

# EXPANDING THE POWER OF BIG LABOR: THE NLRB'S GROWING INTRUSION INTO HIGHER EDUCATION

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## JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH,  
EMPLOYMENT, LABOR, AND PENSIONS

AND THE

SUBCOMMITTEE ON HIGHER EDUCATION  
AND WORKFORCE TRAINING

COMMITTEE ON EDUCATION  
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

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HEARING HELD IN WASHINGTON, DC, SEPTEMBER 12, 2012

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## **EXPANDING THE POWER OF BIG LABOR: THE NLRB'S GROWING INTRUSION INTO HIGHER EDUCATION**

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**Wednesday, September 12, 2012**

**U.S. House of Representatives**

**Subcommittee on Health, Employment, Labor, and Pensions**

**Subcommittee on Higher Education and Workforce Training**

**Committee on Education and the Workforce**

**Washington, DC**

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The subcommittees met, pursuant to call, at 10:03 a.m., in room 2175, Rayburn House Office Building, Hon. David P. Roe [chairman of the Health, Employment, Labor, and Pensions subcommittee] presiding.

Present from Health, Employment, Labor, and Pensions Subcommittee: Representatives Roe, Wilson, Thompson, Walberg, DesJarlais, Rokita, Bucshon, Roby, Heck, Andrews, Kucinich, Kildee, and Holt.

Present from Higher Education and Workforce Training Subcommittee: Representatives Foxx, Kline, Roe, Thompson, Bucshon, Heck, Andrews, Davis and Miller.

Staff present: Katherine Bathgate, Deputy Press Secretary; Adam Bennot, Press Assistant; Casey Buboltz, Coalitions and Member Services Coordinator; Molly Conway, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Amy Raaf Jones, Education Policy Counsel and Senior Advisor; Marvin Kaplan, Workforce Policy Counsel; Barrett Karr, Staff Director; Ryan Kearney, Legislative Assistant; Krisann Pearce, General Counsel; Alex Sollberger, Communications Director; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Aaron Albright, Minority Communications Director for Labor; Tylease Alli, Minority Clerk; Jody Calemene, Minority Staff Director; John D'Elia, Minority Staff Assistant; Celine McNicholas, Minority Labor Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Julie Peller, Minority Deputy Staff Director; and Michael Zola, Minority Senior Counsel.

Chairman ROE. A quorum being present, the joint hearing of the Subcommittee on Health, Education, Labor, and Pensions and the Subcommittee on Higher Education and the Workforce Training will come to order.

I would like to thank my colleague from North Carolina, Dr. Foxx, the chairwoman of the Subcommittee on Higher Education and Workforce Training for agreeing to hold this joint hearing on Expanding the Power of Big Labor—The NLRB’s Growing Intrusion Into Higher Education. Today, we will have opening statements from the chairman and the ranking members of each subcommittee. With that, I recognize myself for my opening statement.

Good morning, everyone. Thank you for being here. I would like to thank our guests for being with us today. We have a distinguished panel of witnesses, and we look forward to their testimony. We continue to learn a great deal through this committee’s oversight of the National Labor Relations Board. We have learned that the NLRB is utterly determined to advance a culture of union favoritism regardless of the costs imposed on workers and employers, or the damage inflicted on its own credibility.

We have learned a growing number of courts are rejecting the NLRB’s policies. Just last week, a federal judge stopped an NLRB effort to overturn the will of Arizona voters who moved to protect workers’ rights to a secret-ballot union election. The courts have also thrown out the board’s ambush election scheme, as well as its plan to force employers to promote unionization in their workplace.

And the federal court of appeals rightly ruled against the NLRB’s attempt to dictate the dress code for Starbucks employees. Without question, the NLRB’s activist agenda is out of step with the needs and priorities of middle class Americans. Approximately 23 million workers are struggling to find full-time jobs, while roughly one out of every two college graduates are unemployed or underemployed.

Perhaps dissatisfied with its efforts to reshape America’s workforce, the NLRB is now exploring actions that could bring significant changes to the private higher education institutions. In 2004, a decision known as Brown University restored labor practice governing graduate students that had been in place for decades, which viewed graduate assistants as students and not employees under the National Labor Relations Act.

Now, without any new facts or compelling reason, the board is reconsidering that decision and contemplating whether to abandon policies that have helped advance the learning experience of graduate students nationwide. The board has also invited legal briefs to reexamine whether the university faculty are considered employees under the National Labor Relations Act or, instead, fall under the law’s managerial exception.

According to leaders in the higher education community, approximately 90 percent of 4-year institutions have faculty boards that play a critical role in institutional governance. The board’s decision could upset how a vast majority of institutions are managed across the country. Perhaps the most disturbing is the NLRB’s growing challenge to religious freedom.

Over the last year, the NLRB applied an invasive test to determine whether three Catholic universities were, quote—“religious enough” to be exempt from the federal labor law. It is simply unacceptable to allow the NLRB to judge whether a private academic institution has sufficient religious character. A court has outlined a clear standard to determine whether federal labor law applies to

an institution that professes a religious faith, a standard that adheres to Supreme Court precedent and the First Amendment.

It is time the NLRB applied the court standard and ended the uncertainty facing religious institutions. I suspect some of our colleagues will decry today's hearing, and suggest that we are sounding the alarm over a crisis that doesn't exist. Again, I would ask my colleagues to consider what we have learned over the past 2 years.

The NLRB has its agenda clear. Routine cases involving a single workplace have been hijacked in order to impose sweeping changes on all workplaces. It would be foolish to consider each of these issues in isolation. Instead, they should be viewed in the broader context of NLRB's activist agenda. The board's ambush election scheme would leave graduate students, struggling to keep up with their studies and the demands of their professors, just 10 days to decide whether they want to join a union.

Imagine university administrators bargaining with numerous unions within their faculty, each representing a different department of professors' teaching degrees in biology, business, chemistry, et cetera. Yet that is precisely the chaotic environment schools could face if the board's specialty health care decision governs our higher education system. This cannot be what Congress intended when it adopted the National Labor Relations Act to promote the general welfare and the free flow of commerce.

Today's hearing will closely examine these issues as to whether they serve the best interests of our nation's students, colleges and universities. And I look forward to the discussion.

I now recognize my distinguished colleague, Mr. Andrews, the senior Democratic member of the subcommittee, for his opening remarks.

[The statement of Dr. Roe follows:]

**Prepared Statement of Hon. David P. Roe, Chairman,  
Subcommittee on Health, Employment, Labor, and Pensions**

Good morning, everyone. I would like to thank our guests for being with us today. We have a distinguished panel of witnesses and we look forward to their testimony.

We continue to learn a great deal through this committee's oversight of the National Labor Relations Board. We have learned the NLRB is utterly determined to advance a culture of union favoritism, regardless of the costs imposed on workers and employers or the damage inflicted on its own credibility.

We've learned a growing number of courts are rejecting the NLRB's policies. Just last week, a federal judge stopped an NLRB effort to overturn the will of Arizona voters who moved to protect workers' right to a secret ballot union election. The courts have also thrown out the board's ambush election scheme as well as its plan to force employers to promote unionization in the workplace. And a federal appeals court rightly ruled against the NLRB's attempt to dictate the dress code of Starbucks employees.

Without question, the NLRB's activist agenda is out-of-step with the needs and priorities of middle class Americans. Approximately 23 million workers are struggling to find full-time jobs, while roughly one out of every two college graduates are unemployed or underemployed. Perhaps dissatisfied with its efforts to reshape America's workforce, the NLRB is now exploring actions that could bring significant changes to private higher education institutions.

In 2004, a decision known as Brown University restored labor practice governing graduate students that had been in place for decades, which viewed graduate assistants as students and not employees under the National Labor Relations Act. Now, without any new facts or compelling reason, the board is reconsidering that decision and contemplating whether to abandon policies that have helped advance the learning experience of graduate students nationwide.

The board has also invited legal briefs to reexamine whether university faculty are considered employees under the National Labor Relations Act or instead fall under the law's managerial exception. According to leaders in the higher education community, approximately 90 percent of four-year institutions have faculty boards that play a critical role in institutional governance. The board's decision could upset how a vast majority of institutions are managed across the country.

Perhaps most disturbing is the NLRB's growing challenge to religious freedom. Over the last year, the NLRB applied an invasive test to determine whether three Catholic universities were "religious enough" to be exempt from federal labor law. It is simply unacceptable to allow the NLRB to judge whether a private academic institution has sufficient religious character. A court has outlined a clear standard to determine whether federal labor law applies to an institution that professes a religious faith, a standard that adheres to Supreme Court precedent and the First Amendment. It is time the NLRB applied the court's standard and ended the uncertainty facing religious institutions.

I suspect some of our colleagues will decry today's hearing and suggest we are sounding alarms over a crisis that doesn't exist. Again, I would ask my colleagues to consider what we have learned over the last two years. The NLRB has made its agenda clear. Routine cases involving a single workplace have been hijacked in order to impose sweeping changes on all workplaces. It would be foolish to consider each of these issues in isolation. Instead, they should be viewed in the broader context of the NLRB's activist agenda.

The board's ambush election scheme would leave graduate students—struggling to keep up with their studies and the demands of their professors—just 10 days to decide whether they want to join a union. Imagine university administrators bargaining with numerous unions within their faculty, each representing a different department of professors teaching degrees in biology, business, or chemistry. Yet that is precisely the chaotic environment schools could face if the board's Specialty Healthcare decision governs our higher education system.

This cannot be what Congress intended when it adopted the National Labor Relations Act to promote the general welfare and the free flow of commerce. Today's hearing will closely examine these issues and whether they serve the best interests of our nation's students, colleges, and universities.

I look forward to our discussion, and will now recognize my distinguished colleague Rob Andrews, the senior Democratic member of the subcommittee, for his opening remarks.

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Mr. ANDREWS. Thank you, Mr. Chairman. Thank you, Chairwoman Foxx. And, colleagues, good morning. Thank you to the witnesses for their preparation for this morning's hearing.

In the weeks in which we have been back in our districts, I have had a chance to travel and listen to a lot of my constituents. And the other day I was with a doctor that has a radiology practice; he does a very large number of MRIs and CAT scans. And he is having a difficult time finding properly trained people to work in the radiology practice.

I was with a man who started a company that does a lot of installation of solar panels. And they had 600 people working for them 2 years ago. They have about 350 people working for them now because the value of tax credits and subsidies for solar energy has fallen in the New Jersey marketplace and they are looking for a way to regenerate those customers.

I met a number of people who graduated from schools of education, very high-quality schools of education, including Villanova, who are substitute teaching because they can't find their first full-time teaching job because a lot of our public schools have budgets that are under pressure. And our private and charter schools are facing similar pressure, as well.

As the chairman said, there are 23 million Americans looking for full-time work. And I get the distinct sense that what our employers, what our constituents, want us to do is to spend more time



working together to find solutions to create the environment in which entrepreneurs and businesses can create good opportunities for those 23 million people. That is not what we are doing today.

In the context of that great national problem, we are going to be talking about whether a graduate assistant should be able to bargain collectively on campus, or not; whether college faculty are more properly regarded as managerial or as employees on a college campus; and the very important question of the scope of religious freedom, and how to balance that against the workplace rights of employees.

These are significant questions. I don't mean to, in any way, minimize them. But I think that only here, in this city and this institution, would these be regarded as the compelling questions on which the committee should spend its time this morning. Now again, these are important questions and I am delighted that we have witnesses that are very well-versed in helping us understand these questions.

But I guess I would also point out that as important as these questions are, they are also premature. It is likely that the National Labor Relations Board will render decisions in these three areas in the next few months. And some of us will agree with those decisions, and others of us will disagree with those decisions. And there are remedies available, irrespective of our position, if we disagree with the decision.

If we disagree with the decision, there is an appellate process up through the courts. There is a political process in the presidential election, that each one of us is engaged in rather intensely, to elect the person who will have the right to nominate the next NLRB members. And then there is the process within the board itself of litigating and arguing the cases.

And again, I mean no implication that the questions we are facing this morning are insignificant. They are significant, they should be looked at. But I think that the choice of agenda that the majority continues to pursue is not only diversionary but counter-productive. The country wants us to get to work to create an environment where entrepreneurs and businesses can create opportunities for the American people.

That is not what we are doing this morning. Having said that, I will happily engage in a discussion about these important issues this morning. I thank the witnesses and my colleagues for this opportunity.

Chairman ROE. I thank the gentleman for yielding.

I will now recognize Dr. Foxx, chairwoman of the Higher Education and Workforce Training, for her opening statement.

Mrs. FOXX. Thank you, Mr. Chairman. Good morning. And thanks to our witnesses for joining us for this joint subcommittee hearing.

This hearing comes at an appropriate time, as the debate over rising college costs rightly continues to garner national attention. President Obama has traveled the country in recent months promising students and families that his administration is working to lower college costs.

This past weekend, the president told an audience in Florida, quote—"Millions of students are paying less for college today,"

thanks to federal actions. But contrary to the president's comments, the College Board's Trends in College Pricing publication shows published in-state tuition and fees at public 4-year institutions have increased 25 percent over the last 3 years, from \$6,591 during the 2008-2009 academic year to \$8,244 last year.

Similar trends can be seen in private and 2-year degree programs. Clearly, the rhetoric doesn't match the reality. In an effort to find real solutions to the college cost dilemma, the Subcommittee on Higher Education and Workforce Training has held hearings to explore ways states and institutions can help keep college within reach for students.

More importantly, we have seen how federal intervention in higher education, no matter how well-intentioned, often leads to additional institutional expenses; costs that trickle down to students in the form of higher tuition and fees. Today, we are here to discuss actions by President Obama's National Labor Relations Board that would not only infringe upon academic freedom, but could also have serious implications for college costs.

As my colleague, Dr. Roe, mentioned, the NLRB has a reputation for advancing expensive, job-destroying changes to federal labor policies that undermine the rights of workers and employers. And just as the NLRB's specialty health care decision and ambush election scheme threaten to make it more expensive to run a business and restrict employee choice, the board's efforts to expand authority over private post secondary institutions would make it more difficult for colleges to offer a high-quality education at an affordable price.

Should the NLRB succeed in its attempts to expand big labor's influence over faculty at private institutions, a host of potential consequences could arise. A proliferation of union contracts on college campuses would severely limit an institution's flexibility, potentially putting union bosses in charge of everything from how professors are evaluated for tenure to the subject matter and number of courses each faculty member may teach.

Costly labor disputes would severely strain institutions' budgets, leading to a dramatic rise in legal or other expenses, less diverse course offerings and, again, tuition increases. And my colleague from New Jersey has said this is maybe not the most important issue that we could be dealing with today. But I would say, as somebody who has spent a lot of time in higher education, it is not a broken system.

It is looked at by the world as the best system in the world. And I am just not sure why the administration is focused on working to change something that isn't broken. Above all, the NLRB's activism in America's higher education system would have a detrimental effect on students who, in addition to costlier tuition, would likely face reduced academic opportunities.

I am particularly concerned about the board's effort to promote the unionization of graduate student assistants. The opportunity to work as a graduate assistant is priceless. Students get to spend one-on-one time with their professor, assist on special projects, and develop important relationships and references that will serve them well when they begin looking for a career; all the while, earning a little extra money to put toward tuition and living expenses.

And as someone who went through that system myself as a graduate assistant, and who hired lots of graduate assistants, I understand the value of the system, again, as it currently works. For years, the NLRB recognized that graduate students have a primarily educational, not economic, relationship with their respective universities. Their responsibility as students is to learning and completing their degrees.

The cost and uncertainty associated with the proliferation of unionization among graduate students could force institutions to curb, or even shut down, graduate student assistant programs. In closing, I would like to reiterate that we all share the goal of helping to ensure more students have access to an affordable post secondary education. Congress has a responsibility to closely monitor federal actions that might hamper that goal by contributing the problem of soaring tuition, and even compromising education quality.

I look forward to a productive discussion with our witnesses, and I yield back.

[The statement of Mrs. Foxx follows:]

**Prepared Statement of Hon. Virginia Foxx, Chairwoman,  
Subcommittee on Higher Education and Workforce Training**

Good morning, and thank you to our witnesses for joining us for our joint subcommittee hearing.

This hearing comes at an appropriate time as the debate over rising college costs rightly continues to garner national attention. President Obama has traveled the country in recent months promising students and families that his administration is working to lower college costs. This past weekend, the president told an audience in Florida “millions of students are paying less for college today” thanks to federal actions.

But contrary to the president’s comments, the College Board’s Trends in College Pricing shows published in-state tuition and fees at public four-year institutions have increased 25 percent over the last three years, from \$6,591 during the 2008-2009 academic year to \$8,244 last year. Similar trends can be seen in private and two-year degree programs.

Clearly the rhetoric doesn’t match reality. In an effort to find real solutions to the college cost dilemma, the Subcommittee on Higher Education and Workforce Training has held hearings to explore ways states and institutions can help keep college within reach for students. More importantly, we have seen how federal intervention in higher education, no matter how well intentioned, often leads to additional institutional expenses—costs that trickle down to students in the form of higher tuition and fees.

Today we are here to discuss actions by President Obama’s National Labor Relations Board that would not only infringe upon academic freedom, but could also have serious implications for college costs. As my colleague Dr. Roe mentioned, the NLRB has a reputation for advancing expensive, job destroying changes to federal labor policies that undermine the rights of workers and employers. And just as the NLRB’s Specialty Healthcare decision and ambush elections scheme threaten to make it more expensive to run a business and restrict employee choice, the board’s efforts to expand authority over to private postsecondary institutions would make it more difficult for colleges to offer a quality education at an affordable price.

Should the NLRB succeed in its attempts to expand Big Labor’s influence over faculty at private institutions, a host of potential consequences could arise. A proliferation of union contracts on college campuses would severely limit an institution’s flexibility, potentially putting union bosses in charge of everything from how professors are evaluated for tenure to the subject matter and number of courses each faculty member may teach.

Costly labor disputes would severely strain institutions’ budgets, leading to a dramatic rise in legal or other expenses, less diverse course offerings, and, again, tuition increases.

Above all, the NLRB’s activism in America’s higher education system would have a detrimental effect on students, who, in addition to costlier tuition, would likely

face reduced academic opportunities. I am particularly concerned about the board's efforts to promote the unionization of graduate student assistants. The opportunity to work as a graduate assistant is priceless—students get to spend one-on-one time with their professors, assist on special projects, and develop important relationships and references that will serve them well when they begin looking for a career—all while earning a little extra money to put toward tuition and living expenses.

For years, the NLRB recognized that graduate students have a primarily educational, not economic, relationship with their respective universities. Their responsibility, as students, is to learn and complete their degree. The costs and uncertainty associated with a proliferation of unionization among graduate students could force institutions to curb or even shut down graduate student assistant programs.

In closing, I would like to reiterate that we all share the goal of helping to ensure more students have access to an affordable postsecondary education. Congress has a responsibility to closely monitor federal actions that might hamper that goal by contributing to the problem of soaring tuition and even compromising education quality. I look forward to a productive discussion with our witnesses. With that, I now yield back.

---

Chairman ROE. I thank the gentlelady, the chairman, for yielding back.

And I recognize Mr. Andrews again.

Mr. ANDREWS. I ask unanimous consent that my colleague, Mr. Hinojosa's, statement be put in the record. He is the ranking member of the Higher Ed Subcommittee. He is otherwise engaged this morning, but sends his regards and his statement.

[The statement of Mr. Hinojosa follows:]

**Prepared Statement of Hon. Rubén Hinojosa, Ranking Member,  
Subcommittee on Higher Education and Workforce Training**

Chairman Roe and Ranking Member Andrews, I expect today's joint HELP and Higher Education and Workforce Training Subcommittee hearing will focus largely on the National Labor Relations board's (NLRB) position and application of the National Labor Relations Act (NLRA) to faculty and graduate students employed by private universities of higher education, and the exemption from NLRA requirements for religious institutions of higher education.

It's important to note that this hearing will mark the Committee's eighth hearing during the 112th Congress, that the majority examines the work of the NLRB. Once again, I have no doubt that my colleagues on the other side of the aisle will use this hearing to attack the rights of American workers and disparage the National Labor Relations Board's (NLRB). Today, the majority will attempt to undermine the NLRB's work in areas related to higher education.

As Ranking Member of the Subcommittee on Higher Education and Workforce Training, I believe that these committee hearings should serve as an opportunity for this committee to discuss some of the most pressing issues in higher education.

The rising cost of a college and graduate school education, the poor working conditions and paltry wages of thousands of graduate teaching assistants who work tirelessly to educate our students and the dramatic increase of non-tenure track "contingent faculty" on our nation's college campuses, should all be of great concern to this committee.

In the past decade or so, the nature of the higher education workplace has changed significantly. Colleges and universities are relying heavily on graduate teaching assistants and adjunct faculty to teach courses, administer and grade exams, and supervise laboratory sessions.

A study by the AFL-CIO, entitled "Teachers and College Professors—Trends in the Profession," found that colleges and universities have begun to shift more and more of the burden of actual teaching onto graduate teaching assistants in efforts to cut costs.

According to the Bureau of Labor Statistics, there are currently 110,130 Americans who are employed as graduate teaching assistants, and the median annual salary for graduate teaching assistants is just \$31,230. In response to increased workloads and low compensation, it is no surprise that graduate assistants have sought to exercise their right to organize and collectively bargain.

