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Jurisdiction—Nonemployee Status of University and College Students Working in
Connection with Their Studies**

**COMMENTS OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS
IN RESPONSE TO THE PROPOSED NLRB RULE CONCERNING GRADUATE
ASSISTANTS AND OTHER STUDENT EMPLOYEES**

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I. INTRODUCTION.

The American Association of University Professors submits these comments to the National Labor Relations Board in response to the Notice of Proposed Rulemaking (NPRM) concerning the employee status of university and college student employees under the National Labor Relations Act (NLRA). RIN 3142-AA15; 84 FR 49691-49699 (September 23, 2019).

The American Association of University Professors (the “AAUP”), founded in 1915, is a non-profit organization of over 42,000 faculty, librarians, graduate students, and academic professionals, a significant number of whom are private sector employees. The mission of the AAUP is to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good. By submitting these comments in response to the NPRM, the AAUP seeks to assist the National Labor Relations Board (“NLRB” or “Board”) in its rulemaking process to evaluate the legal definition of teaching and research assistants’ employee status under Section 2(3) of the NLRA in a manner that accurately reflects employment relationships in universities and colleges. To this end, AAUP’s comments are based on its long history representing the interests of the academic profession, including AAUP’s position as the preeminent authority on the meaning, scope, and promotion of academic freedom.

For over one hundred years, the AAUP has concerned itself with the promotion of academic freedom, both as a conceptual right and as a practice. The AAUP has been instrumental in the development and enhancement of the laws and policies designed to secure

academic freedom--as well as the very concept of academic freedom itself. From this expert vantage, the AAUP takes the position that collective bargaining enhances and secures academic freedom of universities¹ and those in their employ, including faculty and teaching and research assistants (hereinafter referred to as “graduate assistants”).² The AAUP offers comments that elucidate the inherent need to contextualize abstract debates about academic freedom within the actual operations of universities. Discussions of academic freedom before the National Labor Relations Board (“NLRB” or “Board”) to date fail to portray the full complexities of academic freedom--to differentiate between the university’s institutional academic freedom claims and their relationship to the academic freedom of those in their employ.³ Doing so requires a fundamental recognition that the academic freedom of universities and those in its employ, including graduate assistants, exist in relations of hierarchy with each other; that academic freedom disputes occur between institutions and those in their employ regardless of unionization; and that an effective instrument to ensure academic freedom of the institutions and their employees is through negotiated agreements that define clear processes that will guide the interpretation of competing claims between unequally empowered parties--in other words, through collective bargaining. Put plainly, concern for academic freedom supports broad construal of the statutory meaning of employee; graduate assistants should not be categorically barred from the status of employee under Section 2(3) and their collective bargaining rights

¹ References in these comments to “universities” are intended to encompass colleges and universities.

² While this comment focuses on private college and university graduate assistants, AAUP also supports the inclusion of undergraduate assistants as statutory or common law employees subject to the protections of the NLRA.

³ See, J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L. J. 251, 338 (1989) (“[C]onstitutional academic freedom ought not to protect institutions resembling universities but which do not pursue genuine liberal studies -- that prohibit or consistently discourage professors from following controversial arguments, that recognize no role for faculty in governance, or that seek to indoctrinate rather than educate students. In other words, universities that do not respect the academic freedom of professors (understood as the core of the doctrine developed by the AAUP) or the essential intellectual freedom of students (a concept barely developed) ought not to be afforded institutional autonomy.”)

should be guaranteed. This is in keeping with the purpose of the NLRA, to encourage collective bargaining, as well as the educational mandate of universities, which is premised upon the successful nurturance of academic freedom.

The AAUP's comments address the following key points:

1. Supreme Court and Board precedents support the broad definition of "employee" under Section 2(3) of the NLRA, which encompasses graduate assistants.
2. Graduate assistants have an economic relationship with their university employer, as demonstrated by the empirical evidence that university employers rely on the labor of graduate assistants to carry out the teaching and research work of the university. This evidence refutes the NPRM's assertion that graduate assistants are not employees because they have a "primarily educational, not economic, relationship with their university."
3. The university's "institutional academic freedom" under the First Amendment does not exempt universities from complying with the duty to bargain with unionized graduate assistants under the NLRA.
4. The empirical evidence demonstrates the positive history of collective bargaining for graduate assistants, including empirical evidence that collective bargaining successfully protects the institutional academic freedom of university employers and the individual academic freedom of faculty and graduate assistants.
5. Adjudication, not rulemaking, is the appropriate process for determining Section 2(3) employee status of graduate assistants.

As the following comments demonstrate, the law, policy, and empirical evidence support the Board's findings in *Columbia University*, 364 NLRB. No. 90 (2016), that graduate assistants are employees subject to the protections of the NLRA. The proposed rule should be rejected and the Board's current precedent of *Columbia University* should stand. Decades of successful collective bargaining on campuses counter claims advanced by the NPRM; to adopt the NPRM would be unreasonable to the point of being arbitrary.

II. AAUP, COLLECTIVE BARGAINING, AND ACADEMIC FREEDOM.

The AAUP has chapters on nearly 400 campuses, representing a range of academic workers, including graduate assistants. These include 75 unionized AAUP chapters, 20 of which are located in private sector higher education institutions. AAUP's policies have been recognized by the Supreme Court and are widely respected and followed in American colleges and universities. *See, e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). In cases that implicate AAUP policies, or otherwise raise legal issues important to higher education, faculty members or graduate students, the AAUP frequently submits amicus briefs in the Supreme Court, the federal circuits, and the NLRB. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000); *Columbia University*, 364 N.L.R.B. No. 90 (2016); *Pacific Lutheran University*, 361 NLRB 1404 (2014); *Brown University*, 342 N.L.R.B. 483 (2004); and *New York University*, 332 NLRB 1205 (2000).

