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ARTICLES

IS RELIGIOUS LIBERTY THE ULTIMATE MANAGEMENT PREROGATIVE?: SOME REFLECTIONS ON *PACIFIC LUTHERAN UNIVERSITY* AND *SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925*

David L. Gregory*

INTRODUCTION

Religious liberty is the most important of all the human rights, according to the Second Vatican Council of the Roman Catholic Church.¹ More than a half century since this unequivocal proclamation by the Council Fathers, religious liberty has risen to the fore of a

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1. See Pope Paul VI, *Declaration on Religious Freedom Dignitatis Humane: On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious Promulgated by his Holiness Pope Paul VI*, VATICAN (Dec. 7, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

significant collision with First Amendment jurisprudence and has applied labor management relations dynamics not seen in decades.²

The heart of the matter is this: Has the National Labor Relations Board (NLRB or the Board) of the Obama Administration repudiated long-established law that has kept the Board and the federal courts out of the labor management relations of religiously-affiliated Universities? And, if so, what are the consequences?

Beginning in the early days of the Reagan Administration, the NLRB has gradually become one of the most contentious and, indeed, acrimonious, administrative law battlefields in some of the major public policy debates.³ Perhaps the paradigm case of scorched earth administrative law warfare is the notorious *Boeing* case, wherein the employer threatened to move all major operations to South Carolina, an anti-union state in the nation, for the manufacturer of its world-class airliner due to acrimonious labor management relations with the Machinists Union.⁴

For more than 30 years, the NLRB has been relatively quiescent when it comes to regulating or resolving potential conflicts between the parties and First Amendment advocates.⁵ Within the past several years, the NLRB has launched a frontal assault on what had previously been regarded as excessive entanglement of the NLRB in the theological dimensions of the religiously affiliated employer.⁶

This article will critically assess both the probable ramifications

2. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 491 (1979).

3. See NAT'L LABOR RELATIONS BD., 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 63 (2015), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf> (showing a list of major NLRB cases since the Reagan administration).

4. See Julius Getman, *Boeing, the IAM, and the NLRB: Why U.S. Labor Law is Failing*, 98 MINN. L. REV. 1651, 1655-56 (2014), for an excellent review of the *Boeing* saga. See also David L. Gregory, Ian Hayes & Amanda Jaret, Essay, *Reflections on NLRB's Labor Law Jurisprudence after Wilma Liebman*, 44 LOY. U. CHI. L.J. 926-27 (2013); Nikki Haley, Governor of S.C., Address to Republican National Convention (Aug. 28, 2012), <http://www.c-span.org/video/?c3847756/nikki-haleys-rnc-speech> (delivering a major address at the Republican National Convention in 2012 excoriating organized labor in South Carolina); *Boeing Complaint Fact Sheet*, NLRB, <https://www.nlr.gov/news-outreach/fact-sheets/fact-sheet-archives/boeing-complaint-fact-sheet> (revised Sept. 19, 2011); *Nikki Haley RNC Speech (text and video)*, POLITICO, <http://www.politico.com/story/2012/08/nikki-haley-rnc-speech-transcript-080376> (last updated Sept. 4, 2012, 9:53 PM).

5. See Mary K. Klimesh, Bryan R. Bienias & Jeffrey A. Berman, *NLRB Poised to Change the Game at Private Schools*, LAW360 (July 11, 2014, 11:04 AM), <http://www.law360.com/articles/553037/nlr-b-poised-to-change-the-game-at-private-schools>.

6. See *Catholic Bishop of Chi.*, 440 U.S. at 502.

and the unintended secondary influences upon thousands of academic workers and hundreds of religiously affiliated Universities, inevitably flowing from continuing deference to, or unequivocal repudiation of, the subordination of employee rights to private prerogatives under the guise of the First Amendment excessive entanglement doctrine.