To make matters worse, the Republican 112th Congress has made the cost of a graduate degree more expensive. The Budget Control Act of 2011, for example,

eliminated graduate students' eligibility for subsidized student loans. Prior to July 1, 2012, the federal government paid the interest on some loans for graduate students with financial need. Beginning this past July, interest will accrue while the student is in school, increasing the levels of debt for graduate students.

In closing, I urge this committee to do more to create jobs and assist the millions of unemployed and underemployed American workers who are trying desperately to find good family-sustaining jobs and get back on track. Attacking the rights of American workers, including the rights of graduate teaching assistants who are striving to finish their degrees and provide for their families, is simply unacceptable, especially at a time when Americans need Congress' help to access good jobs and improve their lives.

Thank You!

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Chairman ROE. Without objection, so ordered.

Pursuant to committee rule 7-C, all members of both subcommittees will be permitted to submit written statements to be included in the permanent hearing record. Without objection, the hearing record will remain open for 14 days to allow statements and other questions for the record and other extraneous material referenced during the hearing to be submitted for the record.

The lighting system, just very brief, many of you probably know this. It is a 5-minute time limit. I am not going to gavel you down right in the middle of a sentence, but please try to wrap it up. You will see a green light, and then an amber light which means you have a minute left. And then the red light means I will be reaching for the gavel. And I will try to keep myself within the 5-minute time limit.

I would like to introduce our very distinguished panel. First is Dr. Peter Weber, the dean of Brown University graduate school in Providence and also a chemistry professor. I have got cold sweats thinking about that, Dr. Weber. Dr. Michael Moreland is the vice-dean and professor of law at Villanova University school of law in Villanova, Pennsylvania. Welcome. And Mr. Christian Sweeney is a deputy organizing director of the American Federation of Labor Congress of Industrial Organizations in Washington. Welcome. And Mr. Walter Hunter is an attorney, and shareholder of Littler Mendelson, PC in Providence, Rhode Island.

And I will now allow Dr. Weber to start your testimony. Thank you.

**STATEMENT OF DR. PETER M. WEBER, DEAN,  
BROWN UNIVERSITY GRADUATE SCHOOL**

Mr. WEBER. Does this thing work?

Chairman ROE. Yes.

Mr. WEBER. Chairman Roe, Chairwoman Foxx, Ranking Member Andrews, Ranking Member Hinojosa in absentia, and subcommittee members, thank you for your invitation to participate in this hearing. It is an honor to appear before you today.

I am Peter Weber, professor of chemistry, dean of the graduate school of Brown University. As the senior academic officer of Brown's graduate school, I am responsible for assuring Brown's standards in graduate education. The current educational model has made American universities global leaders in education. I am quite certain that defining Brown's doctoral students as employees would damage the very fabric of graduate education at Brown University and many private institutions of higher learning.

Brown University has 51 Ph.D. programs, and awards some 200 doctor of philosophy degrees annually. A Brown Ph.D. education prepares graduate students for careers as academicians and as researchers and, more generally, as highly-trained experts in all manner of fields. The degree requirements are established by the faculty of each graduate program following disciplinary customs.

Central to all fields is the preparation of a dissertation, a written account of novel scholarship produced by the candidate. Additionally, teaching is an integral requirement in virtually every degree program, for several reasons. First, many of our doctoral students study for academic careers, where teaching will be part of their professional lives.

Secondly, teaching skills are also valued in many professional careers outside of academia. And third, research has shown that graduate students who train in teaching enhance their research skills. For these reasons, training and teaching is an important and integral aspect of Brown's doctoral education.

At Brown, teaching is considered equivalent to a course. Brown Ph.D. students receive a guarantee of 5 years of financial support, which includes a stipend, tuition remission, health insurance and fees. While the exact level of the stipends vary from program to program, most programs exceed the support levels specified by the graduate school.

The stipend is the same for all students enrolled in the program, and does not vary if the student exclusively takes courses while on a fellowship or serves as a research or teaching assistant. There is no line-designated salary in the student support budget of the graduate school.

Let us examine the difference between the academic nature of our teaching assistantship program and an alternative cost-driven approach, to instruction. If Brown wanted to staff courses with individuals who already possess a Ph.D., it could do so for a small fraction of the cost of graduate students on teaching assistantships.

In other words, we could engage fully-trained adjunct faculty to satisfy Brown's teaching needs for a fraction of the cost of our graduate student financial aid program if our goals were merely to purchase instructional services. But that is not our goal. Instead, we wish to provide our Ph.D. candidates the opportunity to learn the art of teaching.

This approach to doctoral training is costly to Brown, but it is enormously beneficial to all our students. Our undergrad students benefit from enthusiastic assistants who care deeply about their academic fields. And the doctoral students receive mentorship from their faculty advisors and a preparation that enables their academic and professional careers.

I am a scientist by profession, not a lawyer or a labor relations expert. I do not know much about the National Labor Relations Act or about the duty to bargain. What I do know is that in private universities such as Brown engaging in collective bargaining about the core of the academic curriculum would wreak havoc with academic freedom. It makes no sense for a university like Brown to have to bargain over the terms and conditions of service by students who teach or research as an integral part of their academic training.

Are we to bargain about course selection, course content, course length, the number of exams or papers in a course, the year in which a student serves as an assistant? What if a student performs poorly as a teaching assistant? Are we to bargain over the just cost for the discipline imposed?

These are very legitimate concerns when one contemplates that a curriculum may be transformed into a job merely because that curriculum requires students to learn how to teach and engage in academic research. For these reasons, I respectfully oppose the prospect of calling students employees in Ph.D. programs such as the ones at Brown University.

This concludes my prepared testimony. Thank you for the opportunity to share my opinions with you. I look forward to any questions members of the subcommittees may have.

[The statement of Mr. Weber follows:]

**Prepared Statement of Peter M. Weber, Dean of the Graduate School,  
Brown University**

Chairman Roe, Chairwoman Foxx, Ranking Member Andrews, Ranking Member Hinojosa and Subcommittee Members, thank you for your invitation to participate in this hearing. It is an honor to appear before you today.

My name is Peter Weber. I am Professor of Chemistry and Dean of the Graduate School at Brown University. As the senior academic officer of Brown's Graduate School, I am responsible for assuring Brown's standards in the delivery of graduate education, for guiding the school's growth, and for identifying ways to recruit the strongest students as Brown expands and strengthens its nationally recognized graduate programs. I am quite certain that defining Brown's graduate students as "employees" would damage the fabric of graduate education at Brown University and institutions like it.

I believe that it is both shortsighted and naive to suggest that students whose academic program requires teaching and research as a condition for the receipt of the Ph.D. can be regarded as employees without destroying the educational model that has shaped Brown and so many other private institutions of higher learning. Our current educational model has made American universities global leaders in education, attracting students from around the world.

Let me tell you about Brown University, where I have taught since 1989. Brown has 51 Ph.D. programs and awards some 200 Doctor of Philosophy degrees annually. A Brown Ph.D. education prepares graduate students for careers as academicians and researchers and, more generally, as highly trained experts in all manner of fields. The Ph.D. curricula and degree requirements are established individually by the faculty leading each graduate program and take into consideration disciplinary customs and developments.

Central to all fields is the preparation of a dissertation, a written account of novel scholarship produced by the candidate. Additionally, teaching is an integral requirement in virtually every degree program, for several reasons. First, many of our doctoral students study for academic careers, where teaching will be part of their professional lives. Learning to teach as a doctoral candidate prepares the students for these academic careers. Secondly, teaching belongs to the so-called transferrable skills, that is, skills that are of value in many professional careers within and outside of academia. Third, research has shown that graduate students who train in teaching enhance their research skills. For all these reasons, training in teaching is an important and integral aspect of Brown's doctoral education.

The training is done as the students assist professors teaching courses at Brown. In limited instances, students receive the honor of being appointed as a teaching fellow, which enables them to design and teach their own course, the syllabus of which is developed in close consultation with a faculty advisor. Teaching is so critical to the graduate education curriculum that it is considered equivalent to a course. If a student fails to perform adequately in his or her teaching role, the student can be terminated from the Ph.D. program itself. Therefore, if a graduate student ordinarily would take four courses in a semester, he or she would take only three if serving as a teaching assistant. If a student fails to perform adequately in his or her teaching role, the student can be terminated from the Ph.D. program itself.

Similarly, training in research happens in Brown laboratories and offices as graduate students pursue the discovery of knowledge alongside faculty mentors. Doctoral students may also be appointed as fellows or proctors. During a fellowship semester, students devote themselves fully to their course studies or to the preparation of a thesis. A proctorship is defined to be a non-instructional, academic position intended to foster the professional development of graduate students. These can include, for example, helping to edit academic journals, curating museum exhibitions, or developing programs in the student's area of academic specialization. Like teaching and research assistantships, all proctorship positions are part of the academic training of doctoral students.

Candidates who are enrolled in Ph.D. programs at Brown receive a guarantee for five years of financial support, which includes a stipend, tuition remission, health insurance and fees. Doctoral students also receive financial support for four summers during their studies. While the exact level of the stipends varies from program to program, most programs exceed the support level specified by the Graduate School. The stipend is the same for all students enrolled in a program, and does not vary if the student exclusively takes courses while on a fellowship, or serves as a research assistant, a teaching assistant or as a proctor. There is no line designated "salary" in the student support budget of the Graduate School.

At Brown, we do not consider teaching, research or proctorships to be "jobs." That concept is so foreign to our academic mission that characterizing our Ph.D. candidates as "employees" would irrevocably alter the essence of our programs. Graduate students do not apply for a job at Brown; they apply for admission as students. Teaching experience is not usually an important criterion for admission, as preference is given to academic performance during the undergraduate studies. Once admitted, students receive training in research and teaching as part of their academic experience.

Let us examine the difference between the academic nature of our teaching assistantship program and an alternative, cost-driven approach to undergraduate instruction. If Brown wanted to staff courses with individuals who already possess a Ph.D., it could do so for a small fraction of the cost of graduate students on teaching assistantships. In other words, we could engage fully-trained adjunct faculty to satisfy Brown's teaching needs for a fraction of the cost of our graduate student financial aid program, if our goal were merely to "purchase" instructional services. But that is not our goal. Instead, we wish to provide our Ph.D. candidates the opportunity to learn the art of teaching as part of their doctoral education.

Indeed, from a purely economic and employment point of view, it would be rational for us to assign our most experienced doctoral students—those, say, in the seventh year of study—to serve as teaching assistants. But we do not. Why? Again, our goal is the training and professional development of our doctoral candidates. Learning how to teach is one of many aspects of professional development that is completed within the timeframe recommended for completion of the doctoral degree, which of course varies by discipline. We do not seek to retain experienced teaching assistants for employment purposes. Instead, we wish to confer degrees upon successful completion of the academic requirements, which include learning how to teach.

This approach to doctoral training is costly to Brown, but it is enormously beneficial to all our students: our undergraduate students benefit from enthusiastic assistants who care deeply about their academic fields; and the doctoral students receive mentorship from their faculty advisors and a preparation that enables their academic and professional careers. Brown is proud of its "university/college" model, which views teaching and research as an integrated whole for all students.

I am a scientist by profession, not a lawyer or a labor relations expert. I do not know much about the National Labor Relations Act or about the "duty to bargain." What I do know is that in private universities such as Brown, engaging in collective bargaining about issues at the core of the academic curriculum would wreak havoc with academic freedom. It makes no sense for a university like Brown to have to bargain over the "terms and conditions" of service by students who teach, research or serve as proctors as an integral part of their academic training. Are we to bargain about course selection? Course content? Course length? The number of exams or papers in a course? The year in which a student serves as an assistant? The decision whether to assign a student a teaching, research, or proctorship role, as opposed to strictly taking courses? What if a student performs poorly as a teaching assistant? Are we to bargain over the "just cause" for the discipline imposed?

These issues are not mere speculation. They are very legitimate concerns when one contemplates the notion that a curriculum may be transformed into a "job" merely because that curriculum requires students to learn how to teach and engage



in academic research. For these reasons, I respectfully oppose the prospect of calling students “employees” in Ph.D. programs such as the ones at Brown University.

This concludes my prepared testimony. I would like to thank you for the opportunity to share my opinions with you and I am looking forward to any questions Members of the Subcommittee may have.

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Chairman ROE. Thank you, Dr. Weber.  
Dr. Moreland?

**STATEMENT OF DR. MICHAEL P. MORELAND, VICE DEAN AND  
PROFESSOR OF LAW, VILLANOVA UNIVERSITY SCHOOL OF  
LAW, TESTIFYING ON HIS OWN BEHALF**

Mr. MORELAND. Thank you, Chairman Roe.

Chairman ROE. Could you get your mic on?

Mr. MORELAND. Sorry. Thank you, Chairman Roe, Chairwoman Foxx, and Ranking Member Andrews and members of the subcommittees. Thank you for the opportunity to discuss with you today the issue of National Labor Relations Board jurisdiction over religiously-affiliated colleges and universities.

I think it is important to note at the outset what this issue is not about. This issue is not about whether employee unionization and mandatory collective bargaining are valuable legal and policy objectives under the NLRA. Instead, this issue is about the freedom of religious institutions from government interference with regard to their religious mission.

I want to make three brief points in my testimony. First, the NLRB’s use of a substantial religious character test to determine the scope of the religious exemption from the NLRA is at odds with over 30 years’ worth of Supreme Court and lower court precedent. Second, intrusion by the NLRB into the internal matters of religious institutions poses a threat to religious freedom.

And finally, opposition to NLRB jurisdiction over religiously-affiliated colleges and universities is not inconsistent with support by churches of the rights of workers to unionize. In the landmark case of *NLRB v. Catholic Bishop*, in 1979, the Supreme Court held that there is a significant risk of violation of the First Amendment if board jurisdiction extended to church-operated secondary schools.

As the court noted, a variety of issues that the board is routinely called upon to resolve in labor disputes, such as charges of unfair labor practices, would raise serious First Amendment questions if applied to religious schools. Since *Catholic Bishop*, courts have extended their holding of the case to cover a broad range of religiously-affiliated schools.

Then Judge Stephen Breyer noted in 1986 that the court in *Catholic Bishop* did not limit its holding to primary and secondary schools, and that the same entanglement problems that the Court identified in *Catholic Bishop* are acutely present in higher education. The board now, however, takes the position that *Catholic Bishop* is limited to schools with a substantially religious character, and that the board should determine on a case-by-case basis whether a school has such a character.

In order to make this determination, the board considers such factors as the involvement of the religious institution, the daily operation of the schools, the degree to which the school has a reli-

gious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty. But these are precisely the sort of intrusive inquiries that the First Amendment precludes.

In *University of Great Falls v. NLRB*, the D.C. Circuit rebuked the board, and articulated a three-pronged test to determine whether a religious institution was exempt from board jurisdiction to avoid the intrusive inquiry into the good faith claims of a religious university that Catholic Bishop seeks to avoid. First, the institution holds itself out to students, community and faculty as providing a religious educational environment. Two, the institution is organized as a non-profit. And three, the institution is a religiously affiliated.

The board has yet to employ this clear three-pronged test that appropriately balances religious freedom with the objectives of the NLRA, which argues for codification of the Great Falls test in the statute. As the D.C. Circuit explained, the Great Falls test allows the board to determine whether it has jurisdiction without delving into matters of religious doctrine or motive and without coercing an educational institution into altering its religious mission to meet regulatory demands.

Most recently, three Catholic schools—Saint Xavier in Chicago, Manhattan College, and Duquesne University in Pittsburgh—have had claims for exemption from board jurisdiction rejected by the board, and are now appealing those decisions. In each instance, the schools clearly satisfy the test in *Great Falls*.

As Justice Brennan argued in his concurring opinion in *Presiding Bishop v. Amos*, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. And the prospect of government intrusion raises concern that a religious organization may be chilled in its free-exercise activity.

It is ironic that the 200-plus Catholic colleges and universities in the United States, which have had a mission for generations of teaching not merely Catholic theology but also business, science, literature, medicine and law, are now threatened with being put under the thumb of NLRB oversight for it. It is ironic that Catholic colleges and universities, especially in major urban areas, that have long provided an education for both Catholics and non-Catholics are now told by the board that opening their doors to all gives license to the board to interfere with the schools' hiring and employment practices.

It is ironic that Catholic universities embrace of academic freedom now gives cause to the board to conclude that they are not really religious institutions after all. I hasten to add that the Catholic Church has long been an advocate for the rights of employees to form unions and for economic justice. Indeed, Mr. Sweeney's boss, Richard Trumka, is a graduate of Villanova law school.

But there is nothing inconsistent with affirming the objectives of unionization while insisting that religious freedom requires that religious institutions be free of government oversight of employment practices. Whatever one's views about the scope of employee rights to unionize under the NLRA, those claims must yield to the institu-

tional freedom of religious schools. And the constitutionally appropriate test is simply whether the school holds itself out as a religious institution, is a non-profit and is religiously affiliated.

Further and more intrusive inquiry into an institution's mission by the government jeopardizes the religious freedom of schools to live out their character as they see fit. Thank you.

[The statement of Mr. Moreland follows:]

**Prepared Statement of Michael P. Moreland, Vice Dean and  
Professor of Law, Villanova University School of Law**

CHAIRMAN ROE, CHAIRWOMAN FOXX, RANKING MEMBER ANDREWS, RANKING MEMBER HINOJOSA, AND MEMBERS OF THE SUBCOMMITTEES: Thank you for the opportunity to discuss with you today the issue of National Labor Relations Board jurisdiction over religiously-affiliated colleges and universities. I am the vice dean and a law professor at Villanova University School of Law, where I teach and write on topics related to law and religion. Before moving into law teaching, I was an attorney at Williams & Connolly here in Washington and was Associate Director of the Domestic Policy Council at the White House. I am testifying today in my personal capacity.

I think it is important to note at the outset what this issue is not about. This issue is not about whether employee unionization and mandatory collective bargaining are valuable legal and policy objectives under the National Labor Relations Act. Instead, this issue is about the freedom of religious institutions from government interference with regard to their religious mission.

I wish to make three points in my testimony. First, the NLRB's use of a "substantial religious character" test to determine the scope of the religious exemption from the NLRA is at odds with over 30 years' worth of Supreme Court and lower court precedents. Second, intrusion by the NLRB into the internal matters of religious institutions poses a threat to religious freedom. Finally, opposition to NLRB jurisdiction over religiously-affiliated colleges and universities is not inconsistent with support by churches of the rights of workers to unionize.

For many years following enactment of the National Labor Relations Act in 1935, the National Labor Relations Board did not exercise jurisdiction over nonprofit educational institutions at all. Trustees of Columbia University in the City of New York, 97 NLRB 424 (1951). By the 1970s, however, the NLRB was routinely exercising jurisdiction over educational institutions, including religiously-affiliated institutions, with only an exemption for schools that were "completely religious" and offered instruction only in religious subjects. Roman Catholic Archdiocese of Baltimore, 216 NLRB 249 (1975).

In the landmark case of *NLRB v. Catholic Bishop of Chicago* in 1979, the Supreme Court held that the doctrine of constitutional avoidance required that NLRB's jurisdiction not extend to parochial school teachers because (1) there was a significant risk of violation of the First Amendment if NLRB jurisdiction extended to "church-operated" secondary schools, and (2) there was no clear indication of congressional intent in the NLRA to give the NLRB jurisdiction over teachers in church-operated schools. 440 U.S. 490 (1979). "In the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board," the Court wrote, "we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." 440 U.S. at 507. As the Court noted, a variety of issues that the NLRB is routinely called upon to resolve in labor disputes, such as charges of unfair labor practices, would raise serious First Amendment questions if applied to religious schools:

The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions. 440 U.S. at 502.

Since *Catholic Bishop*, courts have expanded the holding of the case to cover a broad range of religiously-affiliated schools, not merely those that are "church-operated" and not merely primary and secondary schools. Then-Judge Stephen Breyer noted in his opinion in *Universidad Central de Bayamon v. NLRB* that the Court in *Catholic Bishop* did not limit its holding to primary and secondary schools and

that the same entanglement problems that the Court identified in *Catholic Bishop* are present in higher education:

[T]o fail to apply *Catholic Bishop* [to colleges and universities] is to undercut that opinion's basic rationale and purpose. The Court there rejected the Labor Board's pre-existing distinction between "completely religious schools" and "merely religiously associated schools." In doing so, it sought to minimize the extent to which Labor Board inquiry (necessary to make the "completely/merely-associated" distinction) would itself entangle the Board in religious affairs. Under this rationale, therefore, we cannot avoid entanglement by creating new, finely spun judicial distinctions that will themselves require further court or Labor Board 'entanglement' as they are administered. \* \* \* These ad hoc efforts, the application of which will themselves involve significant entanglement, are precisely what the Supreme Court in *Catholic Bishop* sought to avoid. 793 F.2d 383, 402 (1st Cir. 1986) (en banc) (Breyer, J., for half of an equally divided court).

NLRB presently takes the position that *Catholic Bishop* is limited to schools with a "substantial religious character" and that the Board should determine on a case-by-case basis whether a school has such a character. In order to make this determination, the Board "considers such factors as the involvement of the religious institution in the daily operation of the schools, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty." In *re University of Great Falls*, 331 NLRB No. 188 at 3 (2000).