As the Board recognized in its decision in *Columbia University*, the AAUP is “an organization that represents professional faculty--the very careers that many graduate students aspire to.” 364 NLRB No. 90, slip op. at n. 104. The AAUP *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments* (“*1940 Statement of Principles*”) has been endorsed by the Association of American Colleges and Universities and, over subsequent decades, by more than 250 academic professional organizations and

institutions.⁴ As stated recently in *McAdams v. Marquette University*, 914 N.W.2d 708 (Wis. 2018), “As the first organization to develop codes of academic freedom, AAUP’s statements remain the model.” *Id.* at 746, n.10 (Bradley, J., concurring). Based on its many years of experience representing the academic profession, AAUP urges the Board to consider, in its rulemaking process, relevant AAUP standards and principles, including AAUP statements supporting collective bargaining rights of faculty and graduate employees. *See, AAUP Statement on Collective Bargaining; AAUP Statement on Graduate Students*. The AAUP further urges the Board to consider the AAUP’s extensive experience representing faculty and graduate employees in collective bargaining. As stated in the AAUP’s *Statement on Collective Bargaining*, “As a national organization which has historically played a major role in formulating and implementing the principles that govern relationships in academic life, the Association promotes collective bargaining to reinforce the best features of higher education.” AAUP POLICY DOCUMENTS & REPORTS 323 (11th ed. 2015). “Collective bargaining is an “effective instrument for achieving” and “securing” the objectives of the Association, including “to protect academic freedom.” *Id.* AAUP’s *Statement on Graduate Students* provides that “graduate student assistants like other employees should have the right to organize to bargain collectively.” *Id.* at 388. This *Statement* recognizes that “graduate assistants ... carry out many of the functions of faculty members and receive compensation for these duties,” which makes collective bargaining appropriate. *Id.* at 387.

⁴ American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, in AAUP POLICY DOCUMENTS & REPORTS 13 (11th ed. 2015)(“AAUP POLICY DOCUMENTS”), <https://www.aaup.org/file/1940%20Statement.pdf>; <https://www.aaup.org/endorsers-1940-statement>.

III. SUPREME COURT AND BOARD PRECEDENTS SUPPORT THE LEGAL STATUS OF GRADUATE ASSISTANTS AS EMPLOYEES UNDER SECTION 2(3) OF THE NLRA.

The NPRM proposes a wholesale exclusion of an entire class of employees based on the view that teaching and research assistants are “primarily students.” The proposed rule, which would exclude over 81,000 graduate assistants,⁵ is not supported by law, policy, or empirical evidence. To the contrary, the coverage of graduate assistants as Section 2(3) employees is supported by statutory language, common law, Supreme Court and Board precedent, and the purposes of the NLRA to encourage collective bargaining.

The statutory language of Section 2(3), as interpreted by the U.S. Supreme Court, supports the Board’s conclusion in *Columbia University* that graduate assistants are employees under Section 2(3) of the NLRA. As the Board stated in *Columbia University*, “[A]mple 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,” which defines a “master/servant” relationship as one where “‘a servant performs services for another, under the other’s control or right of control, and in return for payment.’” 364 NLRB No. 90, slip op. at 10, quoting *New York University*, 332 NLRB 1205, 1206 (2000). Supreme Court precedent leaves no doubt that Section 2(3) provides broad coverage in the statutory language of “any employee.” The Court has stated that the “breadth of [Section] 2(3)’s definition is striking: the Act squarely applies to ‘any employee.’” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). In *NLRB v. Town & Country Elec.*, 516 U.S. 85 (1995), the Court upheld the Board’s broad definition of “employee” under Section 2(3) as consistent with the common law, 516 U.S. at 94, and with the “ordinary

⁵ Comments from the National Center for Collective Bargaining in Higher Education and the Professions, at 5, <https://www.regulations.gov/document?D=NLRB-2019-0002-5754> .

dictionary definition” that “includes any ‘person who works for another in return for financial or other compensation.’” 516 U.S. at 90, quoting AMERICAN HERITAGE DICTIONARY 604 (3d ed. 1992).

The NPRM does not take issue with the legal analysis that the statutory language of Section 2(3), the common law, Supreme Court precedents, and current Board precedent support a broad definition of “employee” under Section 2(3) that includes graduate assistants. Rather, the NPRM relies on policy reasons for excluding graduate assistants, as a class, from employee status under Section 2(3). The NPRM asserts that graduate assistants are not employees, based on the following views: graduate assistants are “primarily students with a primarily educational, not economic, relationship with their university;” the NLRA does not apply easily to the structure of higher education; and collective bargaining may interfere with universities’ institutional academic freedom. 84 FR 49692- 49694. The following sections of AAUP’s comments address these three asserted policy reasons for the proposed rule. As discussed below, none of the asserted policy concerns holds up to scrutiny based on law and policy. Moreover, the empirical evidence of the economic relationship between graduate assistants and the university and the experience in collective bargaining in the private and public universities demonstrates that the asserted policy bases lack evidentiary support. To the contrary, the law, policy, and empirical evidence affirmatively support the current legal status of graduate assistants as employees under Section 2(3) of the NLRA.

IV. GRADUATE ASSISTANTS ARE SECTION 2(3) EMPLOYEES IN AN ECONOMIC RELATIONSHIP WITH THEIR UNIVERSITY EMPLOYER.

A. Supreme Court and Board precedents support Section 2(3) employee status of graduate assistants.

The proposed rule to exclude the entire category of “students who perform any services for compensation” is based on the view that teaching and research assistants are “primarily students with a primarily educational, not economic, relationship with their university.” 84 FR 49693. This asserted educational/economic distinction is not supported by the statutory language of the NLRA, the common law definition of “employee,” Supreme Court precedent, or current Board precedent. As discussed above, in *Town & Country* the Supreme Court confirmed that Section 2(3) broadly defines employees covered by the NLRA. *Town & Country* is important, as well, in recognizing that individuals with a dual status as paid union organizers and as employees of Town & Country are covered by Section 2(3). The economic relationship with Town & Country was not the primary reason that paid union organizer “salts” sought employment with Town & Country. Their dual status as paid union organizers and Town & Country employees, however, did not remove their Section 2(3) status as employees for Town & Country.

Even more similar to the employee status of graduate assistants is the Board’s precedent in *Boston Medical Center*, 330 NLRB 152 (1999), holding that medical interns and residents are employees under Section 2(3). Interns and residents have a dual status as student and employee, with an educational and economic relationship with the teaching hospital affiliated with a university. As the Board noted, “nothing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act.” *Id.* at 160. That interns and residents have a medical degree does not alter the fact that their work as interns and residents is required to complete the educational requirements for certification in a medical

specialty. *Id.* at 160. Thus, the fact that graduate assistants are also students does not remove their employee status when they are performing medical work for compensation under the direction of the university hospital.

