 U.S.C. 3518(c)(1)(B)(ii). A representation proceeding under Section 9 of the NLRA as well as an investigation into an unfair labor practice under Section 10 of the NLRA are administrative actions covered by this exemption. The Board’s decisions in these proceedings are binding on and thereby alter the legal rights of the parties to the

proceedings and thus are sufficiently “against” the specific parties to trigger this exemption.

For the foregoing reasons, the proposed rule does not contain information collection requirements that require approval by the Office of Management and Budget under the PRA.

List of Subjects in 29 CFR part 103

Colleges and universities, Health facilities, Joint-employer standard, Labor management relations, Military personnel, Music, Sports.

For the reasons set forth in the preamble, the Board proposes to amend 29 CFR part 103 to read as follows.

PART 103—OTHER RULES

1. The authority citation for part 103 continues to read as follows:

Authority: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

2. Revise § 103.1 to read as follows:

§103.1 Colleges and universities.

(a) The Board will assert its jurisdiction in any proceeding arising under Sections 8, 9, and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than \$1 million.

(b) Students who perform any services, including, but not limited to, teaching or research assistance, at a private college or university in connection with their

undergraduate or graduate studies are not employees within the meaning of Section 2(3) of the Act.

Dated: September 18, 2019.

Roxanne Rothschild,

Executive Secretary

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