But these are precisely the sort of intrusive inquiries that the First Amendment precludes. As the Supreme Court noted in its plurality opinion in *Mitchell v. Helms*, "[I]nquiry into \* \* \* religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." 530 U.S. 793, 828 (2000).

The Religious Freedom Restoration Act, enacted in 1993, brings with it a new factor for the NLRB to consider when attempting to exercise jurisdiction over religious educational institutions. RFRA requires that the government not substantially burden the free exercise of religion (even if the burden results from a rule of general applicability) unless the burden is necessary for the furtherance of a compelling governmental interest and is the least restrictive means of achieving that interest. Three years after RFRA was enacted, the University of Great Falls challenged the NLRB's finding that it was not exempt from recognizing a faculty union, stating that the NLRB's exercise of jurisdiction would violate RFRA. NLRB responded by stating that RFRA had no effect on its jurisdictional decisions because the Board's practices in the wake of *Catholic Bishop* avoided creating a substantial burden on the freedom of the exercise of religion. The NLRB then evaluated the Great Falls under its *Catholic Bishop* standard and concluded that it was not "church operated" within the meaning of the holding of *Catholic Bishop* largely because the Catholic Church was not involved directly in the day-to-day management or administration of the school.

The D.C. Circuit, in an opinion that sharply rebuked the Board, held that the NLRB's determination of a school's religious character was an inappropriate and invalid way to make jurisdictional determinations. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). The D.C. Circuit articulated a three-pronged test to determine whether a religious institution was exempt from the jurisdiction of the NLRB that would avoid the intrusive inquiry into the good faith claims of a religious university that *Catholic Bishop* sought to avoid: (1) the institution "holds itself out to students, faculty and community as providing a religious educational environment," (2) the institution "is organized as nonprofit," and (3) the institution "is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion." 278 F.3d at 1347. The NLRB has yet to employ this clear three-pronged test that appropriately balances religious freedom with the objectives of the NLRA, which argues for codification of the Great Falls test in the statute. As the D.C. Circuit explained, the Great Falls test "allow[s] the Board to determine whether it has jurisdiction without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands." *Id.* at 1345. In 2008, another institution, Carroll College, successfully challenged the Board's exercise of jurisdiction over it when the D.C. Circuit again held that a school met all three components of the test set forth in Great Falls. *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). The Board, however, continues to adhere to its own "substantial religious character" framework for evaluating the religious exemption of colleges and universities from NLRB oversight.

Most recently, three Catholic schools—St. Xavier in Chicago, Manhattan College, and Duquesne University in Pittsburgh—have had claims for exemption from NLRB jurisdiction rejected by the Board and are now appealing those decisions. In each instance, the schools clearly satisfy the test in *Great Falls*. For instance, the NLRB maintains that Manhattan College, while clearly holding itself out to be a religious institution, does not meet the admissions, hiring, and curriculum criteria that the NLRB thinks exempted institutions must meet in order to be “substantially religious.” In response, the Association of Catholic Colleges and Universities and the Association of Jesuit Colleges and Universities have filed amicus briefs on behalf of their sister institutions.

Cases addressing similar attempts by government to distinguish which institutions are “really” religious and which are not come to the same conclusion. For example, in *Colorado Christian University v. Weaver*, the U.S. Court of Appeals for the Tenth Circuit (in an opinion written by then-Judge Michael McConnell) held that a Colorado public scholarship program that excluded students who attended “pervasively sectarian” universities was unconstitutional. 534 F. 3d 1245, 1250 (10th Cir. 2008). In order to determine if a university was “pervasively sectarian,” the government was required to examine the curriculum of the school and take into consideration whether, for example, the students were required to attend religious services. But such inquiries are precisely what the First Amendment prohibits, for “[t]hese determinations threaten to embroil the government in line-drawing and second-guessing regarding matters about which it has neither competence nor legitimacy.” 534 F.3d at 1265. As Justice William Brennan argued in his concurring opinion in *Presiding Bishop v. Amos*, “[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree.” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1978) (Brennan, J., concurring in the judgment).

The Board’s narrow view of what constitutes a religious institution is at odds with the approach taken in other contexts, such as employment discrimination law. Title VII exempts religious organizations from the prohibition on discrimination based on religion, and both EEOC’s own guidance and cases such as *LeBoon v. Lancaster Jewish Community Center Ass’n*, 503 F.3d 217 (3d Cir. 2007), hold that the exemption for religious institutions from Title VII’s prohibition on discrimination based on religion is quite broad. As Judge Roth put it in the Third Circuit’s opinion in *LeBoon*:

First, religious organizations may engage in secular activities without forfeiting protection under Section 702. \* \* \* Second, religious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection. \* \* \* Third, religious organizations may declare their intention not to discriminate, as the LJCC did to the United Way and in its employee handbook, without losing the protection of Section 702. \* \* \* Fourth, the organization need not enforce an across-the-board policy of hiring only coreligionists. \* \* \* We will not deprive the LJCC of the protection of Section 702 because it sought to abide by its principles of “tolerance” and “healing the world” through extending its welcome to non-Jews. 503 F.3d 217 at 230.

It is ironic that the 200-plus Catholic colleges and universities in the United States—which have had a mission for generations of teaching not merely Catholic theology but also business, science, literature, medicine, and law—are now threatened with being put under the thumb of NLRB oversight for it. It is ironic that Catholic colleges and universities, especially in major urban areas (such as Boston College, Fordham, St. John’s, Georgetown, Villanova, DePaul, Loyola-Chicago, and Loyola-Los Angeles) that have long provided an education for both Catholics and non-Catholics are now told by the Board that opening their doors to all gives license to the NLRB to interfere with the school’s hiring and employment practices. It is ironic that Catholic universities’ embrace of academic freedom and inquiry now gives cause to the Board to conclude that they are not “really” religious institutions. As the D.C. Circuit put it in *Great Falls*:

If the University is ecumenical and open-minded, that does not make it any less religious, nor NLRB interference any less a potential infringement of religious liberty. To limit the Catholic Bishop exemption to religious institutions with hard-nosed proselytizing, that limit their enrollment to members of their religion, and have no academic freedom, as essentially proposed by the Board in its brief, is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause—not to prefer some religions (and

thereby some approaches to indoctrinating religion) to others. 278 F.3d 1335, 1346 (D.C. Cir. 2002).

I hasten to add that the Catholic Church has long been an advocate for the rights of employees to form unions and for economic justice. But there is nothing inconsistent with affirming the objectives of unionization while insisting that religious freedom requires that religious institutions be free of government oversight of employment practices. Indeed, as some commentators have noted, the collective bargaining and labor dispute processes at the heart of NLRB jurisdiction are in tension with what the Church holds out in its own teaching. As one scholar has argued:

[B]ehind the bargaining process and a key factor in motivating the parties to reach agreement is the availability of economic weapons and the threat that they will be used. The presence of these weapons and a corresponding “area of labor combat” is, as the Supreme Court has said, part and parcel of the structure of the Act. Labor peace is achieved under the Act by balancing the power of employers and employees, directing both parties to bargain in good faith, and giving each party wide discretion in the use of weapons should less adversarial tactics fail.

This vision of the collective bargaining process is deeply inconsistent with the Church’s vision. For the Church, the animating spirit in labor-management relations must be one of brotherhood and cooperation. \* \* \* Thus, for the Church, the collective bargaining process is not one where the parties necessarily proceed from antagonistic viewpoints and concepts of self-interest. To the contrary, each party must try to understand the other’s position, even put themselves in the other’s position, and genuinely seek reasoned interchange and a harmonious outcome. The common good, not merely common ground, should be the object of the negotiating process, and the primary motivation for reaching agreement should be love, not fear.

Kathleen A. Brady, “Religious Organizations and Mandatory Collective Bargaining under Federal and State Labor Laws: Freedom From and Freedom For,” 49 Villanova Law Review 77, 121-22 (2004).

In conclusion, let me draw your attention to a recent case that I think helpfully illuminates the debate over NLRB jurisdiction over religious institutions. The United States Supreme Court held unanimously earlier this year that the First Amendment grants religious institutions immunity from discrimination claims with regard to employment decisions about “ministers,” which includes a much broader category of employees than merely ordained clergy. We can all agree that employment anti-discrimination laws are important and valuable, but, as Chief Justice Roberts wrote in his opinion for the Court, the balance between religious freedom and “the interest of society in the enforcement of employment discrimination statutes” has been decisively struck by the First Amendment in favor of religious freedom. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 710 (2012). Similarly, we might have broad agreement about the importance of the objectives of the NLRA, objectives that the Catholic Church and many other churches embrace, but, when it comes to the internal governance of religiously-affiliated colleges and universities, the First Amendment—and a long line of Supreme Court and court of appeals cases—strikes the balance on behalf of institutional autonomy. Whatever one’s views about the scope of employee rights to unionize under the NLRA, those claims must yield to the institutional freedom of religious schools, and the constitutionally appropriate test is simply whether the school holds itself out as a religious institution, is a non-profit, and is religiously-affiliated. Further and more intrusive inquiry into an institution’s mission by the government jeopardizes the religious freedom of religiously-affiliated schools to live out their character as they see fit.

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Chairman ROE. I thank you.  
Mr. Sweeney?

**STATEMENT OF CHRISTIAN SWEENEY, DEPUTY ORGANIZING  
DIRECTOR, AMERICAN FEDERATION OF LABOR—CONGRESS  
OF INDUSTRIAL ORGANIZATIONS**

Mr. SWEENEY. Good morning. I want to thank Chairman Roe, Ranking Member Andrews, Chairwoman Foxx, and Ranking Member Hinojosa for the opportunity to testify before the committee today. I serve as the deputy director of the organizing department of the AFL-CIO.

I am grateful for the opportunity to address this hearing because my own roots in the labor movement are in higher education. I helped organize a union at the University of California Berkeley when I was working as a graduate student instructor while I pursued a Ph.D. in history. When I arrived at Berkeley, TAs were making about \$12,000 a year.

Many were faced with heavy workloads; teaching, grading and running labs. We had serious concerns about the gaps in health care coverage. Family health care was impossible to afford for many student employees with children. At the same time, an overwhelming majority of us were incredibly grateful to be studying and working at such a fine institution.

We just wanted a way to have a serious conversation about the issues we faced as university employees with the people who established our terms and conditions of employment. Over the course of several years, we built majority support for our union and eventually won eight union representation elections on each of the University of California campuses.

During the first contract negotiations, I served as the president of our new local union. When we sat down to bargain, we based many of our contract proposals on the best practices that already existed within the university system itself. Ultimately, we reached an agreement that addressed many of the concerns we had about our rights as employees, increased wages, and guaranteed health care for the first time.

The conditions that I faced as a teaching assistant were not unique to the University of California. Today, over 100,000 people are employed as teaching and research assistants at public and private universities across the United States. In my years as an organizer assisting workers on campuses throughout the country, I have heard remarkable stories about the conditions these workers face.

One TA at a private university here in Washington told me about how he severely injured his knee, but could not afford the university's health insurance or the surgery to repair it. On another campus, I heard complaints from a graduate student employee of sexual harassment that she dared not raise for fear of reprisals. She would have preferred to deal with that problem through a quick union grievance procedure rather than pursue slower, more public legal remedies.

Research assistants, as well, face very real workplace issues in labs. Researchers regularly deal with carcinogens, radioactive materials and extreme fire hazards. Recently, for example, a lithium fire claimed the life of a researcher at UCLA. The notion that the NLRB or big labor is somehow pushing its way into academia is misguided.

In fact, the opposite is true. Workers in academia are reaching out to unions in large numbers. In the 14 years that I have been an elected leader and a staff person, I have worked on 12 union representation elections in higher education with 20,000 eligible workers. Workers ultimately voted for collective bargaining in 11 of the 12 elections.

The reason for this outcome is that workers in higher education have very real workplace concerns that they want to address

through the democratic process of collective bargaining. Universities today are relying increasingly in contingent, short-term teachers and researchers. In 2009, only 24.4 percent of instructional staff in higher education were full-time tenure-track members.

The sciences are also more heavily relying on contingent researchers. In the past, a new Ph.D. might expect to work as a post-doc for a year or 2. Now, 5, 7, even 10 years of low-paid postdoctoral researcher positions is common. In the last decade, thousands of postdoctoral researchers have organized unions in California, New Jersey and Massachusetts.

In recent years, the most significant intrusion into higher education by the NLRB, in my view, came in 2004 when the Bush National Labor Relations Board stripped the right to form a union under federal law from teaching assistants and research assistants in private universities. All the TAs and RAs are asking for now of the board is to return to their earlier precedent and apply the common law.

Service compensation direction control are the three factors that common law looks at to define who is an employee. Do TAs and RAs meet these standards? I think the answer is an unequivocal yes. They provide a valuable service—teaching and research—that the universities rely on. They are compensated for their work, and pay taxes on their wages.

And finally, universities control their work in the classroom and the lab. Some would like to say that there are too many unknowns to allow TAs and RAs the freedom to form unions. But the reputation of the fine graduate programs at the University of California Berkeley, Michigan, Wisconsin and other schools provide evidence.

My own alma mater, I am proud to say, Berkeley, has more top-ranked Ph.D. programs than any other university in the country public or private. And that has not changed since we first organized our union a little over 10 years ago. Additionally, the concerns about academic judgment, as well, can be relatively easily addressed.

Article 22 of the contract between NYU and the UAW stated this is the only contract that existed in a private university. Decisions regarding who is taught, what is taught, how it is taught and who does the teaching involve an academic judgment, and shall be made solely at the discretion of the university.

Some of our opponents would like to portray union activists in these campaigns as insensitive to the special characteristics of universities. Let me close by saying that the people who form these kinds of unions have deep and lasting commitments to higher education. In fact, Biddy Martin and Robert Holub, the presidents of the University of Wisconsin and the University of Massachusetts at Amherst, were both early members of the Teaching Assistants Association, the Union for Teaching Assistants at the University of Wisconsin.

And with that, I close. And thank you very much.

[The statement of Mr. Sweeney follows:]



**Prepared Statement of Christian Sweeney, Deputy Director,  
Organizing Department, AFL-CIO**

My name is Christian Sweeney and I serve as the Deputy Director of the Organizing Department of the AFL-CIO. I am grateful for the opportunity to address this hearing because, while I have assisted workers from many different industries in organizing unions, my own roots in the labor movement are in higher education. I helped to organize a union at my own university, the University of California, Berkeley when I was working as a teaching assistant and an instructor while I pursued a Ph.D. in history. When I arrived at Berkeley in the late 1990's, TAs were making about \$12,000 a year. Many of us faced heavy workloads—teaching classes, grading papers, running labs—and lacked an effective means to address this issue. Many TAs had serious concerns about gaps in coverage in the university's health insurance system. Family healthcare was impossible to afford for many student employees with children. At the same time, the overwhelming majority of us were incredibly grateful to be studying and working at such a fine institution. Our problem wasn't with issues that we faced as students. The quality of the faculty, labs, and library were all excellent. And we were sensitive to the university's budget challenges. We just wanted a way to sit down and have a serious conversation about the issues we faced as university employees with the people who established our terms and conditions of employment. Over the course of several years, we built majority support for our union and eventually won eight union representation elections on each of the University of California campuses. During the first contract negotiations, I served as the President of our newly constituted local union. When we sat down to bargain, we based many of our contract proposals on best practices that existed within the university system itself, but were not universally implemented. Ultimately, we reached an agreement with the university that addressed many of the concerns we had about our rights as employees, increased wages, and guaranteed healthcare for the first time.

The conditions that I faced as a teaching assistant were not unique to the University of California. Today, over 100,000 people are employed as teaching assistants and thousands more as research assistants at public and private universities across the United States. TAs make up about 20% of the instructional workforce in higher education, and many rely on this employment as they pursue advanced degrees in their fields of academic study.<sup>1</sup> Faced with low pay for teaching, many work additional jobs and rely on loans to make ends meet. In my years as an organizer assisting workers on campuses throughout the country, I have heard remarkable stories about the conditions these workers face. One TA at a private university here in Washington told me about how he severely injured his knee but could not afford the university's health insurance or the surgery to repair it. On another campus, I heard complaints from a graduate student employee of sexual harassment that she dared not raise for fear of reprisals. She would have preferred to deal with the problem through a quick union grievance procedure rather than pursue slower, more public legal remedies. Research assistants face very real workplace issues in labs. Researchers regularly deal with carcinogens, radioactive materials, and extreme fire hazards. In the last few years, for example, fire claimed the life of a researcher at UCLA.<sup>2</sup>

The notion that the NLRB or "Big Labor" is somehow pushing its way in the academia is misguided. In fact, the opposite is true. Workers in academia are reaching out to unions in large numbers. There was a wave of clerical workers and service and maintenance workers who organized on campuses in the 1970's and 1980's. Today, we are seeing sustained interest in organizing on the part of college and university teachers and researchers. In the twelve years that I have been an elected leader, and subsequently a union staff person, I have worked on twelve union representation elections that resulted in over 20,000 employees obtaining representation in colleges and universities. Every single one of those 12 organizing campaigns was started because workers in those institutions reached out to the union for help in organizing. Workers ultimately voted for collective bargaining in eleven of the twelve elections. I am a good organizer, but I am not that good. The reason for this outcome is that thousands of workers in higher education have very real workplace concerns that they want to address through the democratic process of collective bargaining.

In considering who has initiated organizing on college and university campuses and whether real workplace concerns are moving employees there to organize, it is

<sup>1</sup> Brown University, 342 NLRB 483 (2004).

<sup>2</sup> <http://latimesblogs.latimes.com/lanow/2012/09/ucla-professor-arraigned-on-charges-in-fatal-2008-lab-fire.html>.

worth bearing in mind that this is a well-informed workforce with considerable access to information. The faculty and graduate assistants who have organized and considered their employment conditions, made a considered and informed decision to engage in collective bargaining.

While there has been an upsurge in interest in organizing among university employees, collective bargaining in higher education is nothing new. The NLRB asserted jurisdiction over private, non-profit universities forty years ago in *Cornell University*, 183 NLRB 329 (1971). Soon thereafter the Board approved units of faculty members and it has continued to do so continuously since that time. See *New York University* (“NYU”), 332 NLRB 1205, 1208 (2000) (citing cases). In 1999, the Board held that medical interns and residents were employees protected by the Act. *Boston Medical Center*, 330 NLRB 152 (1999). In so holding, the Board squarely rejected the argument that “granting employee status to employees who are also students would improperly permit intrusion by collective bargaining into areas of academic freedom.” NYU, 332 NLRB at 1208. A year later, the Board unanimously applied its holding concerning interns and residents to graduate assistants at New York University. Collective bargaining by graduate assistants has an even longer history in the public sector, dating back to 1969 at the University of Wisconsin. See *Brown University*, 342 NLRB 483, 493 n. 1 (2004) (Members Liebman and Walsh dissenting). As Board Member Liebman and Walsh observed in 2004, “Collective bargaining by graduate student employees is increasingly a fact of American University life. Graduate student unions have been recognized at campuses from coast to coast, from the State University of New York to the University of California.” Id. at 493.

#### A. *Why Do Workers In Higher Education Want To Form And Join Unions?*

University and college employees, especially teachers and researchers, want to form unions because they need to protect their interests as employees. There was time when getting a Ph.D. meant a secure future as a faculty member. In 1970, 68 percent of new Ph.D.’s found full-time tenure track jobs. By the 1980’s that was down to 51 percent.<sup>3</sup> Looking at the issue from the perspective of the percentage of total instructional staff, in 1975, 55.4 percent of instructional staff was full-time tenure track and full-time non-tenure track. By 2009, that number had shrunk to 39.5 percent and a mere 24.4 percent of faculties were tenure track faculty, the faculty with the most institutional stability.<sup>4</sup>

As public funding for higher education has decreased, both public and private institutions have come to rely increasingly on teachers and researchers employed on a part-time and contingent basis who can be hired relatively inexpensively. While this trend is well-known in the humanities and social sciences, the sciences and engineering are also more heavily relying on contingent researchers. In the past, some new Ph.D.’s commonly worked as postdoctoral researchers for a year or two before landing a faculty position. Today, that has changed. It is now expected that almost all science and engineering Ph.D.’s will spend five or more years in low paying “post doc” positions.<sup>5</sup> In the last decade, thousands of postdoctoral researchers have organized unions in California, New Jersey, and Massachusetts.

#### B. *Teaching and Research Assistants*

Teaching and research assistants have been at the forefront of union organizing in higher education for some time. TA and RA unions have become increasingly common since they first began in the late 1960’s. There is a new wave of organizing happening today, but many of our best public research universities—Wisconsin, Michigan, Oregon, Washington, the UC schools—have been organized for some time. The real intrusion into higher education by the NLRB came in 2004 when the Bush NLRB stripped the right to form a union under the federal law from TAs and RAs at private universities.