The NPRM seeks to bolster its position that graduate assistants and the university do not have a “fundamentally economic relationship” by arguing that the NLRA does not fit easily in the context of colleges and universities. 84 FR 49692. The NPRM quotes the Supreme Court’s statements in *Yeshiva University* that “[t]he Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry,” *NLRB v. Yeshiva University*, 444 U.S. 672, 680 (citing *Adelphi University*, 195 NLRB 639, 648 (1972)), and that, “principles developed for use in the industrial setting cannot be ‘imposed blindly on the academic world.’” 444 U.S. at 681 (quoting *Syracuse University*, 204 NLRB 641, 643 (1973)).

The NPRM, however, incorrectly attempts to bootstrap *Yeshiva* into support for the Board’s treatment of graduate assistants as being outside the parameters of the NLRA. *Yeshiva* does not support this position. The Supreme Court recognized that the NLRA is flexible enough to apply to collective bargaining in the employment structures of colleges and universities. The Court did not create a wholesale exclusion of faculty from Section 2(3). The Court applied the *Bell Aerospace* definition of managerial employees in the context of the university, viewing the analysis of faculty employment status as a dynamic process that must take into account the particular factors of faculty responsibilities and authority. The *Yeshiva* Court did not define all faculty as managerial, stating, “It is plain...that professors may not be excluded [as managerial employees] merely because they determine the content of their own courses, evaluate their own students, and supervise their own research” and “there also may be faculty members at Yeshiva

and like universities who properly could be included in a bargaining unit.” 444 U.S. at 690 n. 31. Thus, the Board has applied *Yeshiva* on a case-by-case basis to determine whether faculty are professional employees under Sections 2(3) and 2(12).⁶ As the D.C. Circuit Court of Appeals has stated, “[C]ontext is everything. Every academic institution is different, and...the Board must perform an exacting analysis of the particular institution and faculty at issue.” *Point Park University v. NLRB*, 457 F.3d 42, 48 (D.C. Cir. 2006). In evaluating the context of employment in higher education, the Board has also considered the changes brought by the “corporatization” of universities, which is characterized by an increasingly hierarchical structure of decision-making, a severe reduction in tenure-track faculty lines, and a corresponding growth in low-wage contingent faculty positions. *Pacific Lutheran*, at 87.

Thus, the NPRM’s proposed wholesale exclusion of graduate assistants from Section 2(3) finds no support in the statutory provisions of the NLRA, Supreme Court precedents interpreting the NLRA, and Board precedents finding educational/economic relationships to be consistent with employee status under Section 2(3). To the contrary, the coverage of graduate assistants as Section 2(3) employees is far more consistent with the statutory language, common law, Supreme Court precedent, and the purposes of the NLRA to encourage collective bargaining. As the Board stated in *Columbia University*, “The unequivocal policy of the Act...is to ‘encourag[e] the practice and procedure of collective bargaining’ and to ‘protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.’ Given this policy, coupled with the very broad statutory definitions of both ‘employee’ and ‘employer,’ it is appropriate to extend statutory coverage to students working for

⁶ See, e.g., *Pacific Lutheran University*, 361 N.L.R.B. 1404 (2014); *St. Thomas University*, 298 NLRB 280 (1990); and *The Cooper Union for the Advancement of Science and Art*, 273 NLRB 1768, 1775 (1985).

universities covered by the Act unless there are strong reasons *not* to do so.” 364 NLRB No. 90, slip op. at 5. As discussed above, statutory law and Supreme Court and Board precedents do not provide valid reasons to exclude graduate assistants from coverage under the NLRA. Nor does the empirical evidence provide reasons to exclude graduate students based on the NPRM’s asserted educational/economic distinction. As discussed in the following section, empirical evidence demonstrates the reality of the economic relationship between graduate assistants and their university employer.

B. Empirical evidence demonstrates the economic relationship between graduate assistants and university employers who rely on the labor of graduate assistants to carry out the teaching and research work of the university.

Graduate assistants are paid to teach thousands of courses, class hours, and students, to assist in research, and to perform administrative and other duties at universities across the country. Their labor is integral to the modern research university. When graduate students work as teaching and research assistants, their work is indistinguishable from that performed by university faculty. As the Board stated in *Columbia University*, “Teaching assistants frequently take on a role akin to that of faculty, the traditional purveyors of a university’s instructional output. The teaching assistants conduct lectures, grade exams, and lead discussions. Significant portions of the overall teaching duties conducted by universities are conducted by student assistants. The delegation of the task of instructing undergraduates, one of a university’s most important revenue-producing activities, certainly suggests that the student assistants’ relationship to the University has a salient economic character.” 364 NLRB No. 90, slip op. at 73.

Graduate students teach because they are paid, not because it is at the core of Ph.D. training. “And, the fact that teaching may be a degree requirement in many academic programs does not diminish the importance of having students assist in the business of universities by

providing instructional services for which undergraduate students pay tuition.” *Columbia University*, 364 NLRB No. 90, slip op. at 74. Common knowledge among university faculty and graduate students, as well as the evidence in *Columbia University*, reveal that the teaching assignments for graduate students are typically quite far afield from their research. A Ph.D. candidate will get little educational benefit from teaching freshman physics or math or elementary German (beyond simply learning how to manage a classroom), or staffing the Physics or Math Help Room, or proctoring or grading homework or exams. Yet these teaching, research, and administrative responsibilities are required in order to receive compensation, whether it is paid as a stipend, an “adjunct salary” or hourly pay.

While graduate assistants learn something that is professionally useful, “teaching abilities acquired through teaching assistantships are of relatively slight benefit in the attainment of a career in higher education.” *Columbia University*, 364 NLRB No. 90, slip op. at n. 104. Rather, the extensive use of graduate assistant labor in teaching reflects the universities’ needs to ensure course coverage rather than providing an educational benefit for the graduate assistants. As the Board stated, “Indeed, the fact that teaching assistants are thrust wholesale into many of the core duties of teaching--planning and giving lectures, writing exams, etc., including for such critical courses as Columbia's Core Curriculum--suggests that the purpose extends beyond the mere desire to help inculcate teaching skills.” *Id.* at 74.

As the Board held in *Columbia University*, graduate research assistants, including those paid through externally funded grants, are employees when they perform required service for the employer under the direction and control of a university employee. External grants are paid to the university to enable the faculty to conduct research, and the faculty principal investigators under the grant supervise graduate students conducting the research necessary to fulfill the

mission of the university. At Columbia University, as is typical in other universities, “research assistants...work under the direction of their departments to ensure that particular grant specifications are met...[T]he University typically receives a benefit from the research assistant's work, as it receives a share of the grant as revenue...” 364 NLRB No. 90, slip op. at 81. The fact that the research duties may also be useful to a graduate assistant’s dissertation does not mean that the research is not work for compensation under the direction of the university. As the Board noted, “One can conceive of countless employment situations where the employee gains personally valuable professional experience and skills while simultaneously performing a valuable service for his or her employer.” *Id.* at n.111. This is true, of course, for faculty members and graduate assistants who gain knowledge, skills, and professional experience from their teaching and research work.

