Congress of the United States
Washington, DC 20515

January 15, 2020

Ms. Roxanne Rothschild
Associate Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

RE: Comment on Notice of Proposed Rulemaking, Jurisdiction – Nonemployee Status of University and College Students Working in Connection With Their Studies, RIN 3142-AA15

Dear Ms. Rothschild:

We write in opposition to the National Labor Relations Board's (NLRB) proposed rule to strip students of their protections under the *National Labor Relations Act* (NLRA) when they perform work for their university. The proposed rule, which offers no opportunity for the affected workers to comment in a public hearing, contradicts both the text and purpose of the NLRA. Moreover, this attempt to legislate through rulemaking subverts congressional authority and falls short of the United States' commitment to protect the right to freedom of association.

Student workers are a vital component of the higher education workforce. They teach and develop courses, grade student work, conduct research, and assist with university administration. Moreover, universities increasingly employ students to perform work identical to that of tenure-track faculty and adjuncts. Between 2005 and 2015, the number of graduate teaching assistants grew by 16.7 percent, far outpacing the number of tenure-track faculty, which grew by only 4.8 percent.[1] Universities' increased reliance on student workers indicates that student workers are now doing work that would previously have been performed by tenure-track faculty. The NLRB must recognize the dignity of this work by protecting student workers' rights under the NLRA and abandoning the proposed rule.

The Proposed Rule Violates the Text and Purpose of the National Labor Relations Act by Denying Student Workers the Right to Organize Unions

The NLRB's 2016 decision in *Columbia University* correctly recognized graduate workers as statutory employees under the NLRA.[2] As that decision noted, Section 2(3) of the NLRA does not include students in its list of statutory exclusions.[3] Because the NLRA does not explicitly define "employee," settled precedent requires the NLRB to apply the common law of agency

[1] Teresa Kroeger et al., Economic Policy Institute, The State of Graduate Student Employee Unions 4 (2018), https://www.epi.org/files/pdf/138028.pdf.
[2] 364 NLRB No. 90 (2016).
[3] *Id.*, slip op. at 4 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984)).

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when assessing whether a worker is covered under the NLRA.[4] The common law standard considers "the hiring party's right to control the manner and means" by which the work is performed, and this standard does not exempt workers on the basis of their also having an educational relationship with the hiring entity.[5] In fact, the Restatement of Employment Law explicitly observes that student workers can be employees under the common law.[6] In recognizing that student workers are statutory employees, the NLRB's decision in *Columbia University* complied with the NLRA's explicit purpose of "encouraging the practice and procedure of collective bargaining."[7]

The proposed rule is therefore based on an impermissible interpretation of the NLRA because the NLRB has no authority to deviate from the NLRA and common law. "Congress delegated to the Board the authority to make tough calls on matters concerning labor relations, but not the power to recast traditional common-law principles of agency in identifying covered employees and employers."[8] Although the proposed rule claims that the NLRB can ignore the common law because student workers have an educational relationship in addition to their economic relationship,[9] nothing in the NLRA or common law permits the exclusion of any workers on the basis of this relationship.[10] In the years since the NLRB's decision in *Columbia University*, graduate student assistants at private universities have joined unions and collectively bargained without "unduly infringing upon traditional academic freedoms."[11] At public universities, student workers have organized unions for 50 years and have the right to collectively bargain in 14 states;[12] the proposed rule has not identified a single instance of how collective bargaining has ever "imperil[ed] the protection of academic freedoms."[13] The NLRB therefore lacks any justification to regulate a new exclusion.

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[4] *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995) (Noting that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine[.]"); *see also Columbia University*, 364 NLRB No. 90 slip op. 4-5 (2016) (internal citation omitted) ("[T]he Supreme Court has endorsed the Board's determination that certain workers were statutory employees where that determination aligned with the common law of agency.").

[5] *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (quoting Restatement (Second) of Agency § 220(2) (1958)).

[6] Restatement of Employment Law § 1.02 , cmt. g. (2015) ("Where an educational institution compensates student assistants for performing services that benefit that institution, however, such compensation encourages the students to do the work for more than educational benefits and thereby establishes an employment as well as an educational relationship.").

[7] 29 U.S.C. § 151; *see also Columbia University*, 364 NLRB No. 90, slip op. at 6-12 (2016).

[8] *See Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1207 (D.C. Cir. 2018).

[9] 84 Fed. Reg. at 49693-94.

[10] *See Brown University*, 342 NLRB No. 483, 496 (2004) (Members Liebman and Walsh, dissenting).

[11] *Brown University*, 342 NLRB No. 483, 490 (2004); *see* Teresa Kroeger et al., Economic Policy Institute, The State of Graduate Student Employee Unions 2 (2018), https://www.epi.org/files/pdf/138028.pdf.

[12] National Center for the Study of Collective Bargaining in Higher Education and the Professions, Comment Letter on Proposed Rule, Nonemployee Status of University and College Students Working in Connection with Their Studies (Nov. 20, 2019), https://www.regulations.gov/document?D=NLRB-2019-0002-5754.

[13] 84 Fed. Reg. at 49694; *see also* Colleen Flaherty, *The Sky Isn't Falling*, Inside Higher Ed (Aug. 25, 2016), https://www.insidehighered.com/news/2016/08/25/u-michigan-has-one-countrys-oldest-graduate-student-unions-and-hasnt-held-it-back.