Despite the extended experience with collective bargaining in higher education, which is devoid of any evidence of interference with the mission of colleges and universities, in 2004, the Board abruptly reversed course and denied graduate assistants the protections of the Act. *Brown University*, 342 NLRB 483 (2004). In dissent, Members Liebman and Walsh described the majority’s “troubling lack of interest in empirical evidence.” Id. at 493. By 2004, that empirical evidence consisted not only of a bargaining history at more than 20 universities, but studies demonstrating “that collective bargaining has not harmed mentoring relationships between faculty

<sup>3</sup>Joe Berry, *Reclaiming the Ivory Tower* (Monthly Review Press, 2005) at p. 5.

<sup>4</sup><http://www.aaup.org/NR/rdonlyres/7C3039DD-EF79-4E75-A20D-6F75BA01BE84/0/Trends.pdf>, U.S. Department of Education, IPEDS Fall Staff Survey.

<sup>5</sup><http://the-scientist.com/2012/08/01/opinion-the-postdoc-challenge/>.

members and graduate students.” Id. at 493 n. 1, 499. The Board currently has pending before it another case arising out of NYU in which it has been asked to return to the position it articulated in 2000 that individuals can be both students and employees covered by the Act. I believe this is a sound position.

In this regard, I would encourage those seeking to understand this issue to look at the experience in public universities. The work of teaching assistants and research assistants at public and private universities is virtually indistinguishable. Across the country, teaching assistants and research assistants teach stand-alone courses, grade papers and exams, lead discussion sections, conduct undergraduate science laboratory classes, and serve as front-line researchers in nearly every university research laboratory. Both public and private universities rely heavily on their work. At Columbia University, when TAs organized around 2000, more than half of the courses in the core curriculum were taught by TAs. Similarly, at the University of California, about 60 percent of classroom instruction is provided by TAs. It is worth noting that UC Berkeley has more top-ranked graduate programs than any other university.<sup>6</sup> Likewise, other universities with union TAs, like the Universities of Wisconsin and Michigan, have more than their share of the very best Ph.D. programs. But you need not rely solely on rankings of graduate programs. Peer reviewed research has also demonstrated that an overwhelming majority of faculty believe that collective bargaining by TAs and RAs has a positive or neutral effect on mentor-mentee relationships.<sup>7</sup>

Concerns over the impact of collective bargaining on the educational mission of universities are not well founded. At NYU, the only private university ever to have had a contract for TAs and RAs, the union and the university reached an agreement to allay the administration’s concerns about collective bargaining’s intrusion into matters of academic judgment. Article XXII of the contract states, “[d]ecisions 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.”<sup>8</sup>

### *C. Faculty and Issues Arising Under the National Labor Relations Act*

In addition to the status of teaching and research assistants, the NLRB has also repeatedly considered two other issues related to the application of the Act to faculty.

First, in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court held that the implied exemption from NLRA coverage for so-called managerial employees applies as well to college faculty members to the extent that the faculty exercises managerial authority. The Court held that the exemption covered the faculty members at Yeshiva, because their authority over University academic policy was nearly absolute. In the thirty-plus years since Yeshiva was decided, the Board has decided numerous cases involving the managerial status of college faculty members, sometimes finding that the faculty members have sufficient authority to be excluded from NLRA coverage, sometimes finding that they do not. But I submit that as the Sixth Circuit stated in a case interpreting Yeshiva, “[T]he [managerial] exception must be narrowly construed to avoid conflict with the broad language of the Act, which covers ‘any employee,’ including professional employees.” *Kendall Memorial School v. NLRB*, 866 F.2d 157, 160 (6th Cir. 1989). As the NLRB has noted, an overly broad application of the managerial exception can result in the exclusion of an entire class of professional employees from the coverage of the NLRA. *University of Great Falls*, 325 NLRB 83, 93 (1997), *aff’d*, 331 NLRB 1663 (2000), *reversed on other grounds*, 278 F.3d 1335 (D.C. Cir. 2002). This is consistent with the Yeshiva majority’s assertion that “[w]e certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress’ expressed intent to protect them.” 444 U.S. at 690.

Some critics have also expressed concern about the impact of faculty collective bargaining on academic freedom. This issue is perhaps best answered by the American Association of University Professors, which actively defends academic freedom.

The basic purposes of the American Association of University Professors are to protect academic freedom, to establish and strengthen institutions of faculty governance, to provide fair procedures for resolving grievances, to promote the economic well-being of faculty and other academic professionals, and to advance the interests

<sup>6</sup>In the latest National Research Council study, Berkeley had the highest number of top-ranked doctoral programs in the nation, based on a regression analysis involving 20 criteria from more than 5,000 programs at 212 institutions. <http://grad.berkeley.edu/admissions/#1> (September 9, 2012).

<sup>7</sup>“9 of 10 Professors Say Grad-Student Unions Don’t Strain Advisor-Advisee Ties,” *The Chronicle of Higher Education*, November 1999.

<sup>8</sup><http://www.2110uaw.org/gsoc/NYU-2110-contract.pdf>.

of higher education. Collective bargaining is an effective instrument for achieving these objectives.<sup>9</sup>

The D.C. Circuit has recently called upon the Board to more fully explain its analysis under *Yeshiva*. The Board is undertaking to do that in Point Park University, which is on remand from the D.C. Circuit, and has called for amicus briefs advising it on that matter.

Second, in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court created an implied exemption from NLRA coverage for primary and secondary school teachers at religious schools in order to avoid a serious constitutional question under the First Amendment. The Court did so on the grounds that teaching at that level would inevitably involve some degree of religious instruction, no matter what formal subject matter was being taught. The Board has extended Catholic Bishop to exempt certain college teachers. The District of Columbia Circuit Court of Appeals has questioned whether the Board's method of determining a college's religious nature unduly intrudes upon the college's right to freely exercise its religion. The Board has several cases pending in which it should be able to articulate an application of the Catholic Bishop consistent with the D.C. Circuit's understanding of Catholic Bishop.

#### *D. Conclusion*

In the last thirty years American higher education has changed, among the greatest of those changes has been the use of contingent instructional and research staff. No one should be surprised that the employees most impacted by those changes are coming together through the democratic process of collective bargaining to make their votes heard. Adjunct faculty, many of whom are paid as little as \$1,500 for a teaching a semester-long course, and graduate student employees are an inexpensive way for many universities and colleges to close their budget gaps. All these workers are asking for is a method to have some small measure of say in their work lives. That is a right which we afford to almost every private sector employee and universities have not made the case for why they deserve a special exception. Collective bargaining is a democratic and rational process that allows management and workers to find common ground to make their workplaces better. By its very definition it is flexible and there is no reason why workers including teachers and researchers should be denied the right to participate in collective bargaining.

Chairman ROE. Thank you, Mr. Sweeney.  
Mr. Hunter?

#### **STATEMENT OF WALTER HUNTER, SHAREHOLDER, LITTLER MENDELSON, P.C.**

Mr. HUNTER. Chairman Roe, Chairwoman Foxx, Ranking Member Andrews, thank you very much for having me here to testify. It is a great honor.

My name is Walter Hunter. I am a shareholder in the law firm of Littler Mendelson and co-chair of Littler's higher education practice group. The views that I express today are my own, but are based on 30 years' of experience in labor relations; 22 as a labor attorney in private practice, and 8 as Brown University's former vice president of administration.

I am not appearing today on behalf of Brown or Littler or any client or any organization. First, let me say that I am confident you will agree with me that higher education in America is a national treasure. This noble enterprise promotes learning, supports research and inspires creativity in ways that are the envy of the world.

In the field of labor law, higher ed is also quite different from private industry. Although you can expect colleges and universities to fiercely protect academic freedom, teaching, learning and re-

<sup>9</sup> <http://www.aaup.org/AAUP/pubsres/policydocs/contents/statementcolbargaining.htm>, (September 10, 2012).

search, my experience is that colleges and universities have a very intense desire to promote positive labor relations.

Colleges and universities may disagree with the positions of organized labor on some issues, but they do so with a profound sense of appreciation for the labor movement and the collective bargaining process, where appropriate. There are a number of NLRB issues that affect higher ed that concern me, which are addressed in more detail in my written statement.

Grad student unions. As you know, in Brown University the NLRB held that graduate student assistants who perform services at the university in connection with their studies are not statutory employees within the meaning of the act. I believe that Brown was well-reasoned and correctly decided, and that overruling Brown would be a terrible mistake.

Collective bargaining is an inappropriate model to resolve broad academic issues with graduate students, such as class size, financial aid, who, what, when and where to teach or conduct research. Collective bargaining is also an inappropriate model to govern the relationship between faculty members and the students whom they mentor.

Revisiting Yeshiva. Last May, a divided NLRB invited briefs from the public on what appears to be an effort to revisit the Supreme Court's decision in Yeshiva that faculty are managerial employees. The court made poignant observations that still hold true in universities today. Faculty decide what courses will be offered, when they will be scheduled, and to whom they will be taught.

Faculty debate will determine teaching methods, grading policies, matriculation standards. And after listening to numerous other faculty responsibilities, the court went on to say, quote—"When one considers the functions of a university, it's difficult to imagine decisions more managerial than these."

I agree with the 7th Circuit Court of Appeals, which urged the NLRB to exercise caution and not interfere with the delicate balance of a college's governing structure. The court noted that private colleges are plagued with reductions in government support, spiraling costs and declining enrollments, and must rely on faculty and the collegial decision-making process to promote educational excellence within the bounds of financial resources.

Social media and other policies. Colleges and universities draft policies that promote safe, supportive, nurturing and creative environments. To promote learning and academic freedom, many college and university policies urge members of the community to treat each other with courtesy, civility and mutual respect. Some policies expressly incorporate those goals into workplace non-violence policies. Unfortunately, many of these policies would be viewed as unlawfully over-broad by the general counsel on the board.

Confidential investigations. The NLRB's recent Banner Health System case held that an employer must establish a specific, legitimate business justification for requiring employees to maintain confidentiality during internal investigations of employee complaints. This makes it more difficult for colleges and universities to create an atmosphere where students, faculty and staff feel comfortable reporting incidents of harassment and discrimination. Col-

leges and universities should be given wide berth to establish reasonable confidentiality rules here.

Quickie elections. Requiring higher ed employees to vote in a union election 10 or 18 days after a union petition has been filed is just completely inconsistent with what a university is all about. Universities are places where people make informed decisions after carefully studying the relevant facts and arguments.

Micro-bargaining units. The NLRB's Specialty Healthcare decision regarding the appropriateness of bargaining units represents a fundamental shift in what has been settled law for decades. The proliferation of micro-units could raise costs of administration, decrease efficiency, reduce effectiveness, deprive employees of an effective choice, and result in unfair and inconsistent treatment of employees.

Campus access rights. The board has issued decisions making it difficult for universities to control access rights to their campuses. Nothing is more important than the safety of students, faculty and staff, and a university should be able to set its own consistently-enforced, reasonable requirements regarding the extent to which it will make its campus accessible.

Thank you very much.

[The statement of Mr. Hunter follows:]

**Prepared Statement of Walter C. Hunter, Esq., Shareholder,  
Littler Mendelson, P.C.**

I wish to thank Committee Chairman Kline, Committee Ranking Member Miller, Subcommittee Chairwoman Fox, Subcommittee Chairman Roe, Ranking Subcommittee Members Hinojosa and Andrews and Members of this Committee for inviting me to testify before you on this important topic. It is a great honor and privilege to appear before you today.

My name is Walter Hunter. I am a Shareholder in the law firm of Littler Mendelson, P.C. and co-chair of Littler's higher education practice group. With over 900 attorneys, Littler is the largest law firm in the world dedicated exclusively to the practice of labor and employment law. The views I express to you here today are my own. They are based on thirty years of experience in labor relations—22 as an attorney in private practice representing employers in many industries, and eight years as an executive—Brown University's Vice President of Administration from 2000-2008. I am not, however, appearing here today on behalf of Brown, Littler Mendelson, any client or any organization.

As a labor lawyer with the unique perspective of having been a former VP of Administration, I would like to share some of my views regarding NLRB issues that may particularly affect higher ed.

First, I am confident that you will agree with me that higher education in America is a national treasure. This noble enterprise promotes learning, supports research and inspires creativity in ways that are the envy of the world.

In the field of private sector labor law, higher ed is also quite different from private industry. Although you can expect colleges and universities to fiercely protect academic freedom, teaching, learning and research, my experience is that colleges and universities have a very intense desire to be leaders in the promotion of positive labor relations. After all, colleges and universities educate the future labor leaders of the world. Colleges and universities may disagree with the positions of organized labor on some issues, but they do with a profound sense of respect for the labor movement and the value of unions to our society. They insist on advancing the cause of positive labor relations and have a deep respect for the collective bargaining process where appropriate.

There are a number of significant legal issues currently being considered by the NLRB or the General Counsel in areas that have a direct impact on private sector colleges and universities. Some of the ones that are the most concerning to me are the following:

### 1. *Grad Student Unions*

As you know, in *Brown University*,<sup>1</sup> the NLRB held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act, because they “have a primarily educational, not economic, relationship with their university.” The Board has announced its interest in revisiting this question and has invited briefs on the question of whether the Board should overrule *Brown*.

I believe *Brown* was correctly decided, and that overruling *Brown* would be a terrible mistake. In *Brown*, the Board said that: “imposing collective bargaining would have a deleterious impact on overall educational decisions \* \* \* These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants’ duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution \* \* \* Although these issues give the appearance of being terms and conditions of employment, all involve educational concerns and decisions, which are based on different, and often individualized considerations.”

This does not mean that graduate students would not have a voice, because they do. Whether it is individually, through graduate student councils or via other mechanisms for communication, the interests of grad students are robustly presented and debated inside our colleges and universities. However, for the reasons articulated by the Board in its well-reasoned decision in *Brown*, I feel strongly that collective bargaining is not the proper model to address these issues.

### 2. *Revisiting Yeshiva*

On May 22, 2012, a divided NLRB issued a Notice and Invitation to File Briefs on a number of issues related to the Supreme Court’s decision in *NLRB v. Yeshiva University*.<sup>2</sup> This invitation was issued in connection with a case that began almost ten years ago involving an effort by the Communications Workers Union to organize faculty at Point Park University.<sup>3</sup>

The Union petitioned to represent faculty at Point Park University in October, 2003. The University argued that under *Yeshiva*, its faculty members are managerial employees and therefore exempt from bargaining. The Board ruled against the University in 2005, but in August 2006 the U.S. Court of Appeals for the D.C. Circuit vacated that decision and remanded the case to the Board for a fuller analysis under *Yeshiva*.<sup>4</sup>

The D.C. Circuit remanded the case to the Board because it felt that *Yeshiva* requires a detailed analysis of the faculty members’ degree of control over academic matters, including curriculum, course schedules, teaching methods, grading policies, matriculation standards, admission standards, size of the student body, tuition to be charged, and location of the school. The Court instructed the Board to identify which of the relevant factors set forth in *Yeshiva* are significant, which are less so, and why.

Rather than limiting itself to the mandate of the D.C. Circuit and examining the relevant facts in the Point Park University case, the NLRB seems to be using this case as an opportunity to set the stage for a revisit of *Yeshiva* itself. I believe that *Yeshiva* was properly decided. The Court clearly understood that not every university is the same, and the decision wisely left enough room for the Board to conclude that faculty at some universities do not meet the managerial standard. There is no reason to revisit the principles announced in *Yeshiva*, however, because those principles have not changed over time.

The Supreme Court recognizes that higher education is unique. The Court explained that “the ‘business’ of a university is education, and its vitality ultimately must depend upon academic policies that largely are formulated and generally are implemented by faculty governance decisions.”<sup>5</sup> “The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry.”<sup>6</sup> The Court observed that “in contrast, authority in the typical ‘mature’ private university is divided between a central administration and one or more collegial bodies.”<sup>7</sup>

The Court made poignant observations in *Yeshiva* which still hold true at universities today:

They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions

more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served. \* \* \* The problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy.<sup>8</sup>

To the extent that a factual inquiry reveals that a particular university operates on a completely different model under which faculty do not participate in such governance, Yeshiva allows for that factual inquiry to yield a different result. However, my experience is that the fundamentals described in Yeshiva are still true today. No revisit of Yeshiva by the Board is necessary or appropriate.

It is also instructive to consider the wise counsel of the Seventh Circuit Court of Appeals in *NLRB v. Lewis University*.<sup>9</sup> The Court decisively rejected the argument that the faculty's decisions were merely exercises of their independent professional judgment rather than as managers. The court urged the NLRB to exercise caution in applying the managerial analysis so as not to interfere in the delicate balance of a college's governing structure. The court noted that private colleges are plagued with reductions in government support, spiraling costs and declining enrollments, and must rely on faculty and the collegial decision-making process to produce educational excellence within the bounds of limited financial resources.<sup>10</sup> I agree.

Many of those outside of higher ed fail to appreciate, or even fail to respect the unique ways in which our colleges and universities govern themselves. But this system of governance, unusual as it is, has created the most amazing system of education in the world.

### 3. Social Media and Other Policies

The NLRB and the General Counsel's office have become very active with respect to the interplay between communications through social media and the Section 7 rights of employees. The NLRB's Office of the General Counsel has been particularly active in its efforts to mold policy in this area.<sup>11</sup> I have significant concerns over what the impact of future decisions in this area might have on colleges and universities with respect to issues of safety and the maintenance of a climate conducive to learning.

Colleges and universities treasure their environments. They work hard to foster environments that are safe, collegial, engaging and respectful. They publish policies that urge members of the community to behave in a manner that engenders mutual respect, and treat each other with courtesy and civility. Recognizing the incidence of violence in the workplace, some policies expressly incorporate the goals of civility, respect and integrity in their workplace non-violence policies.

The Office of General Counsel Memorandum Number OM 12-59 examined a number of social media policies, explaining why the felt certain policies were unlawful. Some of the results are surprising, even disturbing. For example, the Memorandum states that the Office found unlawful an employer's instruction that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline." The rationale for the Office's position was that the prohibition was ambiguous as to its application of Section 7. It believes an employee might believe that the policy prohibits criticisms of labor policies or treatment of employees.<sup>12</sup>

The Memorandum goes on to explain what employers would have to do to promulgate policies satisfying the General Counsel's view of the legal requirements. I believe universities and colleges would find the instructions confusing. More importantly, I believe the focus here is misplaced. Colleges and universities should be able to exercise their judgment on how best to promote a safe, supportive, nurturing, creative environment by publishing policies that promote these important values. These policies do not chill Section 7 activity, and colleges and universities would not use them to punish Section 7 activity.

### 4. Confidential Investigations

On July 30, 2012, in a ruling that affects both union and non-union employers, the National Labor Relations Board held that an employer must establish a specific legitimate business justification for requiring employees to maintain confidentiality during internal investigations of employee complaints. In *Banner Health System d/b/a Banner Estrella Medical Center*,<sup>13</sup> the Board, by a 2 to 1 majority, held that an employer may not maintain a blanket rule prohibiting employees from discussing ongoing investigations of employee misconduct. According to the Board, such a rule violates Section 7 of the National Labor Relations Act, which protects employees'



rights to engage in “concerted activities” for their mutual aid and protection, regardless of whether the employees belong to a union.

The facts at issue in Banner Health System are straightforward. The NLRB’s general counsel alleged that the medical center’s “Interview of Complainant Form,” which included a general instruction that employees making internal complaints not discuss their complaints with coworkers during the ensuing investigation, violated Section 8(a)(1) of the Act. The medical center’s human resources consultant did not provide employees with copies of the form during interviews, but instead used it as a guide for conducting those interviews. As such, the human resources consultant routinely—but not always—relayed the instruction to complaining employees.

The Board rejected the employer’s argument that the confidentiality instruction was necessary to protect the integrity of its investigations and found the employer’s “generalized concern” insufficient to outweigh employees’ Section 7 rights. Instead, the Board concluded, in every investigation, an employer must identify a specific need to protect witnesses, avoid spoliation of evidence or fabrication of testimony, or prevent a cover-up, before instructing employees to maintain confidentiality. Consequently, in the Board’s view, the employer’s blanket instruction violated the Act.

Colleges and universities have solemn obligations to investigate harassment and discrimination. They are required to have Title IX coordinators, and they are required to maintain policies and an atmosphere where students, faculty and staff feel comfortable reporting incidents of harassment and discrimination. I can tell you from personal experience that people reporting such activities are invariably concerned about the confidentiality of their interviews, or the confidentiality of the interviews conducted of other witnesses. Certainly, the effectiveness of an investigation itself could be compromised by an early disclosure. Colleges and universities should be able to set their own policies about how to address such confidentiality concerns consistent with their legal obligations under numerous federal laws. This can be done with appropriate recognition of the legitimate Section 7 concerns that may arise.

#### 5. Other Issues

There are several other issues before the Board that impact higher education in important ways. They include procedures for representation elections, bargaining unit composition and property access rights.

##### *a. Representation Procedures.*

When the National Labor Relations Board adopted a new rule in December 2011 modifying certain NLRB election procedures, there was substantial speculation about how these changes would be implemented, and their practical effect. There have been legal challenges to these rules, of course, and there have been announced intentions of revisiting the issue, even if the rules are ultimately struck down. The proposed rules raise many concerns, the most significant of which is the expected timeline from petition to election.