The NLRB has jurisdiction over religiously affiliated Universities⁷ in all instances except when a University's purpose is to provide a religious-based environment and when its faculty members perform functions in furtherance of the institutional religious mission.⁸ Under such exceptional circumstances, the NLRB will decline jurisdiction to avoid the secular governmental agency infringing on the University's First Amendment right to be free of such excessive entanglement.⁹

Moreover, the NLRB has jurisdiction over petitioned-for faculty units, unless the University employer can prove that the units are managerial employees exempted from the National Labor Relation Act's (the NLRA or the Act) coverage.¹⁰ Faculty are considered managers when, in view of the totality of the circumstances, the employer proves that the faculty exercise both actual and effective control in areas of University governance and operation.¹¹ The Board will focus on the following areas of decision making: Academic Programming, Enrollment Management, Finances, Academic Policies, and Personnel Policy and Related Matters.¹²

The NLRB's decision in *Pacific Lutheran University* closely re-examined two landmark Supreme Court cases: *Catholic Bishop of Chicago* and *Yeshiva University*.¹³ In both cases, the Court provided guidelines that narrowed the scope of the NLRB's jurisdiction in the realm of religiously affiliated colleges, Universities, and secondary schools.¹⁴ Consequently, the NLRB developed new standards to

7. Throughout this article, "University" will be broad umbrella terminology used to incorporate colleges and similar institutes of higher education.

8. *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 7 (Dec. 16, 2014).

9. *Id.* at 8; see also U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

10. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 272 (1974); see also *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 16-17.

11. See *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 18-20. The Board also measures the University's decision making structure and the contingent faculty's relationship to the University within its decision making process. See *id.* at 20.

12. *Id.* at 14. The Board affords more weight to the first three areas than the remaining two. *Id.*

13. See *id.* at 1.

14. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 679-83 (1980); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 506-07 (1979).

broaden its jurisdiction over faculty members and provide an outlet for such employees to engage in collective bargaining under section 7 of the National Labor Relations Act (the NLRA or the Act).¹⁵ The NLRB initiated an ambitious effort to make the non-viability of the Supreme Court's framework, careening between sensitive constitutional issues and tricky assessments of "managerial" status for faculty members under the NLRA, glaringly apparent.¹⁶

The Board in *Pacific Lutheran University* reviewed two commonly litigated issues. First, the University argued that faculty members are not within the Board's jurisdiction because it is a "self-identified" religious University.¹⁷ The Board responded with a twofold test to overcome the excessive entanglement constitutional concern at the heart of *Catholic Bishop of Chicago*.¹⁸ As a threshold matter, the University must first demonstrate "that it holds itself out as providing a religious educational environment."¹⁹ Next, the University has the burden of proving that its petitioned-for faculty members have a specific role in performing a religious function within the educational environment.²⁰ If the answer is in the affirmative for both prongs, the Board must decline jurisdiction over the faculty members.²¹

Second, the University contended that, even if it fails on the religion issue, its faculty members hold managerial status, which make them exempt from the Board's jurisdiction.²² In response, the Board refined the standard of review for managerial employees as originally set forth in *NLRB v. Yeshiva University*.²³ At its core, the Board analyzed the faculty's managerial authority by determining whether the members were engaged in primary and/or secondary areas of decision-making.²⁴ The Board then determined whether such decision-making illustrated that the faculty members were given actual control and/or made effective recommendations that were commonly accepted by University committee boards.²⁵

In *Seattle University*, a case that bracketed *Pacific Lutheran*, the

15. *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 5.

16. *See id.* at 5-11.

17. *Id.* at 1.

18. *See id.*; *Catholic Bishop of Chi.*, 440 U.S. at 501.

19. *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 5.

20. *Id.*

21. *See id.* at 8-9.

22. *Id.* at 14.

23. *Id.*

24. *Id.* at 17.

25. *Id.* at 19.

NLRB struggled to deal with First Amendment jurisdictional questions when applying its precedent.²⁶ There, the Board grappled with preserving and enforcing the Act's purpose²⁷ when faced with the issue of how a religiously affiliated institution chooses to govern itself.²⁸ Additionally, *Seattle University* argued that its petitioned-for faculty units were managerial employees exempt from the Act's coverage.²⁹

Accordingly, Part I (*Catholic Bishop*) and Part II (*Yeshiva University*) of this Article will analyze the Supreme Court's likely response to the Board's effort to assert jurisdiction over a faculty bargaining unit. However, because the *Yeshiva* decision left open serious questions in relation to the possibility of unionization among faculty members, and the *Catholic Bishop* decision was based on a narrow construction of the NLRA, the Board recognized the need to re-examine these issues in *Pacific Lutheran*.³⁰

Part III of this article will discuss how and why *Pacific Lutheran* has modified the review standards regarding religiously affiliated Universities. Within this section, subsection A will analyze the new standard and address its application to the facts of *Pacific Lutheran*, and subsection B will focus on the managerial issue. Lastly, Part IV will address the *Seattle University* case and its procedural posture in relation to *Pacific Lutheran*. This section will also discuss *Seattle University's* background, reasoning and holding; and most importantly, it will illustrate the influence *Pacific Lutheran* had on *Seattle University's* holding.