Universities’ extensive use of graduate student labor in teaching is part of the “corporatization” of higher education, discussed above, which includes the dramatic growth of low-wage contingent teaching positions. In 2016, at all US institutions combined, 73 percent of instructional positions were off the tenure track.⁷ This is nearly the reverse of the proportions in 1969, when 78 percent of faculty positions were tenured and tenure-track.⁸ The dramatic increase in low-wage contingent faculty includes graduate assistants, who currently constitute approximately 21 percent of instructional faculty.⁹ At research-intensive institutions, the reliance

⁷ AAUP, *Data Snapshot: Contingent Faculty in US Higher Ed* (2018), <https://www.aaup.org/news/data-snapshot-contingent-faculty-us-higher-ed#.XgpW43t7niU>

⁸ *Pacific Lutheran University*, 361 NLRB at 1422, n. 43, *citing*, Adrianna Kezar & Daniel Maxey, *THE CHANGING FACULTY AND STUDENT SUCCESS I* (2012).

⁹ AAUP, *Data Snapshot*, *supra* note 7.

on graduate student labor is even greater, where graduate assistants constitute approximately 28 percent of the instructional faculty.¹⁰

V. THE EMPIRICAL EVIDENCE DEMONSTRATES THE POSITIVE HISTORY OF COLLECTIVE BARGAINING FOR ACADEMIC EMPLOYEES IN COLLEGES AND UNIVERSITIES.

A. There is an established history of collective bargaining for graduate assistants.

The Supreme Court and the Board have recognized that the NLRA is flexible enough to apply to collective bargaining in the employment structures of private colleges and universities. Further, empirical evidence demonstrates that university administrations and unions have entered into collective bargaining agreements that fit the circumstances of the work performed by the graduate assistants in the bargaining unit. This evidence is found in collective bargaining agreements in the fifty-year history of collective bargaining in public universities and in the more recent history of collective bargaining for graduate assistants in private universities.

The comments submitted by the National Center for the Study of Collective Bargaining in Higher Education and the Professions (“National Center”) provide a rich data set of empirical evidence of the success of collective bargaining for graduate assistants.¹¹ The data show stable collective bargaining relationships, including the long-term relationships at City University of New York (CUNY) (union certified in 1969) and University of Wisconsin-Madison (collective bargaining agreement in 1970). The National Center’s comments provide data of 42 current collective bargaining agreements covering graduate assistants, including 10 in private universities. Not surprisingly, the most common provisions in the collective bargaining agreements address the “bread and butter” issues found in collective bargaining agreements in all

¹⁰ *Id.*

¹¹ <https://www.regulations.gov/document?D=NLRB-2019-0002-5754>

industries: wages, grievance-arbitration, terms of appointment, non-discrimination, management rights, health care, health and safety, leave, workload, discipline, union security, and no-strike clauses.

As importantly, the data show that collective bargaining agreements covering graduate assistants include provisions specific to the college and university setting, with management rights clauses and other provisions addressing educational policies and academic freedom. The following sections of these comments discuss the relationship between collective bargaining and academic freedom. The discussion in Section IV.B. reveals that collective bargaining is fully consistent with protections of academic freedom. Further, as discussed in Section IV.B., collective bargaining agreement provisions demonstrate that the parties have successfully agreed on provisions that protect universities' institutional academic freedom and the individual academic freedom of graduate assistants.

B. Collective bargaining by graduate assistants is fully consistent with protecting academic freedom.

In the face of fifty years of unionization by graduate assistants in public universities and the growth of graduate assistant unionization in private universities, the NPRM continues to assert that collective bargaining endangers academic freedom. These assertions are based on nothing more than speculation. Approximately 35,000 graduate assistants are already members of unions at private universities, and more than two dozen public universities have worked with unionized graduate assistants for the past fifty years of graduate assistant unionization.¹² As

¹² *Unions in the Ivory Tower*, New York Times, August 24, 2016. Starting with the University of Wisconsin in 1969, dozens of other public schools have followed suit in every region of the country. (CA, FL, IL, IA, MA, MI, OR, PA, WA) (*Columbia University*, 364 NLRB no. 90, slip. pp. at 8-9 (2016).) *See also*, *Comments from the National Center in Response to Proposed NLRB Rule Concerning Graduate Assistants and Other Student Employees* (Nov. 20, 2019), *supra* note 11, which “identif[ied] 42 public and private institutions with current contracts that cover an aggregate of over 68,000 graduate and/or undergraduate employees....” *Id.* at 11.

Gordon Lafer, a professor at the University of Oregon and a former senior labor policy advisor for the US House of Representatives Committee on Education and Labor, has documented, “There 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.”¹³

As the previous quotation attests, the assertion that collective bargaining imperils academic freedom raises issues about universities’ institutional autonomy over “matters traditionally in the domain of academic decision-making.” 84 FR 49694. As support, the NPRM quotes Justice Frankfurter’s concurring opinion in *Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957), which defines the university’s “institutional academic freedom” “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.”¹⁴ The NPRM also asserts that the duty to bargain with graduate assistants under the NLRA would “inappropriately involve the Board . . . in the educational relationships between faculty members and students.” 84 FR 49694.

These assertions in the NPRM are flawed in multiple ways. First, the NPRM presents a narrow and partial view of the scope of academic freedom. The full scope of academic freedom includes individual academic freedom of those who work for the university by engaging in teaching and research – that is, faculty and graduate assistants. Indeed, the educational mission

¹³ Quoted in 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, 2018. available at: <https://www.thecrimson.com/article/2018/5/4/academic-versus-labor-bargaining-parameters>. See also, National Employment Law Project, Comments in response to NPRM, <https://www.regulations.gov/document?D=NLRB-2019-0002-5726> .