General Counsel’s Memorandum<sup>14</sup> was designed to provide detailed guidance to the NLRB’s Regional Directors, who would be responsible for implementing the new rule. Currently, the NLRB has a time target of holding an election within 42 days after a petition is filed. The General Counsel’s memorandum does not officially change this 42day time target, but the streamlined procedures would make it possible for an election to be scheduled within 18 days after the petition is filed, or even faster in some circumstances.

I believe requiring higher ed employees to vote in a union election eighteen days after a petition has been filed is completely inconsistent with what a university is all about. Universities are places where people make informed decisions after carefully studying the relevant factors and arguments involved in a thoughtful way. Whatever the purpose may be of scheduling an election eighteen days after a petition, the effect will be that employees will be less informed when they make their decision. It deprives universities of their rights to articulate their position, it deprives employees of their rights to be fully informed and deprives employees who might be opposed to the unionization effort to research the issue and discuss the same with their colleagues.

##### *b. Bargaining unit composition.*

In August of 2011, the Board issued a decision in the case Specialty Healthcare.<sup>15</sup> In that case, the Board articulated a new standard for determining the appropriateness of bargaining units of employees. Specifically, the Board stated that groups of employees who were “readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)” will be found appropriate, assuming they share a community of interest as determined using the traditional criteria. Under the new standard, such a group can only be placed in a larger

unit with which it shares a community of interest if the party seeking such placement can demonstrate that the employees in the smaller group share “an overwhelming community of interest” with the rest.<sup>16</sup>

This is one of the most significant NLRB decisions in years. It represents a fundamental shift in what has been settled law for decades and I believe could have a significant adverse impact on colleges and universities. It could raise costs of administration, decrease efficiency, reduce effectiveness and result in an unfair and inconsistent treatment of employees.

*c. Property rights*

In *The Research Foundation of the State University of New York at Buffalo*,<sup>17</sup> the Board held that an employer, who did not own its office building, violated the Act by having a union organizer arrested for entering the employer’s offices without permission. According to the Board, although non-employee organizers are not entitled to engage in organizing activity on the private property of others, an employer has no right to exclude union representatives engaged in such activity from areas in which it lacks a property interest. Because the private employer did not actually own the property (the State of New York did), it could not exclude the union organizer from its offices.

Nothing is more important than protecting the safety of students, faculty and staff. It is the issue that keeps university executives up at night. A university should be able to set its own requirements regarding the extent to which it will make its campus accessible to people from outside its community, or inside for that matter. Clearly it may not discriminate against visitors based on union affiliation, but consistently applied access rules are a fundamental university prerogative and solemn responsibility.

ENDNOTES

<sup>1</sup> 342 NLRB 483 (2004)

<sup>2</sup> 444 U.S. 672 (1980)

<sup>3</sup> Case No. 6-RC-12276.

<sup>4</sup> *Point Park Univ. v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006)

<sup>5</sup> 444 U.S. at 688

<sup>6</sup> 444 U.S. at 680

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 686, 689

<sup>9</sup> 765 F.2d 616 (7th Cir. 1985)

<sup>10</sup> *Id.* at 625

<sup>11</sup> See, NLRB Memorandum OM 12-31 (January 24, 2012), NLRB Memorandum OM 11-74 (August 18, 2011) and NLRB Memorandum OM 12-59 (May 30, 2012).

<sup>12</sup> Memorandum OM 12-59 at 8.

<sup>13</sup> 358 N.L.R.B. No. 93 (2012),

<sup>14</sup> GC 12-04

<sup>15</sup> Specialty Healthcare, 357 NLRB No. 83 (2011).

<sup>16</sup> *Id.*

<sup>17</sup> 355 NLRB No. 170 (2010)

Chairman ROE. I thank all of the witnesses for staying within the time limit. Y’all have maybe broken a record today, so thank you for that.

I am going to start by just asking a few questions. One is, I absolutely agree, Mr. Hunter, that our universities and colleges are a national treasure, no doubt about it. And I think the second thing, and I am living, breathing proof of it myself, is that an affordable college education is absolutely mandatory. And we are losing that.

We had a hearing, I guess, 5 or 6 weeks ago on the affordability of higher education. And it is becoming out of reach of even affluent families now. And young people graduate from college with hundreds of thousands of dollars in debt. And I don’t think we can be successful as a nation if we don’t address that. I think that is a basic thing that as a factory worker’s son, as I was, I got a chance to go to a good college and get a great education.

So I totally associate myself with your remarks about our higher education system now. I also think that what Mr. Andrews said to begin with was that today’s hearing—I agree jobs are important—

but I think the First Amendment and religious freedom is even more important. And liberty is more important, I think, than a job. And I think the religious colleges need to have that flexibility.

And I go back to the Catholic Bishop. And I am not a lawyer either, Dr. Weber, so I had a little problem wading through all this also. But I think the court did something really smart there, was that they said we don't want to get into making that definition. And later, a very clear definition was laid down about what a religious institution is.

You only know how religious you are by what is in your heart, and it is difficult to put a standard out there. But I thought the court did a pretty good job. And would you comment on that? And I think they were clear to stay out of that, and to not get into that.

Mr. MORELAND. I agree, Chairman Roe. The problem that the board has gotten itself into is that by imposing this substantial religious character test it requires that the board comb through the school's curriculum and see how religious the students are and what kind of theology requirements the school has.

And the D.C. Circuit has continually rebuffed the board, appropriately so, in saying that if the school holds itself out as religious, is a non-profit, and is affiliated with a recognized religious institution that should be sufficient for purposes of an exemption under the First Amendment. I think that is the Constitutionally-required and appropriate test.

Chairman ROE. And didn't the court also say—my son is a Methodist, but he went to a Catholic school in Chicago, DePaul University—that doesn't make it any less Catholic because he was a Methodist and because maybe someone secular went there? Am I also correct on that?

Mr. MORELAND. I agree. As I pointed out, it is ironic that Catholic schools, by admitting non-Catholics giving access to education, especially in urban areas, to a lot of people who wouldn't otherwise have a college education are now being subject to board jurisdiction for the sake of the board saying that they are not religious enough.

Chairman ROE. I think the other, it was difficult to deal with. But whether a faculty was managerial, or not. And I think the faculty—and, Dr. Weber, I want you to comment on this, on the academic excellence of a university—the faculty has to decide that. So in that way, they are managerial.

And you have to determine what is excellent in your chemistry department. Or now, as you are the dean of all graduate studies that faculty member has to do that in cooperation with the other faculty members. Am I correct?

Mr. WEBER. Yes, absolutely. The faculty that lead the various graduate programs are determining the standards for the academic programs, and so they are certainly in charge of setting the academic guidelines. As a dean of the graduate school, I always defer to the individual programs about the academic content of their program.

Chairman ROE. And I think one of the other things, as a medical student and as a resident and getting a postdoctorate degree, I would have liked to have had more say in—what my grades were. Unfortunately, my professors got to decide that.

I think micro-unions concern me, too, in a university. And if one of you all—Mr. Hunter or whomever, Mr. Sweeney—want to touch this, it doesn't matter. But I think that has a great effect on how a university could function, again because I think it forces the cost up. And we are in a situation now where we can't have the costs go any higher than it currently is.

And I know I looked at myself, until I finished all of my training, as a student. I didn't feel like I was an employee of anyone. And I chose to stay at a hospital that paid me less than half of what the hospital would across the street, working a lot more hours, because I thought my education would be better. I was willing to make that sacrifice. And that is what people do at fine universities, I think.

Mr. HUNTER. Well, on the issue of Specialty Healthcare, I really do think that is a major shift on what has been settled law for decades. So what would the bargaining unit look like, for example, involving graduate students? Would it be humanities versus sciences? Would it be faculty working in Smith Hall? Would it be French versus German?

You could have four different unions representing four different units. You could have one union representing six different units. And so what happens when you try to administer all those different contracts? I mean, we have a number of clients who have multiple employees with responsibility for administering labor contracts. Because it takes more than one when you have got four or five different units.

You might have multiple payrolls to administer. If a university has to administer several payrolls and several different types of employee benefit programs, even the software that you purchase in order to handle that can be immensely more expensive when you have various bargaining units and various benefit programs, as opposed to something that is more centralized.

Chairman ROE. Ultimately, students pay. I will gavel myself down.

And now I yield to Mr. Andrews.

Mr. ANDREWS. Thank you. I thank the witnesses for their testimony.

Dr. Weber, you indicate that if graduate students engage in collective bargaining that it could wreak havoc with academic freedom. There are several dozen universities in America at which graduate students are organized into unions, we have heard Mr. Sweeney say.

Are you, or any other panel members, aware of specific instances at those universities where academic freedom has been impaired?

Mr. WEBER. As you know, the public universities have bargaining units that are well-defined by state laws. And it is my understanding that the NLRB would fold this wide open if private universities were to unionize. And so—

Mr. ANDREWS. But I am asking a different question. I am asking, at places where there is collective bargaining for graduate students, are you aware or is any other panelist aware of instances where academic freedom has been impaired?

Mr. WEBER. Let me read to you—give me a second—a colleague who, before coming to Brown University, had been at a university

where there was unionization. And so she wrote me this e-mail, and I read that to you. And I am kind of taking parts.

She writes, "As a stone liberal, I am usually very pro union. But I am firmly in the camp that graduate students are not employees." Again, this is a professor who has been at both places. "Unionization can change the dynamics of relationships between grads and professors, especially those faculty in administrative positions."

"Lines at least temporarily get drawn and become adversarial. Protests, or strikes, which happened at least once while I was there, were stressful and disruptive."

Mr. ANDREWS. Okay. That is the response to my question. There is one. Are there any others that you have?

Mr. WEBER. This is a long e-mail. Another fissure that can develop is between graduate and undergrad—

Mr. ANDREWS. Well, that is one person giving another reason. If the standard is going to be faculty opinions, hasn't the AAUP, the American Association of University Professors, who speaks for these professors, endorsed the idea of collective bargaining for graduate students?

Do you think that their position represents the majority, or the minority?

Mr. WEBER. I cannot speak for every university. I am dean at Brown University and I speak for Brown University, and I am confident that many of our sister institutions are quite like it. At universities like Brown, students are clearly students and they are treated as such.

Mr. ANDREWS. No, I appreciate that is your opinion. I respect it. But how about this? That when it comes to the quality of a graduate program, Mr. Sweeney testified that peer reviews of the graduate programs at Berkeley, for example, which is unionized, have scored very, very high, as is the case with other of the UC systems, Wisconsin and others.

How is that these universities have scored high in the peer review rankings of graduate programs if there is this terrible corrupting effect of unionization of graduate students? How did that happen?

Mr. WEBER. I think the, well, first law—state laws curtail the scope of the bargaining at a public institution, which is one difference. And so we are looking here at the NLRB considering private universities. So I don't think it is valid to look at a public institution. I should—

Mr. ANDREWS. But your comments were really directed to collective bargaining, not to particular law. Tell me why collective bargaining hasn't corrupted and ruined those graduate programs that are so highly rated that Mr. Sweeney talked about.

Mr. WEBER. You need to understand that the reputation of universities is built over many decades.

Mr. ANDREWS. Mm-hmm.

Mr. WEBER. The faculty that our universities are faculty that have joined the university over many decades. The time constant for change in graduate education is not immediate. And so the rankings that Mr. Sweeney refers to are probably the rankings of the NRC, which were data that was collected between 2001 and 2006. Some of that data goes back to the early 1980s.

Mr. ANDREWS. Is there any evidence that since 2006 the reputation of the universities Mr. Sweeney cited has been downgraded? Any evidence of that at all?

Mr. WEBER. The NRC has not redone the ranking since then. I would also argue that——

Mr. ANDREWS. Could I just give Mr. Sweeney a chance? You have actually done this, and been a graduate student. Have you ever witnessed an impairment of academic freedom at any university that has collective bargaining?

Mr. SWEENEY. No. And, in fact, I see it as an aid, as the AAUP does. The AAUP, you know, supports collective bargaining broadly in higher education, and is also, you know, one of the premier organizations defending academic freedom.

If anything, in my experience it has been the case that a contract actually insulates the mentor/mentee relationship, and provides a little more security.

Mr. ANDREWS. Such as the NYU contract that you read from.

Mr. SWEENEY. I agree completely. The——

Mr. ANDREWS. Thank you very much. My time has expired.

Chairman ROE. I thank the gentleman for yielding.

Dr. Foxx?

Mrs. FOXX. Thank you, Mr. Chairman. I would also like to add to my opening comments my concern about the attack on religious freedom. I do believe I mentioned that Mr. Andrews said at the beginning that maybe this wasn't the most important thing that we could be doing.

But I want to associate myself with the comments that the chairman made that protecting religious freedom—which is the first part of our First Amendment to the Constitution, and it is no accident that it is in that place—is probably the most important thing we could be doing in this Congress.

And so I am very pleased that that is a part of the issues that we are dealing with today. And I particularly appreciate Dr. Moreland's presentation in that regard. I would like to come back to Dean Weber for a moment. And I want to thank you again for your very good responses to the questions that you have been asked.

And I want to say to you, if you would like to put into the hearing today the e-mail that you were referring to, you are welcome to do that. None of us would insist that you do that, but if you would like to you are welcome to share that.

Does Brown pay its graduate assistants, Dr. Weber?

Mr. WEBER. Does Brown pay its graduate—excuse me, like——

Mrs. FOXX. Are they compensated as graduate assistants?

Mr. WEBER. So all our doctoral students receive full tuition. They receive health insurance. They receive the health fees, and they receive 5 years of a stipend. It is a generous stipend; it is currently at a minimum of \$24,000 per year. And that is for all our graduate students, all our Ph.D. students regardless of discipline.

So yes, they do. And full tuition at Brown.

Mrs. FOXX. And is this given to them? Is it considered financial aid?

Mr. WEBER. Absolutely. This is financial aid to the students. This is not compensation for work. This is financial aid.

Mrs. FOXX. Are some of your graduate students teaching assistants and some not teaching assistants?

Mr. WEBER. Yes, absolutely. We always have a fairly large number of students who are appointed otherwise. So we have a number of teaching assistants, but many students are not. Let me give you an indication. A typical graduate student in history, for example, would come in, first year, have a fellowship.

Then be a teaching assistant for 3 years. And the fifth year would be a fellowship again. In the fellowship years, the student is pursuing courses and studying, pursuing research, writing the dissertation.

Mrs. FOXX. And I would assume you probably have some who are research assistants, as well as teaching. Or, I don't mean in addition to. But some are research assistants?

Mr. WEBER. Absolutely.

Mrs. FOXX. And some are teaching assistants?

Mr. WEBER. Absolutely.

Mrs. FOXX. Okay. Trying to remember my days as a graduate student.

So you consider the relationship with the graduate students at Brown an educational relationship as opposed to an economic or an employee relationship.

Mr. WEBER. Yes, absolutely.

Mrs. FOXX. Okay, terrific.

Dean Moreland, I wonder if you would describe the relationship that you have with employees or with graduate assistants at your school. Do you consider that relationship to be confrontational, or to be one of a mentor/mentee, or an associational relationship?

Mr. MORELAND. Well, I am vice-dean of a law school, which is, as you know, a little different in terms of graduate assistants and the like that Dr. Weber is involved with. But to the larger point, I obviously don't speak on behalf of Catholic higher education across the country. But I think it is fair to say that Catholic universities do try to have, and strive very much for a cooperative relationship.

And we take things like community very seriously at places like Villanova. And I think one of the dangers of board oversight that schools have pointed to is that it injects a confrontational relationship between faculty, adjunct faculty, and the administration that is of grave concern to Catholic institutions which otherwise would not welcome.

Mrs. FOXX. Thank you, Mr. Chairman.

Chairman ROE. Thank you for yielding.

Mr. Kildee?

Mr. KILDEE. Thank you, Mr. Chairman.

You know, work is work and compensation is compensation. And when there is a difference of view on that very often collective bargaining is a very good way of resolving that. My dad did that in 1936 and 1937 when the sit-down strike took place in Flint, Michigan.

By the way, Mr. Sweeney, my grandmother was a Sweeney. And John Sweeney and I used to call each other cousin. But I taught in a Catholic school. Loved the priests, loved the school, am grateful to them, always will be grateful to them.

But at the same time, when I first started teaching I was told the 5-hour day, taught five classes, Latin classes. And then the second year, I was called in by a priest whom I have great respect for. But he said, "You know, maybe we didn't tell you last year, but this is really a 6-hour school. And you are going to teach a sixth hour this coming year, called remedial Latin."

That was for those who were flunking Latin in our regular class, so it was a difficult class. And I had no recourse. And I was happy to have the job. But you can see situations like that arise. Would you like to make any comment on that? I really had no choice. I am still grateful to them, but that was another hour of my day that I had to be teaching.

Mr. Sweeney?

Mr. SWEENEY. Before I went to graduate school, I actually also taught at a Catholic high school in New York City. And so I appreciate that, your experience as a teacher in a Catholic school. And I am sensitive, of course, to the religious mission of Catholic higher education.

In my experience, collective bargaining isn't anathema to these other relationships. As workers and managers, there are always relationships. Whether it is the mentor/mentee relationship, or the relationship that you might have had to the priest who was running the school where you taught.

And, in fact, collective bargaining if the rules are spelled out clearly and the responsibilities of workers and management are spelled out clearly, can actually protect those other important relationships from anxiety, from problems. You know, it is a problem when your mentor can determine whether or not you can pay your rent or what kind of health insurance you are going to have or, you know, those sorts of issues.

If you insulate those economic issues from these other ones, you protect the incredibly important other relationships that exist in the workplace.

Mr. KILDEE. You know, I think what I know now—and having spent 36 years here in Congress—that I certainly probably would have said no, I am not going to teach that sixth hour. I don't know. I was pretty hungry in those days. But you know, I probably would have reminded them of Pius XI's *Quadragesimo Anno* and Leo XIII's *Rerum Novarum*, right, which really outlines the bargaining rights of all workers.

And I am just thinking about that. I again want to go back and say I am grateful for the situation I had there, but still at the same time realize that people have to be reminded that there are certain rights you have to defend. And collective bargaining is a great way to defend those rights.

That is just my comment for the day, and thank you, Mr. Sweeney.

Mr. SWEENEY. I wholeheartedly agree. And going back to the mentor/mentee relationship, to pick up on something that Mr. Andrews said earlier that has been echoed by Chairwoman Foxx and Chairman Roe about the importance of preserving what is great about higher education in America.

You know, there are peer review studies. You know, both rankings of graduate programs, there are wonderful graduate pro-



grams at the universities represented here. But there are also peer reviewed studies about what, in fact, faculty members at schools that have unions for teaching assistants and research assistants say about that.

And there is actually some research going on right now at Rutgers that is going to update those studies. But the ones that exist say that nine out of ten faculty members who were surveyed on this question said that the relationships were neutral or positive in the union context.

So just saying that there is real evidence that we can know that says the sky isn't falling

Mr. KILDEE. Thank you very much.

And thank you, Mr. Chairman.

Chairman ROE. I thank the gentleman for yielding.

Mr. Walberg?

Mr. WALBERG. Thank you, Mr. Chairman. Thanks to the panel for your insights and for being with us today.

Mr. Moreland, in your testimony in discussion of the substantial religious character test, and how the NLRB chose to disregard 30-plus years of court precedent in the cases of the three religious universities. Could you go into a little further detail of what process they went through, if that was evident in any way, in dealing with the question of religious enough and what that looks like?

What did that process look like? What aspects of the school's religious nature did they consider, or do they consider now as they move forward? And how did they arrive at that decision?

Mr. MORELAND. What the regional officer does—and this is shown, for instance, in appendices to some of these circuit court cases that have come down the last several years—is inquire about the nature of the curriculum, about whether students of only that faith are admitted, the extent of the theology requirement, things like that.

And as Judge Breyer, in the 1st Circuit case I quoted from, in 1986, and as D.C. Circuit cases have held continuously, it is precisely that kind of inquiry, that kind of combing through a university's mission to figure out whether it is substantially religious enough. That it is precisely that inquiry that the NLRB or any government agency has neither the legitimacy nor the competency to undertake.

Mr. WALBERG. So really it is not so much a process as just simply a philosophical look at trying to find ways to assure themselves that this is not just simply a religious institution, a religious liberty case. And so for the purposes of change agency or what have you, they will make that decision arbitrary and disregard case law in the process.

Mr. MORELAND. That is certainly the concern, and has been the concern with the Saint Xavier in Chicago, the Duquesne and Manhattan College cases that have come to the fore in the last year and a half or so.

Mr. WALBERG. It would certainly be my concern as a legislator that in the area of religious liberty, First Amendment freedoms and opportunity, that an outside arbitrary board is going to determine what is religious enough, and that is a precedent and maybe a precipice, even more so. There is a danger in falling over. Let me

move on. Mr. Hunter, as I understand the collective bargaining process, both parties negotiate wages, they negotiate benefits, they negotiate working conditions; all sorts of things that go into the process. There are some excellent universities in my home state of Michigan. I won't sing any fight songs right now, but some excellent schools that offer a wide range, very wide range, of graduate programs. Could a university really be expected to reach agreements tailored towards all of the requirements. And the requirements are many as far as students and what they expect needed to satisfy all conditions involved with receiving a graduate degree. Is that a doable thing? Is it possible? And what would be the size of the load that they are expected to determine in the process of making those agreements?