I. CATHOLIC BISHOP OF CHICAGO: NLRB JURISDICTION OVER RELIGIOUSLY-AFFILIATED UNIVERSITIES

In 1979, the Supreme Court rejected the NLRB's decision to exercise jurisdiction over lay faculty members at Catholic-affiliated secondary schools.³¹ However, this was only after the Board slowly inched its way to assert jurisdiction over all private, nonprofit, and

26. See *Seattle Univ.*, Case No. 19-RC-122863, 2014 WL 1713217, at *1, 11 (N.L.R.B. Apr. 17, 2014), *remanded*, 2015 WL 456610 (N.L.R.B. Feb. 3, 2015).

27. See 29 U.S.C. § 157 (2012) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining. . . .").

28. See *Seattle Univ.*, 2014 WL 1713217, at *12-14; U.S. CONST. amend. I, *supra* note 9.

29. See *Seattle Univ.*, 2014 WL 1713217, at *14-15.

30. See *Pac. Lutheran Univ.*, 361 NLRB No. 157, at 1-2, 15.

31. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979).

educational institutions.³² At the beginning of the 1970s, the NLRB widened its jurisdictional control as it observed that Universities had increased their involvement in interstate commerce.³³ Correspondingly, as the broadening trend continued, the NLRB increasingly invoked its jurisdiction regarding church-operated schools.³⁴ Undaunted by First Amendment concerns, the Board asserted jurisdiction over employer's activities that were dedicated to sectarian religious purposes.³⁵ After applying the Supreme Court standard established in *Lemon v. Kurtzman*,³⁶ the Board deemed that asserting jurisdiction over lay teachers of Catholic secondary schools would not produce excessive governmental entanglement with religion.³⁷ However, the Supreme Court repudiated the NLRB's attempt to advance its jurisdiction.³⁸ In a 5-4 decision, Chief Justice Burger narrowly construed the NLRA to avoid the sensitive constitutional issue the Court would encounter if it permitted the Board to assert jurisdiction over faculty in church-operated school systems.³⁹

Catholic Bishop involved two types of schools: one group of schools operated by the Catholic Bishop of Chicago, otherwise known as "minor seminaries" for their role in educating potential priests; and another group operated by the Diocese of Fort Wayne-South Bend, Inc. (the Schools).⁴⁰ Schools from both groups provided a traditional secular education in full accord with the "tenets of the Roman Catholic faith" and required mandatory religious training.⁴¹ In 2014, in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court most recently defined "religious employers" to encompass "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order."⁴² Nonetheless, despite the Schools' religious affiliation, the Board received representation petitions filed by interested union organizations seeking to represent only lay teachers.⁴³ Thereafter, the Board rejected the

32. *See id.* at 497.

33. *See id.* (citing Cornell Univ., 183 N.L.R.B. 329 (1970)).

34. *See id.*

35. *See id.* at 497-98.

36. *See id.* at 501-04; *see also* *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1970).

37. *See Catholic Bishop of Chi.*, 440 U.S. 498.

38. *See id.* at 507.

39. *See id.* at 490-91, 502.

40. *Id.* at 492.

41. *Id.* at 493.

42. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2763 (2014) (quoting 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

43. *Catholic Bishop*, 440 U.S. at 493.

