January 15, 2020

Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001

Via Federal e-Rulemaking Portal: http://www.regulations.gov

Re: Proposed rule regarding nonemployee status of university and college students working in connection with their studies, 84 Fed. Reg. 49691 (Sept. 23, 2019)
Regulation Identification No. 3142–AA15

Dear Secretary Rothschild:

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. For one hundred years, the ACLU has been at the forefront of efforts nationwide to protect the full array of civil rights and civil liberties, including the rights of academic freedom and free association.

The ACLU submits this comment in opposition to the National Labor Relations Board's ("NLRB" or the "Board") proposed rule, which would establish that student workers at colleges and universities are not "employees" within the meaning of Section 2(3) of the National Labor Relations Act ("NLRA") and so are exempt from NLRB jurisdiction. The ACLU opposes the rule, which misconstrues the role the First Amendment plays in this area, inaccurately asserting that the proposed rule "advances the important policy of protecting traditional academic freedoms" while ignoring the associational rights that undergird individuals' ability to form and join a labor union.

As an organization devoted to the robust application of the First Amendment to college and university campuses, we consider carefully the argument that defining student workers as employees under the NLRA might impinge upon traditional academic freedoms. Academic freedom is "a special concern of the First Amendment," *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), and it extends not only to professors, but also to institutions and students. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Regents of*

AMERICAN CIVIL LIBERTIES UNION

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2644
Fax: (212) 549-2644
aclu.org

Susan N. Herman
President

Anthony D. Romero
Executive Director

Richard Zacks
Treasurer

Univ. of Cal. v. Bakke, 438 U.S. 265, 312–13 (1978); *see also Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985). But allowing student workers to unionize under the NLRA in no way violates those freedoms.

Contrary to the policy justifications the NLRB sets forth in the proposed rule, allowing graduate assistants to bargain collectively would not "uniquely imperil[ ] the protection of academic freedoms" by requiring universities to bargain about issues that directly impact "who may teach," "what may be taught," "how it shall be taught," and "who may be admitted to study." *See* Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. 49691, 49694 n.13 (proposed Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)). This alarmist rhetoric is ungrounded in fact. There is no reason to believe that collective bargaining over employment conditions will have any effect on the academic freedom of the institutions.

Associated Press v. N.L.R.B., 301 U.S. 103 (1937), is instructive on this point. In that case, the Supreme Court rejected similar First Amendment arguments—rooted in the freedom of the press, rather than academic freedom—brought by the Associated Press in an attempt to prevent editorial employees from unionizing under the NLRA. The Associated Press contended that its freedom to "furnish unbiased and impartial news reports" would be violated if editorial staff were employees under the NLRA because it could no longer "determine for itself the partiality or bias of editorial employees." *Id.* at 131. The Court rejected this argument, holding that recognizing editorial staff as employees under the NLRA in no way "circumscribes the full freedom and liberty [of the Associated Press] to publish the news as it desires . . . or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication." *Id.* at 133. The same is true in the academic freedom context: recognizing student workers as employees under the NLRA would in no way circumscribe institutions' academic freedom, including their policies with respect to course content. *See also N.L.R.B. v. Wentworth Inst.*, 515 F.2d 550, 556 (1st Cir. 1975) (rejecting a similar argument that allowing faculty to engage in collective bargaining would infringe the academic freedom of educational institutions).

The purpose of student workers' organizing is to improve their working conditions. It is not to exert control over academic matters. This is evidenced by recent collective bargaining agreements between universities and student employees, which have all focused on core economic issues and conditions of employment, such as wages, hours, and health care.[1]

[1] *See, e.g.*, Collective Bargaining Agreement between GSOC-UAW Local 2110 and New York University (Arts. IV, XVII, XVIII), available at https://makingabetternyu.org/wp-content/uploads/Executed-UAW-NYU-MOA_searchable.pdf; Collective Bargaining Agreement between SEIU Local 509 and Brandeis University (Arts. 13, 18, 21), available at https://www.brandeis.edu/humanresources/CollectiveBargainingAgreement/documents/Brandeis-Graduate-Assistant-CBA.pdf; Collective Bargaining Agreement between SEIU

Preemptively prohibiting all student workers from organizing is a solution in search of a problem. To the extent that universities are concerned that bargaining agreements will reach topics covered by academic freedom, the NLRB can use its authority to "define the scope of mandatory bargaining," *see Columbia University*, 364 N.L.R.B. No. 90, slip op. at 7 (2016), to exclude subjects that would infringe the academic freedom of faculty and universities. *See Regents of the Univ. of Cal. v. Pub. Emp't Relations Bd.*, 715 P.2d 590, 605 (Cal. 1986) (describing the University's argument that allowing medical residents to unionize would result in bargaining of educational matters as "premature" because such "scope-of-representation issues may be resolved by the Board when they arise"); *Regents of the Univ. of Mich. v. Mich. Emp't Relations Comm'n*, 204 N.W.2d 218, 224 (Mich. 1973) ("[T]he scope of bargaining . . . may be limited if the subject matter falls clearly within the educational sphere."). In this way, the institutions can fulfill their roles both as employer and as educator without jeopardizing academic freedom.

Indeed, many institutions have already successfully navigated their role as employer while maintaining their academic freedom. Some schools have done so by including "academic freedom" clauses or broad management rights provisions in their collective bargaining agreements with their graduate student unions.[2] Student employees have accepted the institutions' efforts to preserve their control over academic matters. For example, the New School's collective bargaining agreement with its graduate student workers explicitly states that "[m]anagement of the University is vested exclusively in the University," and that "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 the right "to determine or modify the number, qualifications, scheduling, responsibilities and assignment of [Academic Student Workers]" and the right "to exercise sole authority on all decisions involving academic matters." New School Collective Bargaining Agreement with ACT-UAW, Local 7902 and UAW (Art. X), available at http://www.actuaw.org/wp-content/uploads/2016/06/TNS-PTF-CBA-2014-2019.pdf. Academic freedom clauses and management rights provisions like these, while by no means required by the First Amendment, offer a way to assuage institutions' concerns by allowing for the protection of graduate student workers' rights while simultaneously preserving institutions' protected academic freedom.

If anything, rather than requiring the exclusion of graduate student workers from the NLRA, the principles the First Amendment and the NLRA rest upon suggest the opposite, as the constitutionally protected right of association confers the right to form and join a labor union. *See Thomas v. Collins*, 323 U.S. 516 (1945); *State Emp. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 132 (2d Cir. 2013); *Orr v. Thorpe*,

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Local 509 Graduate Assistants and Tufts University (Arts. 13, 18, 21), available at https://as.tufts.edu/sites/default/files/2018-2023-GSAS-CBA-Signed.pdf.

[2] Collective bargaining agreements between New York University, Brandeis University, and Tufts University and their respective graduate student unions, for example, have all contained such clauses. *See supra* note 1.

427 F.2d 1129, 1131 (5th Cir. 1970); *AFSCME v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287, 288 (7th Cir. 1968).

We appreciate the National Labor Relations Board's attention to our comments. If you have any questions about these comments, please contact us at veidelman@aclu.org.

Sincerely,

Ronald Newman
National Political Director
American Civil Liberties Union

Arianna Demas
Vera Eidelman
Speech, Privacy, and Technology Project
American Civil Liberties Union