Mr. HUNTER. One of the things you are addressing here is, you know, what are mandatory subjects of bargaining and what would be covered at the table. One of the things that is good about the shared governance process at universities that exists where we don't have unions representing the graduate students is that everything is on the table. And you don't have to have this concern over whether there is a strike threat or some arbitration if there is a disagreement; that the shared governance process works better than the collective bargaining model.

So what would be covered in a contract? Another principle that we have to deal with if there is a union present is that if a union represents individuals, it represents employees. It is the exclusive representative with respect to all wages, hours and working conditions.

Direct dealing isn't permitted between the organization and those, quote—"employees." So, for example, in situations where you would be able to work one-on-one—a faculty member dealing with two students, a department dealing with three students—in the absence of a collective bargaining relationship that direct dealing is perfectly permissible.

In the presence of a collective bargaining——

Mr. WALBERG. And unique needs can be met with each student.

Mr. HUNTER. Needs can be met individually with each student, and address their needs as would be appropriate for the institution and those students. Now, clearly, a union can waive its right to insist that there not be direct dealing. But as a matter of law, direct dealing with students, if they were deemed to be employees, on wages, hours and working conditions wouldn't be permissible absent waiver or absent having the union involved in that discussion.

And sometimes the interests of the union might not be aligned with the interests of the people who are trying to work out a deal with their university.

Mr. WALBERG. Thank you.

Mr. SWEENEY. May I jump in on——

Mr. WALBERG. I think my time has expired.

Chairman ROE. I thank the gentleman for yielding.

Dr. Holt?

Mr. HOLT. Thank you, Mr. Chairman.

As one who greatly values America's marvelous system of higher education, and someone who has been involved in it both as student and professor, and someone who has looked intently at the

evidence of the benefits of collective bargaining, I am very interested in this personally.

I was a grad student in physics at NYU more decades ago than I would like to think. But after that time, when Yale and other places began to organize, I had a V-8 moment where I hit myself in the forehead and said, "Wow, I could have had a union." It was not because I found a malevolent environment there, as a teaching assistant. It was not that I wanted to engage in adversarial confrontational relations with the employer.

But it was simply that I thought it would be beneficial to teaching assistants such as I had been to have the university pay attention to not simply the educational well-being of the TA and grad students, but also all of those other interests and those other aspects of the work. They should have been considered and subject to review, and they were not.

So, you know, it is not, as my colleague, Mrs. Foxx, was saying, a choice between either an economic relationship or an educational relationship. And further, as someone who later served as an officer in a local chapter of the AAUP, where our paramount principle that we worked on all the time was defending academic freedom, I don't understand some of the questions or accusations that are being made here today.

Let me just—I have eaten up most of my time for questioning, so let me quickly get to a couple of points. Mr. Sweeney, is it an issue that would argue against organizing that some of the funding comes from work-study or federal grants?

Mr. SWEENEY. No, it is not. And the funding sources for how people in universities are paid come from a variety of sources; tuition, grants, et cetera. The clerical worker who works in a lab is entitled to collective bargaining. I don't think anyone is suggesting that they are not. Their funding for that position comes from various sources, as well.

Mr. HOLT. Again, Mr. Sweeney, what do decisions of the IRS about the taxability of the pay for a TA, for example, a teaching assistant, what do those decisions—how do those decisions bear on this discussion?

Mr. SWEENEY. Sure. So as was the case in my experience in California, it has been the case in the universities where I have been working as an organizer, teaching assistants—when they are paid for teaching assistant work—are subject to the IRS tax code and subject to Social Security and all the other taxes that are paid on wages. As opposed to when they are truly on a fellowship in a student role, and not providing service in return for their work.

Mr. HOLT. Mr. Andrews was asking the panelists if they could point to examples, evidence, of a deterioration in academic freedom that came in those places, now becoming many, that are organized. Let me ask for evidence of a different charge, which has to do with tuition increases. Is there evidence that tuition has gone up in those places that have been organized?

Mr. SWEENEY. Yes. So a rise in tuitions is a concern of everyone. Rising tuitions are, you know, a problem in higher education across the board, both in places where workers are organized and in places where workers are not organized. With only about 15 per-

cent union density in higher education, I think you can pretty safely say these two issues are not coupled.

Mr. HOLT. Yes. I actually have here a graph of a number of universities—Rutgers, Oregon State, Michigan, University of Rhode Island, University of Kansas, University of Illinois Chicago—that are organized, plotted by their tuition increases year by year. And they are all over the map. There is nothing to suggest—there happen to be a few that have lower tuition increases than average.

Most of them, more of them, have that. But there is nothing that suggests there is a pattern that is driving tuition up.

Mr. SWEENEY. No, no evidence that I have ever seen.

Mr. HOLT [continuing]. Organizing.

Mr. SWEENEY. Yes. Universities are complicated financial institutions.

Mr. HOLT. Well, it is a complicated question.

Mr. SWEENEY. Yes.

Mr. HOLT. And I certainly believe there is good will on both sides here.

I thank the chair.

Chairman ROE. I thank the gentleman for yielding.

Dr. Heck?

Mr. HECK. Thank you, Mr. Chairman. And thanks all the panel members for being here today.

Mr. Hunter, public institutions allow graduate students and professors to unionize under state law. Is there a difference between the law governing these institutions, such as California public universities that Mr. Sweeney mentioned, and what would be proposed, or allowed, under the NLRA?

Mr. HUNTER. Well, yes, there are a number of differences. First, typically, and under state labor relations laws, there is no right to strike. Most states prohibit individuals who are employed under their state labor laws from striking. Some states have more specific criteria what is a subject of bargaining, or not.

For example, I believe in California class size is a mandatory subject. Whereas in New York, class size is excluded. That is, there are some things that are identified by states as covered, some things that are not. But a major difference, public versus private, is the right to strike.

Mr. HECK. So while state laws may be more proscriptive, under the NLRA the doors are wide open as to what may be put onto the table in organizing at a private institution.

Mr. HUNTER. Actually, I think it can go both ways. In some cases, they will explicitly include things as covered under bargaining, and some situations they will specifically exclude it. Some states take a much harder line toward strikes in the public sector; double fines, fining the unions in those circumstances. And other states don't have those similar kinds of penalties.

Mr. HECK. You also expressed concerns over the NLRB's position on social media policies that it feels are overly broad. You expressed concerns about the impact of this on safety in the campus climate. Are there other areas where this issue could come into play that concerns you, and how about rules that regard this type of workplace conduct?

Mr. HUNTER. I think the rules in social media, and also in workplace conduct, are quite troublesome. The board, in a number of cases, has ruled that employers have had overbroad rules regarding workplace conduct. Or have reinstated people engaged in fairly outrageous workplace conduct because of the argument that it was covered—that the rule itself was overbroad.

I have seen cases, I have one right now, where an employee, in 2001, was terminated for something that could otherwise have been a terminable offense. But it was pursuant to an overbroad rule. Since he was terminated for, let us say, an appropriate reason, but pursuant to an overbroad rule, the board ordered reinstatement of that employee. The initial back pay demand in that case was \$1.6 million.

He had worked for them for 3 months, did something that he could have been terminated for. But because the rule was technically overbroad, there was an order of reinstatement. I am concerned that universities ought to be able to have broad rules that govern conduct in the workplace; promoting civility, promoting respect. And to say that a rule at a university that says we want you to treat each other with civility and respect, and try to foster a collaborative environment.

Because that, arguably, has a chilling effect on individuals who might be engaging in concerted activity, that rule itself is viewed as overbroad. And in an era when we are concerned about workplace violence, we are concerned about campus climate, when we are concerned about having an atmosphere at a university where people feel free to discuss things and do it in an open way, to not be able to have just a general rule that says we want people to treat each other with respect strikes me as something that doesn't make sense.

Mr. HECK. Thank you.

Thank you, Mr. Chairman. I yield back.

Chairman ROE. I thank the gentleman for yielding.

Ranking member of the full committee, Mr. Miller?

Mr. MILLER. Thank you very much. We have dictators that have laws that say you can't disrespect the state, and you can go to jail for life. I don't think we want to do that.

Dr. Weber, let me ask you a question. You say should Brown have to bargain over the terms and conditions of service by students who teach, research, serve as proctors. Are we to bargain about course selection, course content, course length, the number of exam papers in a course, the length of a course, the year in which a student serves as an assistant? And are we to argue over just cause for discipline imposed?

Your answer is no, right?

Mr. WEBER. I suggest we should not——

Mr. MILLER. So if you lengthen, if you double, the length of the course.

Mr. WEBER. Excuse me?

Mr. MILLER. If you double the length of the course, no bargaining? If you double the number of papers, no bargaining? If you double the exams, no bargaining? If you cut the proctorships in half, no bargaining?

Mr. WEBER. See, there is a wide spectrum of activity. So——

Mr. MILLER. I understand that. I am just asking you what happens in those instances.

Mr. WEBER. Yes, there should be no bargaining. The——

Mr. MILLER. There should be no bargaining. If you cut the course in half, if you double the assignment of the graduate student during the time that they are teaching or they are reading papers or grading exams?

Mr. WEBER. So the university has general rules that limit the——

Mr. MILLER. But I am asking, you don't want to bargain over this. What happens when you do that, and then I have other responsibilities as a graduate student?

Mr. WEBER. So as the dean of the graduate school, we have the rule that teaching assistants are not to work more than 20 hours per week.

Mr. MILLER. When you change it?

Mr. WEBER. Excuse me?

Mr. MILLER. What if you change it? Say it is 40 hours.

Mr. WEBER. No, we do not change it. So——

Mr. MILLER. No, no, no. You haven't changed it. What happens when you do change it?

Mr. WEBER. So okay, graduate school policies are decided in the graduate council at Brown University. And the graduate council——

Mr. MILLER. What happens when you change those policies arbitrarily?

Mr. WEBER. We do not change them arbitrarily.

Mr. MILLER. Oh, oh, oh. Okay. So all the reasonable people sit on that side of the table.

Mr. WEBER. Oh, no, no, no, no.

Mr. MILLER. Whoa, whoa. Wait a minute, wait a minute. You are dealing with people here who are graduate students and post-docs who have run all of the obstacles to get to that position in life. In some cases, they are working in nationally competitive labs from the National Foundation, or others.

But they would go crazy if they had a union. But you would never go crazy if you have all of the power in the administration of the graduate school.

Mr. WEBER. So again, the policies are determined by——

Mr. MILLER. No, no. I just want to know what you think about these people who you have awarded these fellowships to, who you have awarded these teaching positions to, who you have awarded the assistant positions to, to the post-docs, that somehow they can't manage the issues of just cause, or they couldn't manage the length of a course where there is another way to do it.

So only the academy knows the right way.

Mr. WEBER. No, no. Please let me explain now. The——

Mr. MILLER. You have explained it. You said it all resides there.

Mr. WEBER. No, no. What I am saying is, there are bodies in the university that take care of policies for graduate school. And these bodies——

Mr. MILLER. Yes, I understand all that.

Mr. WEBER [continuing]. Have strong——

Mr. MILLER. It just doesn't include graduate students or post-docs with any authority.

Mr. WEBER. No. That is what I was trying to say. These students are——

Mr. MILLER. The grad students have a majority on the boards?

Mr. WEBER. The graduate students are strongly represented on these bodies. So the graduate students, we have a strong graduate student governing body. They send representatives to committees at the universities that set policies for graduate education. We have student representation even on——

Mr. MILLER. Mr. Sweeney. Mr. Sweeney. Thank you.

Mr. Sweeney, I just want to know about these people that were the post-docs at UC Berkeley. In fact, we had husband and wife post-docs, and the wife at Stanford was getting the pay increase mandated by the National Science Foundation. And Berkeley was withholding it because they were going to use it to underwrite foreign students. But other than that, it was a great decision made.

Mr. Sweeney, do these people lose their minds when they get a union?

Mr. SWEENEY. No, generally it works out pretty okay.

Mr. MILLER. They have a huge stake in this system in terms of their professional success, do they not?

Mr. SWEENEY. Absolutely.

Mr. MILLER. And years of investment.

Mr. SWEENEY. Yes, certainly.

Mr. MILLER. And academic achievement.

Mr. SWEENEY. Certainly.

Mr. MILLER. And sacrifice.

Mr. SWEENEY. Yes.

Mr. MILLER. But somehow, if they got a union, they would just bring down the very institution on which their professional success ultimately is dependent.

Mr. SWEENEY. I don't believe that that would be the case. And certainly evidence shows that it is not.

Mr. MILLER. Well the evidence shows a lot of other things in terms of how arbitrary the institutions were being with these students prior to the establishment of a bargaining unit.

Mr. SWEENEY. Absolutely. Certainly in any system where power is held by one side there are going to be problems. What collective bargaining does is, it gives us a democratic way to address those issues and come to mutual agreement on both sides of the table. And that is why thousands of people want it.

Mr. MILLER. Well, the fact here is—I mean, you know, this obviously works for Brown University, and it is a great institution. But you have decided that that this is all academic, has nothing to do with being an employee. That is a little bit like Microsoft deciding all their employees were independent contractors until they were told they are not independent contractors, they are employees and you have obligations to them.

But you have arranged this in that fashion. But again, the suggestion is that all of the wisdom resides on the employer side of this academic experience. And I just think it is fraught with peril in terms of the respect and the dignity of these students who have achieved this position. And a suggestion that somehow they

wouldn't act responsibly and we couldn't deal with these issues that are part of their everyday life just doesn't hold water here.

Thank you.

Chairman ROE. Okay. I thank the gentleman for yielding.

Mrs. Roby?

Mrs. ROBY. Thank you, Mr. Chairman.

Mr. Hunter, I have a couple questions for you. Thank you all for being here today. The 2001 survey of higher education governance asked respondents, including two private faculty governance bodies, to evaluate how their powers have changed over the past two decades.

And 92 percent of private faculty governance bodies responded if they had the same or more power now. Additionally, 86 percent of respondents from private institutions felt the main representative body of faculty either implemented or made policy decisions. Almost 90 percent of faculty had determinative or joint authority with the administration on content of the curriculum.

Almost 70 percent had determinative or joint authority on faculty appointments. And 61 percent had determinative or joint authority on tenure decisions. When compared to the 1970 American Association of University Professors survey, one author found that faculty participation in governance of academic matters increased over time.

So my question to you is, do these findings weigh for or against a finding that faculty are managers under Yeshiva?

Mr. HUNTER. Well, I think they clearly weigh toward the conclusion that faculty are managerial. It also argues that there isn't a huge shift in the governance by faculty over the past decades, as has been suggested in some circles. You know, when I talk to my clients who are presidents of colleges or general counsels of colleges, what they say is that, in fact, the participation by faculty are more robust than ever.

That if you are an administrator, by the way, in a university, you know what it is like to do your job, and what it is like to do it in collaboration with faculty that have substantial input, authority, power over matters that are essentially the essence of what the university does.

The other thing about whether they are managerial or not—assuming first, with respect to those statistics that you gave, that there are other institutions where the facts went in the other direction—Yeshiva allows for factual inquiry to address that. There is no need to revisit Yeshiva. Because if they are not managerial, they are not managerial.

But the principles announced in Yeshiva still hold true. So I think the statistics that you just gave indicate that, in fact, faculty are managerial. And when you look at what they do, it is what universities do.

Mrs. ROBY. Thank you. And the NLRA protects professional employees' rights to unionize, but not managerial employees. So what is the genesis of, and rationale behind, the managerial exception?

Mr. HUNTER. The genesis of that is actually a matter of court decisions, rather than it being explicitly written into the act. But it came about as a result of board and court rulings that managerial employees, like supervisory employees, are in positions where we



shouldn't be concerned about a divided loyalty between what that individual does on behalf of the institution as opposed to what that individual might be interested in doing with respect to the union.

Mrs. ROBY. And just so we are clear, the difference between a manager and a professional employee, can you state that for the record? And are they mutually exclusive? In other words, can faculty be both professional employees and managers?

Mr. HUNTER. Absolutely. Faculty are professional, and they are also managerial. They are not mutually exclusive at all. The managerial aspect involves whether they are acting on behalf of, or in the authority of, the institution with respect to the essence of what it does. Professional employees might provide guidance, might provide information that a different body or a different organization might take into account.

But managerial employees actually do it, either jointly with other organizations or individuals within the institution. Or by themselves, on their own independent authority.

Mrs. ROBY. Thank you so much.

Mr. Chairman, I yield back.

Chairman ROE. I thank the gentlelady for yielding.

Mrs. Davis?

Mrs. DAVIS. Thank you, Mr. Chairman. I appreciate your all being here. I am sorry I missed some of that discussion.

I had a meeting recently with a number of young post-docs at one of our universities, some of our public universities. And obviously, by California law, they are covered on these issues. But I think what really impressed me was that we work so hard to have young people who are interested in stem education.

You know, we are working so hard on scientific discovery and keeping students engaged, and hoping that they are going to be able to receive an NIH grant at some point. And when you talk to these students, you know that there are many, many other things that these bright men and women can do. And yet they stay, and they work hard as a post-doc or as a teaching assistant because they really believe what they are doing.

And the one thing they know is that they could do and make a whole lot more money is in the financial system or otherwise. What they shared is that despite the fact that some people think that they shouldn't be collective bargaining or in unions, that they feel that they get support there that they don't get on their job, necessarily, because they really are toiling in many, many cases.

Could you comment on that? Because there is a value issue here in terms of what we as a society decide that we are going to support. And some of that support for a lot of these students is the fact that they know they are not getting what they could get if they decided to go elsewhere, but they feel that they are going to, you know, cure cancer, they are going to do amazing things for this country.

Mr. SWEENEY. Sure, if I—

Mrs. DAVIS. Where does this fit in this discussion?

Mr. SWEENEY. Yes. So I had the honor to work with some of the postdoctoral researchers in the University of California system when they organized. And, you know, post-docs are such an integral part of research and science and engineering and other fields.

The one thing I would say is that I think that as important and as passionately as we all feel about the educational research work that is happening in these institutions, a big part of the impetus to form unions is to deal with some of the more mundane—pay, health care. You know, does the offer of a job really mean a job—those sort of basic kinds of things that workers deal with across the board.

You know, these folks, the post-docs, aren't even students anymore. They have gotten the terminal degree in their field. They are, you know, beyond that point. So, you know, they are the kinds of issues that people want to deal with in all kinds of workplaces. You know, the question of, there has been some discussion today about bargaining over academic matters.

That is not really at the core of what this impetus is. It is really a question of, you know, can we have a little say, can we have some small measure of democracy and dialogue about how we pay the rent and, you know, get health care for our kids, and, you know, those sorts of things.

The situation of post-docs, I think, is very, very interesting. It used to be the case that this was a relatively short-term position that people would have for a pretty short period of time before moving into a faculty job or moving into industry. That deal is over. There is an increased reliance on postdoctoral researchers. And so now the standard is that people are doing these jobs for a much longer period of time.

And so what might have been a relatively temporary position is now one that you hold for a while. So the workers have an interest in, say, well, you know, if I am going to do this for 5, 7, 10 years. That is about the time that the average job, in the economy, for a professional, can last. So, you know, what the health care is going to be, what the pay is, really matters.

You know, making \$35,000, \$40,000 a year for a couple of years with an advanced degree doesn't sound like a terrible deal if you are on the younger side. Although, you know, these folks have been in grad school for a while.

Mrs. DAVIS. And if I may, as that has changed and is changing, and it becomes more significant, should we anticipate that they are going to be causing more trouble for the university and for the communities in which they work?

Mr. SWEENEY. Yes, I think that is the important part. And I am happy to be here talking about the NLRB. The important part is that one of the good things the National Labor Relations Act does is it provides a system to deal with these matters in a systematic and rational way so that employers' workers can sit down and bargain as equals.

So that there isn't disruption, that there aren't conflicts, and that the power relationships are equalized in some small measure.

Mrs. DAVIS. I don't know if anybody else wanted to comment. Do you think that because this is changing for a lot of the post-docs that they are going to cause more problems? Do you think that it is inherent in that situation? Anybody? No?

Okay, thanks.

Chairman ROE. Thank you for yielding?

Mr. Rokita?

Mr. ROKITA. Thank you. I thank the both chairs for holding this hearing. And I thank the witnesses for their preparation for the discussion. I had to leave in the middle. I apologize about that, but I heard it start off.

A quick question for Mr. Sweeney. Not to be antagonistic, but who, in your opinion, do you think a university exists for? What group of people, the students or the teachers? What is the primary purpose?

Mr. SWEENEY. I think universities are places for research and learning and teaching. I think they exist for the public at large.

Mr. ROKITA. For the public at large. But—

Mr. SWEENEY. I think everybody benefits from that.

Mr. ROKITA. People matriculate. The public at large doesn't matriculate. Students matriculate. At least from the private sector setting. Let us talk about private universities. I mean, it seems to me that is what a university is for, to Chairman Foxx's opening statement.

And it seems to me, when you talk about parity in bargaining, we are talking about graduate students who, by definition, are intelligent, capable human beings. And there are a lot of them. So it seems to me, in that situation, there would be parity. And I read your testimony, I understand where you are coming from.

And that the free market otherwise can determine—if they are being treated that badly a university that treats them well, ethically, would more than welcome them. Because why? Because they need that research that you talk about. And we may differ on what the primary function of a university is, but that research needs to be done. And I think the free market private sector, working as equals, can easily take care of that.