Congress Has Declined to Exclude Student Workers from Labor Law, and the National Labor Relations Board Must Not Usurp Congressional Authority

Congress has rejected legislation to deny student workers the right to collectively bargain when they have an employment relationship with their university, and the NLRB should not legislate an interpretation of law that Congress has explicitly discarded.[14] When the House Committee on Education and Labor (the Committee) marked up the *College Affordability Act* on October 29, 2019,[15] it rejected an amendment to prohibit universities from treating students as employees for purposes of collective bargaining.[16] The Congressman proposing the amendment specifically targeted the NLRA's coverage of student workers and argued, "Federal labor law extends collective bargaining rights to employees, who have an economic relationship with an employer. That is not the primary relationship that students have with their universities, and higher education law should reflect this important difference."[17] The Committee rejected this amendment by a vote of 17 ayes to 28 nays.[18] Congress has declined to legislate this exclusion, and the rationale of *Columbia University* stands. The NLRB should cease its attempt to legislate an exclusion rejected by Congress.

Denying Student Workers their Freedom of Association Would Undermine the United States' Commitments under International Law

The United States is a member of the International Labor Organization (ILO) and a signatory to its Declaration on Fundamental Principles and Rights at Work.[19] Accordingly, the United States has "an obligation…to respect, to promote, and to realize…the principles concerning the fundamental rights [of] freedom of association and the effective recognition of the right to collective bargaining."[20] However, the United States has previously run afoul of these international standards due to the NLRB's decision in *Brown University*. After the NLRB issued that decision, a union filed a complaint against the United States before the ILO's Committee on Freedom of Association, alleging that the decision violated graduate teaching assistants' freedom of association. The ILO agreed: "teaching and research assistants in so far as they are workers

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[14] *Monessen S.R. Co. v. Morgan*, 486 U.S. 330, 338-39 n.8 (1988) (internal citations omitted) (citing a Congressional committee's rejection of an amendment to an existing statute as evidence that the existing interpretation of the statute is correct); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation omitted) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").

[15] H.R. 4674, 116th Cong. (2019).

[16] *Markup: H.R. 4674, College Affordability Act Before the H. Comm. on Educ. and Labor*, 116th Cong. (2019), (*see* Amendment #20 offered by Representative Phil Roe).

[17] H. Comm. on Educ. and Labor, *Full Committee Markup: H.R. 4674, College Affordability Act*, YouTube (Oct. 29, 2019), https://youtu.be/I2Kr_l9qZ6o (Statement of Representative Phil Roe at 5:20:20).

[18] *Markup: H.R. 4674, College Affordability Act Before the H. Comm. on Educ. and Labor*, 116th Cong. (2019) (*see* Amendment #20 offered by Representative Phil Roe).

[19] International Labor Organization, Declaration On Fundamental Principles And Rights At Work, Section 2 (June 18, 1998), *available at* http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

[20] *Id.* (noting that member states have this obligation "even if they have not ratified the Conventions in question").

should be ensured full protection of their right to organize."[21] As a result, the ILO recommended that the United States "take the necessary steps…to ensure that graduate teaching and research assistants, in their capacity as workers, are not excluded from the protection of freedom of association and collective bargaining."[22] The ILO decided to close the case only after the NLRB issued its decision in *Columbia University* to protect student workers' right to organize.[23]

The United States government would once again run afoul of its obligations under international law if the NLRB strips student workers of their rights. The *Columbia University* decision was consistent with international standards because it protected students when they met the definition of employee under the NLRA. If the NLRB overturns *Columbia University* through this rulemaking, such a move would frustrate student workers' human right to freedom of association.

Conclusion

For the reasons set forth above, we request that the NLRB withdraw the proposed rule and preserve the standard set forth in *Columbia University*. Thank you for your consideration of this comment.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chair
Committee on Education and Labor

FREDERICA S. WILSON
Chair
Subcommittee on Health, Employment, Labor and Pensions

MARK POCAN
Member of Congress

PRAMILA JAYAPAL
Member of Congress

[21] International Labor Organization, Committee on Freedom of Association, Complaint Against the Government of the United States Presented by the United Automobile, Aerospace and Agricultural Implement Workers of America International Union, para. 801, Report No. 350, Case No. 2547 (2008), *available at* https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2910631.
[22] *Id.* at para. 805.
[23] *Id.*, paras. 33-35, Case No. 2547 (2017), *available at* https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3327323.

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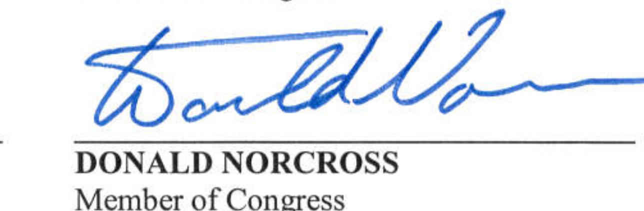

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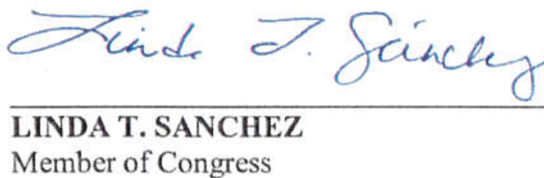
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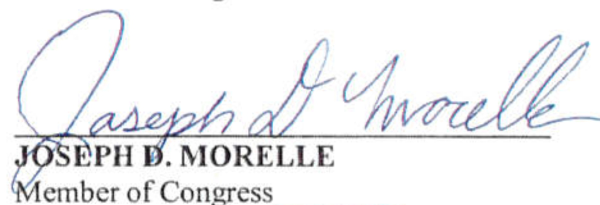
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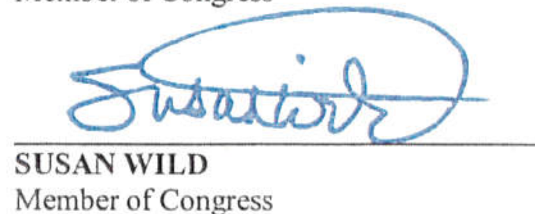
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