¹⁴ See, J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L. J. 251, 339 (1989) (“Through repetition, the scope of institutional autonomy has come to be understood as the four freedoms offered by Justice Frankfurter: ‘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.’”)

of the university depends on respecting the individual academic freedom of faculty and graduate assistants. The AAUP has long recognized that faculty and graduate students are both entitled to academic freedom. The *1940 Statement of Principles* states: “Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time tenured and probationary faculty teacher, but also to all others, such as part-time faculty and teaching assistants, who exercise teaching responsibilities.” AAUP POLICY DOCUMENTS at 13, 14 n.6. Further, as discussed earlier, the AAUP *Statement on Collective Bargaining* “promotes collective bargaining to reinforce the best features of higher education” and describes collective bargaining as “an effective instrument for achieving” and “securing” the objectives of the Association, including “to protect academic freedom.” AAUP POLICY DOCUMENTS at 323.. AAUP ’s *Statement on Graduate Students* provides that “graduate student assistants like other employees should have the right to organize to bargain collectively.” AAUP POLICY DOCUMENTS . at 388.

The NPRM assertions are fundamentally flawed, as well, in providing nothing more than unsubstantiated speculation. The importance of empirical evidence in claims that collective bargaining harms academic freedom and the educational process has been previously recognized by the Board. As the Board explained in *Columbia University*, “the *Brown University* Board insisted that ‘there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process’” despite “the absence of any experiential or empirical basis for it, but also with the remarkable assertion that no such basis was required....” 364 NLRB No. 90, slip op. at n.53, quoting, *Brown University*, 342 NLRB at 493. For the Board to adjudicate in *Brown University* based only on speculation was unacceptable. For the Board, in the current NPRM, to continue to base its assertions on

speculation is completely outside the requirements of the rulemaking process, which must be grounded in empirical evidence. Moreover, the *Columbia University* Board's analysis of the law and empirical evidence reveals that graduate assistant collective bargaining does not harm academic freedom or the educational process. Further, empirical evidence demonstrates that graduate assistant collective bargaining promotes academic freedom and improves faculty-graduate student relationships.

The NPRM also makes a generalized statement about its concern with "free speech rights in the classroom." 84 FR 49694. However, as in the *Brown University* decision and the arguments made by the employer and *amici* to the Board in the *Columbia University* case, the NPRM provides no explanation or even speculation about how collective bargaining would infringe on free speech rights in the classroom. Yet, the NPRM continues to make speculative assertions about academic freedom without even attempting to address the *Columbia University* findings.

The following sections of these comments further examine the assertions about institutional academic freedom and educational relationships. As this analysis demonstrates, speculative claims of institutional academic freedom have not provided colleges and universities with immunity from application of employment law. Courts have determined the appropriate degree of deference to institutional autonomy on a case-by-case basis, an approach that will work well in determining the scope of bargaining under the NLRA. Further, empirical evidence demonstrates that university administrations and unions have been able to enter into collective bargaining agreements that fit the circumstances of the work performed by the graduate assistants in the bargaining unit. Collective bargaining agreements are not "one size fits all." Rather, the flexibility that is part of collective bargaining has enabled the parties to reach

agreement on a variety of arrangements that protect universities' institutional academic freedom and the individual academic freedom of graduate assistants. Furthermore, scholarly research studies provide empirical evidence that collective bargaining does not harm academic freedom and actually improves relationships between faculty and graduate students.

1. The university's "institutional academic freedom" under the First Amendment does not exempt universities from complying with the duty to bargain with unionized graduate assistants under the NLRA.

Both *Brown University* and the current NPRM make amorphous and speculative claims that graduate assistant collective bargaining will harm universities' institutional academic freedom. Such speculations raise a specter of collective bargaining undermining universities' educational process. As noted above, the *Brown* Board even asserted that no empirical basis was required for relying on institutional academic freedom as a ground for excluding graduate assistants from employee status under Section 2(3). In considering the NPRM, however, it is essential to examine closely the meaning of "institutional academic freedom" and the empirical evidence from years of experience in public and private university collective bargaining.

The NPRM asserts potential harm to institutional academic freedom as a basis for excluding all graduate assistants from collective bargaining and thereby retaining the university administration's unilateral control over graduate assistants' wages, hours, and other terms and conditions of employment. Supreme Court precedents addressing institutional academic freedom do not support the NPRM's assertion. Although the NPRM cites to *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), neither case is relevant to the NPRM's asserted exemption of universities from compliance with protective legislation such as the NLRA. Both cases held that the state governments had unconstitutionally engaged in coercive actions that undermined academic freedom. In *Sweezy*, a state legislative

committee violated constitutional due process by requiring a faculty member to testify about his political associations and the content of his lectures. In *Keyishian*, the state violated the First and Fourteenth Amendments by prohibiting schools or universities from hiring faculty who refused to file an affidavit about their organizational membership. In both cases, the government interfered with First Amendment institutional academic freedom by undermining the university's freedom to employ faculty with political views opposing the status quo.

In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the Supreme Court rejected a First Amendment claim by a university for immunity from complying with a federal employment law. The University of Pennsylvania claimed that its First Amendment right of academic freedom should shield it from complying with an EEOC investigative subpoena of tenure file materials relevant to a Title VII claim of sex and race discrimination in a tenure promotion case. The Court noted that the University of Pennsylvania's reliance on *Sweezy* and *Keyishian* was misplaced. Unlike the EEOC's investigative subpoena, *Sweezy* and *Keyishian* involved government attempts "to control or direct the *content* of the speech engaged in by the university or those affiliated with it," and to impose "*direct* infringements on the asserted right to 'determine for itself on academic grounds who may teach.'" *Id.* at 197-98 (emphasis in original). The Court rejected the University of Pennsylvania's academic freedom claims as "remote and attenuated" and "also speculative." *Id.* at 200.

Thus, none of these Supreme Court cases – *Sweezy*, *Keyishian*, or *University of Pennsylvania* – supports the NPRM's assertion that NLRA coverage of graduate assistants would harm the university's institutional academic freedom. Collective bargaining between the university and the union representing graduate assistants is not a coercive governmental action against the university or its employees. The NLRA supports employee rights to choose whether

to unionize and engage in collective bargaining. Further, under Section 8(d) of the NLRA, the government may not compel either party to agree to any particular substantive provisions in collective bargaining.

Despite the relevance to its claims of First Amendment immunity, the NPRM does not cite the Supreme Court's decision in *University of Pennsylvania v. EEOC*. Nor does the NPRM cite another case on point, *Associated Press v. NLRB*, 301 U.S. 103 (1937), in which the Supreme Court rejected the AP's First Amendment claim of immunity from complying with the NLRA with regard to the AP's editorial employees. 301 U.S. at 103. Ruling that applying the NLRA to editorial employees did not violate the employer's freedom of speech or of the press under the First Amendment, the Court observed that the NLRA in no way "circumscribes the full freedom and liberty [of the AP] to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the [AP] is free at any time to discharge . . . any editorial employee who fails to comply with the policies it may adopt." *Id.* at 133. Even an entity with special First Amendment freedoms "has no special immunity from the application of general laws." *Id.* at 132-33.