I mean, we are not talking about uneducated folks or anything like that, that might need the NLRA of the 1930s to help.

Mr. SWEENEY. I would offer that nurses who engage in collective bargaining, other teachers who engage in collective bargaining, lots of workers engage in collective bargaining are intelligent and rely on collective bargaining to arrive at a fair process.

Mr. ROKITA. They may rely—

Mr. SWEENEY. And I would also say that—

Mr. ROKITA. Just let me—coming back to your point, they may rely on it. That doesn't mean it is right or that it is needed.

Moving onto something I found on the IRS Web site last night, the IRS gives you a tax exempt status under 501(c)(3) of the code for churches and religious organizations if the organization is organized and operated exclusively for religious, educational, scientific or other charitable purposes. Net earnings may not inure to the benefit of any private individual shareholder if no substantial part of its activity may be attempting to influence legislation, if the organization doesn't intervene in political campaigns, and if the organization's purposes and activities don't violate fundamental public policy.

So that is one part of government; defining what a religious institution is. Dr. Moreland, is it right to have another part of government—i.e., the NLRB, or even under some kind of skewed interpretation of the NLRA—to define a religious institution or a religious organization any differently?

Mr. MORELAND. That is part of my concern, obviously, is that in the IRS context the definition of a religious organization is quite broad. In the EEOC context it is a little more complicated. It actually is a division among the circuits. But at least on one approach, the EEOC's definition of a religious organization that is exempt under Title VII from the prohibition on religious discrimination.

So a Methodist church can favor Methodists in hiring. That is also a very broad definition of a religious institution. And the concern in the NLRB context is that this substantial religious character test is too intrusive and too narrow. And that has been the source of the recent controversy.

Mr. ROKITA. And even so, isn't it the fact that if there is some legitimate government interest to somehow take a different tack on defining what a religious organization is, doesn't the First Amendment still trump all that, seeing that it is in the Constitution?

Mr. MORELAND. Absolutely. That is right. And surely that was the view of the Supreme Court in 1979, when it interpreted the NLRA in a way to avoid collision with the First Amendment and the way in which the D.C. Circuit has been rebuffing the board in its attempts to exercise jurisdiction over religious universities.

Mr. ROKITA. Thank you. And in your testimony, you say that the NLRB has yet to employ the clear, three-pronged test laid out in Great Falls. Do you have an opinion as to why?

Mr. MORELAND. I think that the board wants to exercise jurisdiction as capaciously as it can. And the Great Falls test would mean that it couldn't exercise its jurisdiction over religiously-affiliated colleges and universities in almost any context.

Mr. ROKITA. And is your testimony that you have never seen the board act like this in your professional career, except for this administration, President Obama's administration?

Mr. MORELAND. It is extremely disturbing, the way in which the board has not taken the lead of the Supreme Court and the D.C. Circuit with regard to its own jurisdiction on this issue.

Mr. ROKITA. Thank you very much.

Chairman, I yield and would ask for unanimous consent to enter the IRS document into the record.

[The information follows:]

## Tax-Exempt Status

Churches and religious organizations, like many other charitable organizations, qualify for exemption from federal income tax under IRC section 501(c)(3) and are generally eligible to receive tax-deductible contributions. To qualify for tax-exempt status, such an organization must meet the following requirements (covered in greater detail throughout this publication):

- the organization must be organized and operated exclusively for religious, educational, scientific, or other charitable purposes,
- net earnings may not inure to the benefit of any private individual or shareholder,
- no substantial part of its activity may be attempting to influence legislation,
- the organization may not intervene in political campaigns, and
- the organization's purposes and activities may not be illegal or violate fundamental public policy.

### Recognition of Tax-Exempt Status

#### Automatic Exemption for Churches

Churches that meet the requirements of IRC section 501(c)(3) are automatically considered tax exempt and are not required to apply for and obtain recognition of tax-exempt status from the IRS.

Although there is no requirement to do so, many churches seek recognition of tax-exempt status from the IRS because such recognition assures church leaders, members, and contributors that the church is recognized as exempt and qualifies for related tax benefits. For example, contributors to a church that has been recognized as tax exempt would know that their contributions generally are tax-deductible.

#### Church Exemption Through a Central/Parent Organization

A church with a parent organization may wish to contact the parent to see if it has a *group ruling*. If the parent holds a group ruling, then the IRS may already recognize the church as tax exempt. Under the group exemption process, the parent organization becomes the holder of a group ruling that identifies other affiliated churches or other affiliated organizations. A church is recognized as tax exempt if it is included in a list provided by the parent organization. If the church or other affiliated organization is included on such a list, it does not need to take further action to obtain recognition of tax-exempt status.

An organization that is not covered under a group ruling should contact its parent organization to see if it is eligible to be included in the parent's application for the group ruling. For general information on the group exemption process, see Publication 4573, *Group Exemptions*, and Revenue Procedure 80-27, 1980-1 C.B. 677.

#### Religious Organizations

Unlike churches, religious organizations that wish to be tax exempt generally must apply to the IRS for tax-exempt status unless their gross receipts do not normally exceed \$5,000 annually.

### Applying for Tax-Exempt Status

#### Employer Identification Number (EIN)

Every tax-exempt organization, including a church, should have an employer identification number (EIN), whether or not the organization has any employees. There are many instances in which an EIN is necessary. For example, a church needs an EIN when it opens a bank account, in order to be listed as a subordinate in a group ruling, or if it files returns with the IRS (e.g., Forms W-2, 1099, 990-T).

An organization may obtain an EIN by filing Form S-4, *Application for Employer Identification Number*, in

Chairman ROE. Without objection, so ordered. I thank the panel and all the witnesses in our panel for a great and lively discussion.

And I will now yield to Mr. Andrews for any closing remarks.

Mr. ANDREWS. I would like to thank you and the gentlelady from North Carolina for staging the hearing.

Yesterday, one of the major credit rating services indicated that if the Congress doesn't address some huge fiscal issues confronting the country very soon, it may well cause a downgrade in the country's credit rating. Which would raise the interest rates on home mortgages and auto loans and business loans and all kinds of other things.

So we are several weeks, several months, away from the entire Internal Revenue Code essentially expiring. We are at a point

where, once again, we are coming up against the country's debt ceiling, probably in the first quarter of 2013. We are facing an across the board spending cut in defense and in many domestic programs I think people widely agree is unwise the way it is being done.

So here is another day that we are spending, of the few days that we are going to spend here between now and election day, and we choose to focus this morning, again, on an interesting set of questions. But questions I think are way outside the mainstream of what the country's worried about.

The title of the hearing is Expanding Big Labor's Power: The NLRB's Growing Intrusion Into Higher Education. You look at the premises behind that title is that there is a growing intrusion into higher education. Now, as far as I can tell the intrusion is that three matters are pending before the board that they are going to decide one way or another in the next couple months.

So we spent the morning talking about how we would react if the decisions came out a certain way, but there haven't been any decisions yet. The problem, apparently, that would be exacerbated by this is that the crown jewel of American higher education would be severely tarnished if there was an outbreak of collective bargaining on college campuses across the country.

I ask, and would hope the record would be kept open to supplement this—I ask the panel for one specific factual incidence of where there has been an impairment of academic freedom when there has been collective bargaining. We heard none. We heard various people's opinions that collective bargaining was good or bad. Dr. Weber, in this context, doesn't approve of it. Mr. Sweeney does.

The person whose e-mail, read by Dr. Weber, doesn't approve of it. The American Association of University Professors does. That is all interesting. It is the way democracy works. But there is not a shred of factual evidence on the record from this hearing this morning, not an iota, of any interference with academic freedom on any campus where there has been collective bargaining.

So the intrusion, evidently, is that the board is going to make a couple decisions of which we don't know the outcome, and that some people have the opinion that collective bargaining by grad students is a bad thing. And others have an opinion that it is a good thing. Again, I appreciate the preparation of the witnesses. But I think that this is a classic case of Nero fiddling while Rome burns.

This country has significant economic problems. We can debate all day whose fault it is. I don't think the public wants that. I think the public wants us to work together to create an environment where entrepreneurs and businesses can create jobs. This hearing is an example of not doing that.

It is also an example, frankly, of good faith and excellent preparation by the witnesses, for which we are profoundly grateful. My quarrel is not with you, it is with our own institution which seems to be fiddling while Rome burns. It seems to me Rome needs to be regenerated and rebuilt, America needs to be regenerated and rebuilt. This is not the way to do it.

I yield back.

Chairman ROE. I thank the gentleman for yielding.  
Dr. Foxx?

Mrs. FOXX. Thank you, Mr. Chairman. I also want to thank our witnesses for being here today and for the excellent presentations that you have made and the materials you have submitted. I have learned a lot from this hearing.

As someone who has spent a great deal of her life in education, I like to think of myself as a lifelong learner and someone who loves to read and to expand my knowledge. And you have done a lot to help me do that today. I think you have done a lot to help others learn a great deal about not just the issue of collective bargaining, but also the threats to our First Amendment rights, the threats to our rights in general.

I share the concern about the state of our economy in this country. I think Republicans are just as concerned, even more concerned, than our colleagues on the other side of aisle about the report by Moody's, the threats by Moody's. But the Republican-led House has done a great deal to respond to the economic threats that are facing our country.

Unfortunately, we have been brought to this point by the bad policies of the Obama administration and the Democrats who are in charge of the Senate. We have sent lots of bills over to them to deal with the problems, the economic problems, and nothing has been done. The administration absolutely refuses to deal with the threats that are facing us.

And so I believe we have done a lot on our side of the aisle. I think part of the reason we have gotten into this situation—and, Mr. Chairman, I would like to submit an article I do not have with me today. But an article that came out months ago, I believe, in National Review, about the problems with the NLRA. I read that article when it came out many months ago.

[The information follows:]



## National Labor Relations Bias

*A misguided law enables the president's union pandering*

BY ROBERT VERBRUGGEN

**T**HE National Labor Relations Board has become a partisan issue of late. After trying—and failing—to destroy secret-ballot union elections via “card check” legislation, President Obama turned away from the democratic process, and toward the NLRB, as a venue for advancing Big Labor’s interests.

To date, Obama has placed three people on the NLRB. During a congressional recess, he installed Craig Becker, who’d served as a top lawyer for two of the nation’s largest unions (the Service Employees International Union and the AFL-CIO), as a member of the board. He selected Mark G. Pearce—who had worked in “union side labor and employment law,” as his official NLRB bio puts it—as another. And Obama chose Lafe Solomon, a career NLRB lawyer, as the board’s general counsel.

Solomon promptly filed a complaint against Boeing, claiming the company had illegally discriminated against a unionized, strike-happy plant in Washington State when it chose to expand production in South Carolina, a right-to-work state, instead. And the board is trying to change the rules governing union elections so that companies have less time to mount anti-union campaigns.

These moves go beyond anything the NLRB has done in the past. But the current behavior of the National Labor Relations Board is only the outermost layer of the true problem: the National Labor Relations Act. In addition to creating a labor system that hurts non-union workers, forcing contracts upon unwilling participants, and engendering corruption, the 1935 legislation violates the Constitution, gives the NLRB the power to function as all three branches of government at once, and allows each president to stock the board with flagrantly biased nominees. President Obama may have abused the NLRA more than his predecessors did, but the NLRA is built for abuse. It should be repealed, or at least reformed.

The NLRA is also known as the Wagner Act, after Sen. Robert F. Wagner of New York, its sponsor. Before its enactment, private-sector employers had basically complete freedom in how they dealt with unionizing employees. They could, for example, simply fire workers who tried to unionize. Only 13 percent of the non-farm work force was unionized, but strikes were disruptive, and they were growing more frequent.

The stated justification for the NLRA was that strikes had hindered the free flow of commerce, and that strengthening unions and giving them a federally protected right to strike



would somehow fix that. In reality, of course, Congress supported the law as a way of tipping the power balance toward unions and away from management. The NLRA was just one of many New Deal laws that accomplished this.

Some of these laws addressed real problems—until the Norris-La Guardia Act, for instance, courts often issued injunctions to end strikes, essentially forcing people to work. The NLRA, however, was a mistake from top to bottom.

As it was originally enacted, the NLRA defined several “unfair labor practices” for businesses, but none for unions. (In 1947, the Taft-Hartley Act added some for unions.) Short of closing a plant entirely, management could no longer discourage workers—using such tools as hiring, firing, discipline, and promotion—from participating in union activities. The only significant exception, confirmed in a 1938 Supreme Court case, was that an employer could hire replacement workers during a strike, and was under no obligation to fire the replacements to make room for returning strikers. The strikers were still considered company employees, however, and had to be reinstated when positions opened up.

Further, the act set up the system through which unions are recognized: First, they have to get 30 percent of workers in the “bargaining unit” (typically, the workers at a given plant) to sign cards. Then, the NLRB supervises a secret-ballot election, and if the union wins, it has the right to represent the workers. (Alternatively, the union can get signed cards from 50 percent of workers and avoid an election, but only if the company voluntarily recognizes the union.) The company is required to negotiate in good faith with its union on a contract; if negotiations falter, the union may strike.

The logic here is simple and straightforward: We want workers to be paid more and treated better; therefore, we’ll arm workers with the weapons they need to gain concessions from employers. Unfortunately, it wasn’t until the 1950s that Milton Friedman proved the economic fallacy of this plan. Yes, unions often manage to get higher pay and better working conditions for their members. But in response, unionized businesses hire fewer workers. The workers who aren’t hired by union companies go to non-union companies—where their competition drives down wages—or remain unemployed. In other words, in the private sector at least, the gains of unionized workers aren’t gains for the working class as a whole; they’re gains by some workers at the expense of others. (In the public sector, which is not covered by the NLRA, higher wages simply come from taxpayers.)

And economics aside, the NLRA system involves a tremendous amount of coercion. Companies have to negotiate with unions—with the threat of a federally protected strike in the background—whenever their employees vote to make them. Businesses may not fire workers for union activities, including striking, regardless of what the relevant contracts say. And while the current case against Boeing involves a fresh issue—whether companies may factor in local labor laws and past strikes when deciding where to build new capacity—the NLRA has long been interpreted to mean that a business may not shut down a unionized plant and reopen it somewhere else (a “run-away shop”) in response to strikes or union demands. If a union loses an election, the NLRB may decide the employer

engaged in “unfair labor practices” and force the company to bargain with the union anyway.

It’s not just employers over whom the law grants unions immense power. When a union wins an election, workers who voted against it are forced to accept the union as their “monopoly bargaining” agent, and are forbidden to negotiate their own contracts with the business. Depending on state law and the specific contract, anti-union workers may also have to join the union or pay dues. Right-to-work laws help in this regard, but they do not solve the problem of coercion—and the NLRA banned even these laws until the passage of the Taft-Hartley Act. In a right-to-work state, workers at union shops don’t have to pay dues or join the union, but they’re still bound by the union contract even if they do not wish to be. Seen differently, they get to free-ride on union negotiating efforts without paying their fair share.

Most of the NLRA’s effects were completely foreseeable. Union membership exploded, almost tripling in the ten years following its passage. And the law failed to accomplish its supposed goal of curtailing strikes: Work stoppages continued to rise through 1937, fell off as the economy improved, and then soared, reaching their all-time high in 1943.

What many did not foresee was the spread of corruption through organized labor. This is a complex story—read Robert Fitch’s *Solidarity for Sale* for an excellent summary by a pro-union, leftist writer—but the bottom line is that it’s called “monopoly” bargaining for a reason. When a union doesn’t face competition and is entitled to dues from thousands of workers, it constitutes a massive opportunity for organized crime. To this day, if you read through the FBI indictments following a mob bust, you’ll find allegations of labor racketeering.

FROM its inception, the NLRA faced constitutional challenges. One involved the question of whether Congress has the authority to dictate how businesses interact with their workers.

The Constitution gives Congress the right to regulate interstate commerce, but during (and since) the New Deal, Congress took this to mean it could regulate anything that had anything to do with interstate commerce. The NLRA was one result of this interpretation: The employment policies of companies that are involved in interstate commerce are not the same thing as interstate commerce itself, and yet the legislation dictated the hiring practices of many large companies throughout the country.

As usual, the Supreme Court acquiesced to this abuse of the commerce power. In 1937’s *NLRB v. Jones & Laughlin Steel Corporation*, it ruled that “although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.” Never mind that Congress has the authority only to “regulate” interstate commerce, not to “protect [it] from burdens and obstructions.”

The NLRA also raises First Amendment concerns. While the Taft-Hartley Act made it clear that employers have the right to speak their mind, company officials can still be punished if

their statements are construed as threats—and even statements that are protected by the First Amendment can be used against employers in discrimination cases.

In 1969's *NLRB v. Gissel Packing Co.*, the Supreme Court ruled that "an employer may communicate to his employees any of his general views on unionism and his specific views about a particular union, as long as there is no 'threat of reprisal or force or promise of benefit.'" (The Court was quoting language inserted into the NLRA by the Taft-Hartley Act.) An employer may even "predict the precise effects he believes unionization will have on his company if the prediction is based on objective fact to convey his belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization." He may not, however, engage in "brinksmanship" or make "conscious overstatements."

Threats, exaggerations, and honest predictions are indeed different things—if they're communicated clearly and the underlying facts are not debatable. But in union elections, clarity isn't the norm; rather, each side steps as close to the legal line as possible. This means that employers do everything they can to emphasize the economic disadvantages of unions, that unions try to paint these comments as implied threats or promises, and that the NLRB and the courts are expected to sort it out.

The Boeing case raises one such issue. As the general counsel's complaint notes, Boeing executives made various public statements explicitly tying the union plant's history of strikes

managers that, while protected by the First Amendment, show that the management doesn't like unions. Some circuits of the federal court system have decided to completely ban the use of these statements as evidence, but others have not. For example, in an often-cited 1963 case, the Fifth Circuit allowed statements in which a company "made no bones about its opposition to the Union" to be used as "background" in a case. To this day, the "circuit split" has not been resolved, and the NLRB allows these statements to be used in the cases it hears, regardless of which circuit the business is located in.

So, employers are left walking a fine line. To keep workers from unionizing, they have to provide information about the harmful effects of unionization, which can include plant closings and lost jobs. But these statements cannot be perceived as threats, and they cannot sound overly heated, lest they give credibility to a discrimination claim. American companies whose workers are considering unionizing have to watch what they say.

ONE reason the NLRA has been so vulnerable to constitutional challenges is that it was intentionally written in vague language. As the Supreme Court once put it, Congress "did not undertake the impossible task of specifying in precise and unmistakable language each incident that would constitute an unfair labor practice." Which is to say, it failed to offer companies a way to predict which of their actions would later be considered illegal.

Of course, when the legislative branch passes a law that fails

## When the law is unclear, the NLRB makes policies up as it goes along.

to the decision to locate the new capacity elsewhere—and according to the general counsel, this means Boeing "threatened or impliedly threatened that the Unit would lose additional work in the event of future strikes." Boeing, of course, denies that its statements were threats, and further says they are protected by the First Amendment.

It's easy to take Boeing's side. Workers at the Washington plant struck in 1977, 1989, 1995, 2005, and 2008, and it would be insane to expect the company to ignore that fact in deciding where to expand. The company officials were merely stating the obvious. But the statements did explicitly connect the action of striking with a consequence of lost work opportunities—which does arguably "interfere with" the right to strike, or discourage employees from exercising it. The law itself, which protects a "right" to shut down one's employer's operations without facing any consequences, is the problem.

Even in cases where it's clear that speech is protected by the First Amendment, that speech can still be held against an employer under the NLRA. Typically, to prove discrimination, a union member has to demonstrate motive, or "anti-union animus." This, however, runs into the same problem we see with racial anti-discrimination laws: If the business says it fired, disciplined, or refused to promote a worker for incompetence, how can an employee prove otherwise?

Often, employees resort to anti-union statements made by

to clearly forbid some things and allow others, the other branches don't have a policy to enforce. So, Congress created the NLRB, a three-member panel (now five members plus a general counsel) that would act as all three branches at once, subject to review by federal courts.

When the law is unclear, the NLRB makes policies up as it goes along. See, for example, the new union-election rules: The NLRA doesn't specify the amount of time an employer should have to prepare for an election, so the NLRB gets to decide, and to change its mind at will. One would be right to say that the proposed rule—which could result in preparation times as low as ten days, compared with today's norm of around 40—is a bad policy, and that it's a change so dramatic that Congress should be involved. But in 1935, Congress chose to delegate election procedures to the NLRB, and until Congress decides to do its job, the NLRB can and will do whatever it pleases.

Since the Taft-Hartley Act, the NLRB's executive aspect has been headed by its general counsel, who supervises NLRB investigators and acts as a prosecutor before the board. When the general counsel files a complaint, the NLRB goes into judicial mode, deciding whether the alleged incident violated the NLRA and establishing precedents that guide future decisions. Like most judicial bodies, the NLRB can be overruled on appeal—but the federal court system gives the board a fair

amount of leeway, siding with it in about 85 percent of cases that are appealed.