Similarly, the university employer has no special First Amendment exemption from complying with the NLRA with regard to graduate assistants. Further, the NPRM provides no evidence to support its speculative claim of harm to institutional academic freedom. Moreover, as discussed below, the empirical evidence demonstrates that the collective bargaining process, itself, has resulted in protections of the university administration's institutional academic freedom and faculty and graduate assistants' individual rights of academic freedom. Additionally, as in any collective bargaining relationship, disputes over the scope of mandatory subjects of bargaining may be resolved by the Board. As the Board recognized in finding

medical residents and interns to be employees under Section 2(3), “[t]he contour of collective bargaining is dynamic with new issues frequently arising out of new factual contexts: what can be bargained about or concentrated on, and what the parties are free to bargain about, may change. But such problems have not proven to be insurmountable in the administration of the Act. *We need not define here the boundaries between permissive and mandatory subjects of bargaining.... We will address these issues later, if they arise.* [T]he parties can identify and confront any issues of academic freedom as they would any other issue in collective bargaining.” *Boston Medical Center*, 330 NLRB at 164 (emphasis added.).

2. Empirical evidence demonstrates that collective bargaining successfully protects institutional academic freedom of university employers and the individual academic freedom of faculty and graduate assistants.

Collective bargaining by faculty and graduate assistants is one of several ways to promote academic freedom on campus, as it allows faculty, students, and administrators to discuss collectively how best to do their shared work of teaching and research. Collective bargaining provides university administrations and unions with the flexibility to reach agreements that fit the circumstances of their institutions and the bargaining unit. Collective bargaining agreements are not “one size fits all,” as shown by the variety of contract provisions addressing universities’ institutional academic freedom and the individual academic freedom of faculty and graduate assistants.

Conflicts over the scope of academic freedom can arise whether or not graduate assistants or faculty are unionized. The process of collective bargaining, though, provides a forum in which the university employer and the union can negotiate for contract provisions that define and clarify the scope of institutional academic freedom and individual academic freedom. These collective bargaining provisions will be helpful in resolving disputes that may arise during the

term of the collective bargaining agreement. Further, interpretations of the scope of individual rights of academic freedom will necessarily take into account the nature of the work performed by graduate assistants. For example, graduate assistants who have independent responsibility for teaching a course will have a broader scope of academic freedom than would a graduate assistant whose responsibilities consist of grading exams under the direction of the faculty instructor of the course. A graduate research assistant who is a co-author with a faculty member will have a broader scope of academic freedom than a research assistant who carries out lab work for a faculty member's research project.

Virtually all collective bargaining agreements in private and public universities include a "management rights clause" that maintains the university administration's unilateral control over matters that would fit within the category of institutional academic freedom. Some collective bargaining agreements include a management rights clause, but do not have a contract provision addressing graduate assistants' individual rights of academic freedom. Examples of this type of collective bargaining agreement are American University, State University of New York, and California State University.¹⁵

¹⁵ See **American University** (Article 2) (Management has "sole discretion" over rights "to establish or modify the academic calendars, including holidays and holiday scheduling; to assign work locations; to schedule hours of work; to recruit, hire or transfer; to determine how and when and by whom instruction is delivered; to determine all matters relating to student and employee hiring, retention, and student admissions; to introduce new methods of instruction; to subcontract all or any portion of any operations; and to exercise sole authority on all decisions involving academic matters."); **State University of New York** (Article 2) (Rights retained by the State, include: "...11. The right to determine admission standards and procedures, course offerings, course content, degree programs and degree requirements; 12. The right to determine academic standards, policies and procedures; and 13. The right to schedule class hours and establish or modify class schedules."); **California State University** (Article 15) ("CSU has the right...to determine how and by who instruction and other services are delivered; to introduce new methods of instruction; and to exercise sole authority on all decisions involving academic matters....Decisions regarding who is provided teaching or other services provided by the CSU, what teaching and other services are provided, how teaching and other services are provided and who provides teaching and other services involve management and academic judgment and shall be made at the sole discretion of the CSU."). For these and other collective bargaining agreements, see the comments submitted by the National Center for the Study of Collective Bargaining in Higher Education and the Professions, *supra* note 11.

Other collective bargaining agreements in public and private universities include a management rights clause and a clause recognizing graduate assistants' academic freedom.

Examples of this type of collective bargaining agreement in private universities are Brandeis University, Tufts University, and New York University.¹⁶

¹⁶ See **Brandeis University** (Article 5, Academic Freedom) (“The University affirms and protects the full freedom of scholarly and intellectual inquiry and expression of Graduate Assistants in their teaching, advising and discussion. Graduate Assistants have the right to express their thoughts freely and openly in all spaces relevant to the performance of their teaching duties (such as classrooms, offices and laboratories). Such freedom carries with it the correlative responsibility of upholding standards for civil discourse and scholarly integrity.”) and (Article 8, Management Rights) (“[M]anagement functions, rights and prerogatives include...the right to:...Exercise sole authority on all decisions involving academic matters, including: a) any judgments concerning academic programming, 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.”); **New York University** (Article VIII, Professional Conditions) (“Graduate Employees shall have reasonable latitude, where appropriate, to exercise their professional judgment within their area of expertise in deciding how best to accomplish their assignments within the scope of the directions given by the individual supervisor as well as fiscal and time constraints. In addition, graduate employees shall receive appropriate acknowledgment of their projects or contributions to projects in such instances in which acknowledgment is customarily publicly given by the University.”) and (Article XXII, Management and Academic Rights) A. ([T]he University has the right to...evaluate, to determine the content of evaluations, and to determine the processes and criteria by which graduate employees' performance is evaluated;... to determine how and when and by whom instruction is delivered; to determine in its sole discretion all matters relating to faculty hiring and tenure and student admissions; to introduce new methods of instruction;...and to exercise sole authority on all decisions involving academic matters. B. Decisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University.”); **Tufts University** (Article 5, Professional Rights) (“5.1 The Union and the University recognize that Graduate Assistants work under the supervision, coordination and authority of faculty. 5.2 When providing instructional services, Graduate Assistants will have reasonable latitude to exercise their judgment in deciding how best to accomplish the learning objectives of a course, while recognizing that some consistency across classes or sections is required. While they also teach under the supervision of a faculty member or of the faculty of the department and school, they also are entitled to freedom in discussion of the subject matter. 5.3 Working in a laboratory or a research group, Graduate Assistants should participate in discussion with their mentors, advisors or supervisors, as well as others working on the project, and are free to offer their own opinions and interpretations in those discussions. In working for a principal investigator on funded or unfunded research, Graduate Assistants should feel free to offer their independent judgment, while recognizing that the grant or project has objectives and that the principal investigator is the final arbiter.”) and (Article 8, Management Rights) (“[M]anagement functions...include...[t]he right to...Determine or modify the hiring criteria and work standards for and the number and qualifications of employees;...and...Decisions regarding who is taught, what is taught, how it is taught, and who does the teaching involve academic judgment and shall be made at the sole discretion of the University.”) For these and other collective bargaining agreements, see the comments submitted by the National Center for the Study of Collective Bargaining in Higher Education and the Professions, *supra* note 11.

Collective bargaining agreements that include provisions for graduate assistants' academic freedom are in keeping with the AAUP principles and standards. The *1940 Statement of Principles* recognizes that faculty and graduate students both are entitled to the protections of academic freedom. AAUP POLICY DOCUMENTS at 13, 14 n.6. AAUP principles and standards specifically recognize that “graduate students have the right to academic freedom” and are entitled to the same privileges and protections as any other faculty or staff on a number of fronts, including due process in the event of job termination, a voice in institutional governance, and the protection of their intellectual property rights. AAUP *Statement on Graduate Students*, AAUP POLICY DOCUMENTS . at 387-88. Further, as discussed earlier, the AAUP’s *Statement on Collective Bargaining* “promotes collective bargaining to reinforce the best features of higher education” and finds that “[c]ollective bargaining is an effective instrument for achieving” and “securing” the objectives of the Association, including “to protect academic freedom.” AAUP POLICY DOCUMENTS. at 323. AAUP’s *Statement on Graduate Students* extends these principles and standards to graduate assistants who, “like other employees should have the right to organize to bargain collectively.” AAUP POLICY DOCUMENTS at 388.

Empirical evidence in the form of scholarly research studies confirm that collective bargaining by graduate assistants does not harm educational relationships or academic freedom. The Board in *Columbia University*, 364 NLRB No. 90, slip op. at 43-44, cited two studies, from 2000 and 2002, which conclude that the evidence does not support the position that collective bargaining will harm mentoring relationships between faculty members and graduate students. See, Gordon J. Hewitt, *Graduate Student Employee Collective Bargaining and the Educational Relationship between Faculty and Graduate Students*, 29 J. Collective Negotiations in the Public Sector 153, 159-164 (2000); Daniel J. Julius & Patricia J. Gumport, *Graduate Student*

Unionization: Catalysts and Consequences, 26 *Review of Higher Education* 187, 191-196 (2002). The Board also cited a more recent 2013 survey-based research study, which compared student-faculty relationships, academic freedom, and economic well-being across unionized and non-unionized campuses. 364 NLRB No. 90, slip op. at 44-45. This study confirmed the findings of prior surveys: unionization does not interfere with faculty-student relationships or harm the education or training of graduate students. *See*, Sean E. Rogers, Adrienne E. Eaton, & Paula B. Voos, *Effects of Unionization on Graduate Student Employees: Student Relations, Academic Freedom, and Pay*, 66 *ILR Review* 487-501 (2013). Comparing unionized and non-unionized graduate student employees at eight major public U.S. universities in terms of faculty-student relations, academic freedom, and pay, this study found that union represented graduate student employees reported higher levels of personal and professional support and unionized graduate student employees fared better on pay. Additionally, unionized and nonunionized students reported similar perceptions of academic freedom. Unionized graduate students “had higher mean ratings on their advisors accepting them as competent professionals, serving as a role model to them, being someone they wanted to become like, and being effective in his or her role.” *Id.* at 505. Accordingly, the authors concluded that “potential harm to faculty-student relationships and academic freedom should not continue to serve as bases for the denial of collective bargaining rights to graduate student employees.” *Id.* at 487. Significantly, the authors also noted that unionization does not impermissibly intrude into the general academic climate. Instead, “the main impact of unionization is on *employees*, rather than the overall climate for *graduate students*.” *Id.* at 500.

Academic administrations predicted the demise of academic freedom in the 1960s and 1970s, when faculty members began to organize unions. The extensive experience of faculty

collective bargaining and graduate assistant collective bargaining at public universities has refuted these predictions. In fact, faculty and graduate assistant collective bargaining has yielded contractual protections for a variety of professional values, including individual academic freedom.¹⁷

Local AAUP chapters have successfully established explicit guarantees of academic freedom in their collective bargaining contracts. Some chapters of unionized faculty refer to the *1940 Statement of Principles* and quote it extensively in their collective bargaining contracts.¹⁸ Other faculty collective bargaining agreements to which an AAUP chapter is a party incorporate the language of the *1940 Statement of Principles* to define academic freedom.¹⁹ These contracts make promises of academic freedom legally enforceable. As former AAUP President, renowned labor law expert, and Professor Emeritus at the University of Pennsylvania Law School, Robert A. Gorman wrote in evaluating the initial ten-year effort by local AAUP chapters in collective bargaining: “[C]ollective bargaining agreements leave no doubt that essential AAUP principles

¹⁷ See David M. Rabban, *Is Unionization Compatible with Professionalism?*, 45 *Indus. & L.R. Rev.* 97, 110 (Oct. 1991) (reviewing provisions affecting professional standards in collective bargaining agreements in a number of professions, including higher education faculty, and finding “substantial, unambiguous support for professional values in many agreements,” which suggests “at a minimum, that unionization and professionalism are not inherently incompatible”).