We will see just how politicized the current NLRB is when it reviews the general counsel's Boeing complaint. There are reasons for pessimism. The same person who nominated Solomon—President Obama—chose two of the board's four current members, and a third, chairwoman Wilma Liebman, is also a Democrat. This partisan imbalance is a predictable consequence of the structure created by the NLRA.

Whereas judicial nominees serve for life, NLRB members are nominated to five-year terms, with one member's term ending each year. No more than three members of the board may be from the president's party—Obama's pending nomination for the vacant seat, Terence Flynn, is by necessity a Republican—so each time the White House changes parties, the new president gets to flip the majority as soon as a member of the opposite party leaves. In theory, the Senate has to approve the nominees—but if the Senate doesn't like his choices, the president may make his appointments while Congress is in recess.

It's tempting to complain about this, or to point at Becker's close ties to organized labor and say that Obama has departed from a standard practice of nominating people without conflicts of interest. Right-leaning commentaries on the current board often mention how it's "stacked" with Democratic union stooges. What they do not mention is that it's actually common for presidents to make NLRB appointments while Congress is in recess, and for nominees to have a clear track record of taking a specific side in labor confrontations.

Just look at Obama's predecessor. Bush recess-appointed seven of his nine NLRB selections. His picks included Peter Kirsanow, a friend of NATIONAL REVIEW whose law practice "focused on representing management in employment-related litigation," according to an official government biography; Peter J. Hurtgen, who "represented employers in labor and employment matters," according to *Politico*; Robert J. Battista, who also represented management in labor disputes; and Michael J. Bartlett, who was director of labor-law policy at the anti-union Chamber of Commerce. And while Bush's NLRB never did anything so drastic as dictate to a company where it could add production capacity or introduce radical changes in the way union elections are handled, it did overturn various precedents, almost always pushing the law in a pro-management direction.

So, while Congress rarely changes the NLRA—the last significant update was in 1974, when coverage was extended to health-care workers—the law means something different every time a new party controls the White House. As Obama took office, the legal-news site Law.com ran a top-ten list of Bush-era precedents that an Obama-appointed NLRB would probably overturn. This makes a mockery of the rule of law.

The NLRA is a bad policy. It deserves to be repealed entirely so that businesses and workers can work out contracts as they see fit, using unions as intermediaries if they so choose. But failing that, Congress needs to restructure the law so that elected officials, not a politically appointed and ever-changing board, make the important decisions about labor law—decisions that include how elections are run, what constitutes an "unfair labor practice," and whether companies may build new facilities wherever they want to. **NR**

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## The 'Sick Man,' STILL

*Turkish Islamization, Iran, Syria, and the  
fate of the Middle East*

BY DAVID PRYCE-JONES

**Q**UESTION any of our political masters or their subordinates about Turkey and they will be quick to assert that it has long proved its faithfulness to Western values. Membership of NATO speaks for itself; there's an important American air base at Incirlik; and for years, Turkish leaders one and all have been petitioning the European Union for admission. This is the one and only country in the Muslim Middle East, it will also be said, that can pass as democratic and secular.

Habitual flattery of this kind masks the reality that superficial imitative Westernization has barely touched Turkey's very un-European history and culture, or the respect and honor that its people feel is their due.

The Turkish republic that replaced the defeated Ottoman Empire after World War I takes its modernizing ideology from Kemal Atatürk, the founding father who knew his own mind and had the authority to enforce it on his people. Islam for him was the cause as well as the guarantee of backwardness, and he did what he could to break its hold.

Official visitors are expected to lay a wreath at his rather forbidding mausoleum in Ankara, rather as politicians visiting Beijing have to do formal obeisance to Mao Tse-tung. Atatürk's lasting contribution was to make the military the real guardians of the constitution of his new republic. Four coups in the last 50 years, and such events as the arrest and hanging of Prime Minister Adnan Menderes in 1960, prove where real power has lain. In the Muslim Middle East, the paradox of the military's resorting to authoritarian methods to safeguard secular democracy has been special to Turkey.

Since 2003, Recep Tayyip Erdogan has been prime minister, and he is now at the start of his third term in office. One of his declared objectives is a new constitution, and it is clear by now that he is reworking Atatürk's legacy. He is setting himself up to have a monopoly on power. Born in 1954, the son of a member of the coast guard, Erdogan is no doubt a sincere Muslim, neither an extremist nor a philosopher but convinced by upbringing and instinct that Islam and patriotism are one and the same thing, and any Turk who disagrees with him will have to be brought into line. Briefly a semi-professional footballer, he has been a fully professional politician all his adult life. Mayor of Istanbul from 1994 to 1998, he was in office when, in a speech to a large public gathering, he quoted some lines of a nationalist poet that are famous for their Muslim triumphalism: "The mosques are our barracks, the domes our helmets, the minarets our bayonets, and the faithful our soldiers."

Upon being arrested for this, he is said to have shouted that the song is not yet over. After four months in jail, he became a

AUGUST 1, 2011

Mrs. Foxx. This law has haunted us, and has created problems for us from its very beginning. And I think that often the problems that we face in this country are things that creep up on us because we don't deal with them at the time that we see them. And I think there is an expression that my husband loves from Barney Fife. "You should nip it in the bud."

And I think if we did more of that in the Congress we would be a lot better off. We have allowed this problem to fester since the NLRA was adopted. I am not an attorney, but the article made a lot of sense to me. And I think we are not fiddling while Rome burns; we are looking at the issues, we are looking at the threats to our Constitution that have been established by this administration.

And, in fact, we probably should do a lot more to deal particularly with the threats to our First Amendment. Because if we can erode our constitutional values, if we can erode our rights—God-given rights—then anything else can be taken away from us. So I don't think this is fiddling while Rome burns. I think it is dealing with the issues that are before us.

And if we don't deal with those, the economic situation is not going to matter much. So I thank you all again for coming. I thank you for the excellent education you have given me. And I hope that other people have done that. And I would say to you, you will probably all be glad to go back to the academic setting and say, "A pox on all your houses."

Thank you very much.

Chairman ROE. I thank the gentlelady for yielding.

Just one comment on the ranking member's closing statement is, we passed over 30 jobs bills that are sitting over in the Senate. The Senate has not passed a budget in over 3 years. The iPad did not exist when the U.S. Senate passed its last budget. That is ridiculous, and that is what we are dealing with here in this Congress.

We could have energy independence in this country in less than 10 years, which I think is one of the most important issues we are dealing with in this country. I think energy independence will bring back manufacturing to America, and we won't pass a Keystone pipeline to bring Canadian oil into this country to help lower energy prices.

If you want a stimulus package, every 25 cents that gasoline goes up a gallon takes 35 cents—\$35 billion, excuse me—out of the consumer's pocket. So if gasoline prices were the same as they were in January of 2009 we would have \$700 billion in every person's pocket in this country so they could determine how they want to spend the money.

No, this was not wasted time. And I very much appreciate all of you all who came and prepared these remarks. I have learned a lot, and I agree, Mr. Hunter, with your comment. And there is no question I would not be sitting in this seat right here today if it weren't for a great, affordable college education. There is no question about it.

I took advantage of it. And the next time I go to college, I want to go to Brown where I get a stipend and where I don't have any tuition. I also might add, too, I think we had three issues that we were listening to today. One is about the collective bargaining rights among TAs and our graduate students. And we have heard lots of opinions, as Mr. Andrews said.

Secondly, about whether the professors. And thirdly, this issue which, to me, is about individual religious liberty and freedom. That is a huge First Amendment right. It is in my district, it is across America. We have seen this debate occur in the health care

arena with contraception in Catholic hospitals and Catholic universities. It is a very important issue.

And I also think there have been some graduate students here. And certainly, most of us have been there. And it is a privilege to go to school, and I selected where I went for several reasons, as many students do. Is it affordable? Can I afford to go there? Can I get the quality of education? And I can tell you what I was interested in. I was interested in taking that 4 years—or, in my case, 7 years, almost 8, that I was learning to be a physician and specialize—to use every minute I could to learn everything I could.

Now, when we talk about toiling, I think working every other night for 2 years, that was toiling. And I wouldn't recommend that to anybody. But that is what I did when I was getting my education. And I think all of these fine universities that you all are representing today do that. I think the NLRB, the other part is debatable about whether you can organize or not. But I just put it very bluntly. They need to butt out about whether there is substantial religious character at a religious college.

If it is a Milligan College or Notre Dame, or whatever, they need to butt out of that. And the courts have been very good at separating church and state in this country for 220 years, and I am glad they have. And there is a clear test in the Great Falls test about what is appropriate. And I think we should stick with that.

So I want to thank you all for all being here. And certainly all the folks that asked the questions.

And this meeting is adjourned.

[Additional submission of Mr. Miller follows:]

**Prepared Statement of Maggie M. Williams, Assistant Professor,  
William Paterson University**

I attended Columbia University from 1993 to 2000 as a Masters and PhD student in Art History. I am currently a tenured Assistant Professor at William Paterson University in New Jersey, where I am a member of AFT Local 1796.

Beginning in 1994, I worked as a research assistant, teaching assistant, or instructor nearly every semester that I attended Columbia. My supervisors were assigned by the department, and my hours and duties were determined by the faculty member to whom I was assigned. I was paid either an hourly wage or a lump sum payment, which was taxed by federal, state, and city governments. I also did not have any maternity leave or health care coverage.

While I was working as an instructor, I attended my first union meeting. I had very little understanding of how unions functioned, and I went to the meeting to gather information. I learned that my status as a paid employee of the university offered me the right to organize under the National Labor Relations Act.

Over the next few years, I spoke to thousands of my fellow teaching and research assistants, all of whom were paid employees of the university. A clear majority of them signed cards saying that they wanted to form a union. We held a legal union election in 2002, but Columbia University fought to have our voices silenced. The ballots from that election were never counted; they were destroyed—probably shredded or incinerated. I was shocked to see something like that happen in a democratic country.

I went on to become a Professor of Art History in the public sector, where my right to join a union was well established. For more than 25 years, the AFT has successfully represented faculty in New Jersey's colleges and universities. Employees of institutions of higher learning—both public and private—have expressed their desire to organize for nearly 3 decades. To deny their right to do so now would be unconscionable.

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[Additional submission of Mr. Hunter follows:]



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September 26, 2012

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**VIA EMAIL**

Honorable Phil Roe  
Chairman  
Subcommittee on Health, Employment, Labor and Pensions  
Committee on Education and the Workforce  
2181 Rayburn House Office Building  
Washington, D.C. 20515-6100

Honorable Virginia Foxx  
Chairwoman  
Subcommittee on Higher Education and Workforce Training  
Committee on Education and the Workforce  
2181 Rayburn House Office Building  
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Re: September 12, 2012 Joint Subcommittee Hearing – Additional Evidence

Dear Chairman Roe and Chairwoman Foxx:

I would like to thank you and Members of the subcommittees for the opportunity to share my views regarding "NLRB Developments Affecting Institutions of Higher Education." I hope that members of the subcommittees found the testimony of all of the witnesses helpful.

I am writing to submit two exhibits for your consideration to set the record straight with respect to an assertion made during the hearing that the collective bargaining agreement at NYU effectively prevented attempted intrusions into matters of academic judgment. The attached exhibits demonstrate that this was not the case. Indeed, NYU withdrew recognition of the union because the union was unable to abide by its commitment to refrain from such intrusions.

During the hearing, Mr. Sweeney pointed to the former collective bargaining agreement at NYU to support his view that collective bargaining will not intrude into academic issues at private universities. He testified as follows:

Concerns over the impact of collective bargaining on the educational mission of universities are not well founded. At NYU, the only private university ever to have had a contract for TAs and RAs, the union and the university reached an agreement to allay the administration's concerns about collective bargaining's intrusion into matters of academic judgment. Article XXII of the

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contract states, "[d]ecisions 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."

The problem, however, is that there is more to this story. The union did not abide by this commitment and tried repeatedly to intrude into academic matters. The attached "Recommendation from the Faculty Advisory Committee on Academic Priorities", obtained from the NYU website, summarizes the problem well:

The Committee is concerned that the United Auto Workers has filed grievances over issues that have threatened to impede the academic decision-making authority of the faculty over such issues as: the staffing of the undergraduate curriculum; the appropriate measures of academic progress of students; the optimal design of support packages for graduate students; and the conditions and terms of fellowships (as opposed to graduate assistantships). The Committee is also worried by the willingness of the United Auto Workers to take such issues to arbitration and by the nature of the arbitration process, in which an outside arbitrator, who rarely has prior experience with the environment of universities, makes decisions that are legally binding on departments and programs. Although no case involving academic decision making has been decided in the favor of the United Auto Workers, this result was only achieved by a combination of vigilance and good fortune, and there are no assurances that the results will be the same in the future. Had any of the cases been decided differently, the ability of faculty to staff the curriculum and to design and implement programs in accordance with their best academic judgment would have been impaired.

The readiness of the United Auto Workers to grieve issues of academic decision-making and the nature of the arbitration process leads the Committee to conclude that it is too risky to the future academic progress of NYU for it to have graduate assistants represented by a union that has exhibited little sensitivity to academic values and traditions. The Committee therefore recommends that NYU not re-enter into negotiations with the United Auto Workers and that it replace the current contract with more appropriate arrangements for governing its relationship with graduate students and providing them the support and respect they deserve.

The University had proposed to the union a new paradigm that would have "provided graduate students with representation over economic issues, while protecting the integrity of the academic decision-making process that is essential to graduate assistants' primary role as students." The union was unable to embrace this paradigm. Accordingly, NYU lawfully withdrew recognition of the union via the attached August, 2005 letter, also copied from the NYU website.

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The attached evidence, therefore, establishes that the NYU collective bargaining agreement did not, in fact, prevent the union from attempting intrusions into academic decision making. Indeed, it was the union's repeated grievances over issues that threatened to impede the academic decision-making authority of the faculty that triggered a withdrawal of recognition.

Thank you for your attention.

Sincerely,



Walter C. Hunter

WCH:plm  
Attachments



RECOMMENDATION FROM THE FACULTY ADVISORY COMMITTEE ON  
ACADEMIC PRIORITIES  
(April 26, 2005)

NYU's Provost, David McLaughlin, charged the Faculty Advisory Committee on Academic Priorities with providing the University Administration with advice on the issue of NYU's maintaining or withdrawing recognition of the United Auto Workers in representing graduate assistants.

The Committee framed its discussions in terms of academic mission and goals, asking what is in the best long-term academic interest of the university as a whole and of its graduate programs. Over the past two decades NYU has become one of the leading research and teaching universities in the country, characterized by an impressive flow of faculty and student talent to all of its schools and a corresponding improvement in program quality. The question the Committee posed is whether, with respect to this academic trajectory, it is better to maintain recognition or withdraw recognition of the United Auto Workers, and if the latter, whether there is an alternative arrangement that would better serve the needs of students and the university.

In addressing this question, the Committee began with an overarching assumption: it is of fundamental importance to faculty, departments and programs that NYU be able to attract outstanding graduate students and create conditions in which they can flourish academically while at NYU; that which promotes these elements is to be encouraged, and that which inhibits them discouraged.

The Committee believes that the environment in which this mission is best achieved is one in which faculty across NYU's diverse departments and schools have the flexibility to tailor programs that are in the best academic interests of their students, and one that also emphasizes the mentoring relationship between faculty and students. Again, that which promotes these elements is to be encouraged, and that which inhibits them discouraged.

The Committee judges there to be compelling reasons for preserving and indeed improving the conditions in the current union contract that deal with stipend levels, health care coverage, sick leave, posting of positions, work loads, and grievance procedures. These conditions are directly related to the university's ability to attract top graduate students and help ensure their success. The Committee recognizes, moreover, that the process of negotiating a union contract facilitated progress on a number of these matters.

The Committee also observes, however, that a traditional employee/employer relationship should not be at the core of students' relationship with the university; educational and intellectual matters are. Graduate students make vital contributions to the university in their roles as teaching assistants, graduate assistants, and research assistants, but graduate students should be regarded, first and foremost, as students, apprentice

researchers, and trainees of their faculty mentors rather than employees. Similarly, assistantships should be regarded, first and foremost, as part of their professional training.

The Committee is concerned that the United Auto Workers has filed grievances over issues that have threatened to impede the academic decision-making authority of the faculty over such issues as: the staffing of the undergraduate curriculum; the appropriate measures of academic progress of students; the optimal design of support packages for graduate students; and the conditions and terms of fellowships (as opposed to graduate assistantships). The Committee is also worried by the willingness of the United Auto Workers to take such issues to arbitration and by the nature of the arbitration process, in which an outside arbitrator, who rarely has prior experience with the environment of universities, makes decisions that are legally binding on departments and programs. Although no case involving academic decision making has been decided in the favor of the United Auto Workers, this result was only achieved by a combination of vigilance and good fortune, and there are no assurances that the results will be the same in the future. Had any of the cases been decided differently, the ability of faculty to staff the curriculum and to design and implement programs in accordance with their best academic judgment would have been impaired.

The readiness of the United Auto Workers to grieve issues of academic decision-making and the nature of the arbitration process leads the Committee to conclude that it is too risky to the future academic progress of NYU for it to have graduate assistants represented by a union that has exhibited little sensitivity to academic values and traditions. The Committee therefore recommends that NYU not re-enter into negotiations with the United Auto Workers and that it replace the current contract with more appropriate arrangements for governing its relationship with graduate students and providing them the support and respect they deserve.

The Committee urges the university to formulate a set of basic principles concerning its relationships with graduate students, including principles that commit the university, its schools, its programs, and its faculty to:

- (1) the highest possible standards of teaching and research;
- (2) competitive and predictable financial aid, health insurance, and other support to enable students to concentrate on their academic work and flourish at NYU;
- (3) honest and open discussions in good faith on all matters of common concern and processes that ensure fair resolutions of disputes;
- (4) opportunities for graduate students, individually and collectively, to have a voice in the educational issues that directly affect them.

A commitment to the above principles will help ensure that the university is able to continue to attract outstanding students and maintain conditions in which they can fulfill their potential. The principles should be applicable to all graduate students at the university, not just those in the departments and schools governed by the current union contract, and should be publicly disseminated. The document articulating these principles should also contain instructions and guidance to schools and departments on

specific matters governed by the current contract (for example, minimum stipend levels for graduate assistants, posting of assistantship positions, etc.) as well as matters of importance to graduate students that cannot be addressed in a union contract governing graduate assistants, either because they concern all graduate students (for example, housing) or because they are not part of wages and benefits (for example, teacher-training programs). Finally, graduate students themselves must be involved in the university and school processes going forward that consider how best to implement the above basic principles and how best to address other matters of graduate student concern.

#### Members of the Faculty Advisory Committee on Academic Priorities

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Department of Philosophy-FAS

**Sylvain Cappell**  
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**NEW YORK UNIVERSITY**  
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August 5, 2005

Via Electronic Mail

Ms. Elizabeth Bunn, Secretary-Treasurer  
 International Union, UAW  
 8000 East Jefferson Avenue  
 Detroit, MI 48214

Dear Ms. Bunn:

We are disappointed by the United Auto Workers' August 4<sup>th</sup> response to our letter. As it signals to us the conclusion of any efforts - formal or informal - to reach an agreement that would be the basis for a new paradigm in our relationship, we want to take a moment to respond to that letter.

In signing an agreement with the United Auto Workers in 2001 and forgoing our right to take this matter to court, we took a leap of faith. We took the risk that you intended to abide by the language of your March 1st, 2001 letter and the contract that followed to ensure academic decision-making was honored in the context of the agreement. Unfortunately, as demonstrated by UAW grievances over who can teach and how many years graduate students can take to complete their studies, our leap of faith was not rewarded. We would be remiss if we did not learn from this experience and avoid making the same mistake twice.

In spite of this history, in the offer we outlined in the August 2<sup>nd</sup> letter, New York University moved farther than any other private university in the nation. Our proposal offered a new paradigm, a paradigm that would have provided graduate assistants with union representation on economic issues, while protecting the integrity of the academic decision-making process that is essential to graduate assistants' primary role as students.

We regret that the United Auto Workers is unable to embrace this new paradigm, and continues to resort to a traditional employer/employee labor model, which has proven to be ill-suited for an academic environment. We thought this was an opportunity to achieve a new partnership between the

UAW and the University, and sadly, we believe your rejection of this proposal is a lost opportunity.

Your assertion about the University's unwillingness to engage with the UAW over these past months is inaccurate. Through the public and private meetings typical of any negotiation, we have remained open to all reasonable suggestions that might bridge the gap that divides us.

Your letter fails to make even a counter-proposal for our consideration. In consideration of that and the fact that a new school year is about to begin, we are informing our community today that the University will not be negotiating a new contract with the United Auto Workers as the representatives of our graduate assistants. We will implement the proposals contained in the June 16th memorandum to the community signed by Executive Vice President Jacob Lew and Provost David McLaughlin, as modified based on comments received during the notice and comment period. This approach will permit our graduate assistants to pursue their academic studies in an environment guided by academic norms and oriented to supporting their academic success, with the support of stipends and benefits that are guaranteed.

Very truly yours,



Terrance J. Nolan

Cc: Via Facsimile (860) 674-1164  
Mr. Philip Wheeler  
Regional Director, UAW  
111 South Road  
Farmington, CT 06032-2560

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[Whereupon, at 11:51 a.m., the subcommittees were adjourned.]

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