¹⁸ Numerous collective bargaining agreements include academic freedom provisions. Such contracts recognize the nearly universal mutual understanding that academic freedom is consistent with collective bargaining. For examples of local AAUP chapter contracts, see Bard College (New York) (Art. IV.C.) (“All teachers ((whether Faculty or not)) will enjoy academic freedom as set forth in the Association of American Colleges-American Association of University Professors’ *1940 Statement of Principles on Academic Freedom and Tenure* . . .”); Curry College (Massachusetts) (Art. III.) (“The College and the AAUP endorse the specific section on Academic Freedom from the document entitled *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*.”); Kent State University (nontenured) (Art. IV.) (tenured) (Art. IV, § 2) (“As stated in the American Association of University Professors’ *1940 Statement of Principles on Academic Freedom and Tenure*. . . .”); Regis University (Colorado) (Art. 11.1) (“Regis University affirms and is guided by the ideal that all members of the faculty, whether tenured or not, are entitled to academic freedom as set forth in the *1940 Statement of Principles on Academic Freedom and Tenure* of the American Association of University Professors. . . .”); University of Rhode Island (Art. 7.2) (“The Board and the University of Rhode Island unconditionally endorse the *1940 Statement*.”).

¹⁹ See, e.g., Central State University (Ohio) (Art. 5.1); University of Cincinnati (Art. 2); Eastern Michigan University (Art. II).

of academic freedom, tenure, due process, peer review, nondiscrimination, and the like, can be rendered fully enforceable as part of the contract rules prevailing in court cases and arbitration proceedings.” Robert A. Gorman, *The AAUP and Collective Bargaining: A Look Backward and Ahead*, 68 *ACADEME* 1a, 3a (Sept. /Oct. 1982). The collective bargaining process is capable of accommodating and adapting to the concerns of any industry or profession, and the academy is no exception.²⁰

VI. ADJUDICATION, RATHER THAN RULEMAKING, IS THE APPROPRIATE PROCESS FOR DETERMINING SECTION 2(3) EMPLOYEE STATUS OF GRADUATE ASSISTANTS.

As discussed in the preceding sections of these comments, the proposed rule in the NPRM should be rejected. The proposed rule is inconsistent with the law, policy, and empirical evidence relevant to employee status of graduate assistants under Section 2(3) of the NLRA. Indeed, the proposed rule is so contradictory to the law, policy, and empirical evidence that to adopt the rule would be an unreasonable and arbitrary interpretation of the NLRA.

An additional basis for rejecting the proposed rule is the inappropriate nature of rulemaking for determining employee status under Section 2(3). Rulemaking may be appropriate for certain issues, such as election procedures, where a categorical approach to filing deadlines or scheduling elections provides needed certainty to avoid confusion in the election process. However, rulemaking is a categorical approach that is not appropriate for determining legal issues such as employee status, which often depend on particular circumstances and contexts.²¹

²⁰ See William M. Weinberg, *Patterns of State-Institutional Relations Under Collective Bargaining, Faculty Bargaining, State Government and Campus Autonomy: The Experience in Eight States*, in Pennsylvania State University and The Education Commission of the States Report 103 (Apr. 1976) (“The higher education ‘industry’ has adapted collective bargaining, as has every other industry, to match its own administrative structure, product and institutional needs, and relationships with unions.”).

²¹ See, MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES*, ch. 1 (1987).

By contrast, adjudication is well suited for creating standards that define employee status, which can be applied to the circumstances on a case-by-case basis. This is the approach taken by the Board and the Supreme Court in *Sure-Tan* and *Town & Country*, which adopted a legal standard that broadly defines “employee” under Section 2(3), consistent with the common law definition of employee.

Thus, determining Section 2(3) employee status of graduate assistants should be done through adjudication, not through rulemaking. The proposed rule takes a categorical approach that excludes the entire class of graduate assistants from Section 2(3) employee status based on the fact that they are also students. The NPRM is a “meat axe” approach to statutory interpretation, lacking any nuance based on situational or contextual circumstances. The NPRM proposes to wield the meat axe even more widely, inviting comments on whether to exclude from Section 2(3) any student who is compensated by the university for any kind of work. This invitation for comments demonstrates the inappropriate use of rulemaking to propose to exclude from Section 2(3) all students who also work for the university.

The Board’s approach in *Columbia University*, by contrast, adopts the *Town & Country* legal standard defining Section 2(3) “employee” based on common law, to find that “student assistants who perform work at the direction of their university for which they are compensated are statutory employees.” 364 NLRB No. 90, slip op. at 15-16. The Board will apply this legal standard on a case-by-case basis to determine the employee status of the individuals at issue. In *Columbia University*, the Board applied the legal standard to the individuals in the petitioned for bargaining unit and determined that the teaching and research assistants are employees, based on a detailed analysis of the evidence of the work performed, the nature of the compensation, and the direction of the work by the university employer.

With its categorical approach, the NPRM also eliminates the possibility of applying other situationally-sensitive and nuanced legal standards relevant to collective bargaining by graduate assistants. For example, the “community of interest” standard for determining appropriate bargaining units enables the Board to address potential legal issues over whether all graduate assistants should be in the same bargaining unit. In another example, as discussed earlier in these comments, the legal standard for determining mandatory subjects of bargaining could be applied to address scope of bargaining issues.

These legal standards apply, as well, to legal issues relevant to student employees engaged in part-time non-academic work, such as work in the university dining halls. For example, the “community of interest” standard can be applied to determine whether part-time student dining hall employees should be in a separate bargaining unit from full-time employees.

VII. CONCLUSION

As discussed in these comments, the law, policy, and empirical evidence support the Board’s findings in *Columbia University* that graduate assistants are employees under Section 2(3) of the NLRA. The precedents of the Supreme Court and the Board make clear that Section 2(3) broadly defines “employee” to cover “any person who works for another in return for financial or other compensation.” Further, the NPRM’s asserted policy reasons for excluding graduate assistants from Section 2(3) do not withstand scrutiny based on the law, logic, or evidence. Graduate assistants have an economic relationship with their university employers, who rely on graduate assistant labor to carry out the teaching and research work of the university. The university has no First Amendment exemption from complying with the duty to bargain with graduate assistants. Furthermore, the empirical evidence demonstrates the positive history of collective bargaining for graduate assistants in public and private universities. The

evidence shows that collective bargaining successfully protects the institutional academic freedom of the university employers and individual academic freedom of faculty and graduate assistants.

Thus, there are overwhelming legal, policy, and evidentiary bases for supporting the definition of graduate assistants as Section 2(3) employees subject to the protections of the NLRA. The proposed rule in the NPRM should be rejected and the current Board precedent in *Columbia University* should stand. As discussed in these comments, this conclusion is fully supported by AAUP's standards and principles promoting the rights of faculty and graduate assistants to engage in collective bargaining as a means "to reinforce the best features of higher education." AAUP *Statement on Collective Bargaining*, AAUP POLICY DOCUMENTS at 323.