Schools' jurisdiction challenge on the ground that the religiously sponsored organizations were not "completely religious."⁴⁴ The Board ordered the Schools to "cease their unfair labor practices and that they bargain collectively with the unions."⁴⁵

On appeal, the Seventh Circuit determined that the Board's "completely religious—merely religiously associated" standard provide[d] no workable guide," as it implicated "very sensitive questions of faith and tradition."⁴⁶ The court reasoned that "certifying a union as the bargaining agent for lay teachers . . . would impinge upon the freedom of church authorities to shape and direct teaching in accord with . . . their religion."⁴⁷ In effect, "the Free Exercise Clause and the Establishment Clause of the First Amendment [barred] the Board's jurisdiction."⁴⁸

The Supreme Court affirmed the Seventh Circuit's decision "declaring that the Court would not uphold any exercise of the Board's jurisdiction that created 'serious constitutional questions' in the absence of an 'affirmative intention of Congress clearly expressed' to grant such jurisdiction."⁴⁹ Specifically, the Court referenced its decision in *Lemon v. Kurtzman* to illustrate that teachers play a key role in the school system and would create an "impermissible risk of excessive governmental entanglement" to channel aid through teachers in "the affairs of church-operated schools."⁵⁰ Even though the Board argued it would circumvent First Amendment issues by inquiring into only factual issues, the Court chose not to entertain areas ripe with constitutional concern where Congress indicated no sign of "affirmative intention" to grant the Board jurisdiction.⁵¹ As a result, the Court contended that the Board's inquiry into the school's religious mission may be enough to violate the sensitive rights guaranteed by the Religion Clauses.⁵²

In stark contrast, Justice Brennan, writing for the dissent, argued that the NLRA's language and history unambiguously extends its

44. *See id.*

45. *Id.* at 494.

46. *Id.* at 495 (quoting *Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1118 (7th Cir. 1977)).

47. *Id.* at 496.

48. *Id.*

49. *See The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1, 254, 256 (1979) (citing *Catholic Bishop*, 440 U.S. at 501).

50. *Catholic Bishop*, 440 U.S. at 501 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)).

51. *See Catholic Bishop*, 440 U.S. at 502-07.

52. *Id.* at 507.

authority or jurisdiction on church-operated schools.⁵³ On that basis, “the Act covers all employers not within the eight [well-delineated] exceptions.”⁵⁴ Because the Act did not include religiously associated employers as an exception, Congress did not intend to exempt them from the Act’s collective bargaining privileges.⁵⁵ The Dissent noted that while various proposals providing exceptions to religiously associated employers passed the House of Representatives, they were ultimately rejected.⁵⁶ Thus, the Dissent argued that not only did Congress confirm its position on employer coverage under the Act, but also that the “Court has consistently declared that in passing the [Act], Congress . . . vest[ed] in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause.”⁵⁷

The Court relied on three main arguments to deny the Board jurisdiction. First, the Court found that Congress’s lack of affirmative intention shall be construed as religiously-affiliated employees are exempted from the Act.⁵⁸ Second, the Court held that an “inquiry into unfair labor practices in church-operated schools would entangle the Board.”⁵⁹ Third, the potential burdens facing the “free exercise clause” seriously infringe on the First Amendment.⁶⁰ The Court ultimately decided that it should not be left to them to determine the line-drawing between religiously affiliated entities or secular employers.⁶¹ Although

53. See *id.* at 511 (Brennan, J., dissenting).

54. *Id.*

55. See *id.* at 511-12; see also 29 U.S.C. § 157 (2012).

56. See *id.* at 512-13.

57. See *id.* at 516.

58. See *The Supreme Court, 1978 Term*, *supra* note 49, at 256.

59. *Id.* at 259.

60. *Id.* at 260.

61. See *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2778-79 (2014). In *Hobby Lobby*, “writing for a five-Justice majority, Justice Alito upheld the [Religious Freedom Restoration Act of 1993 (RFRA)] claim without deciding any Free Exercise Clause issues,” by concluding that RFRA was “designed to provide very broad protection for religious liberty.” Paul Horwitz, Comment, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 162, 165 (2014) (quoting *Hobby Lobby*, 134 S. Ct. at 2767. First, the “ministerial exception” exists because the “First Amendment ‘permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government.’” *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 705-06 (2012). Second, where an employee is regarded as a minister, a court cannot “requir[e] a church to accept or retain an unwanted minister,” *id.* at 706, as it “would have plainly violated the Church’s freedom under the Religion Clauses.” *Id.* at 709. See also *Corp. of the Presiding Bishop of the Church of Latter Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (“§ 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to . . . carry out their religious missions. . . . [T]he statute effectuates a more complete separation of the [church and state to] avoid[] the kind of intrusive inquiry into religious belief[s].”).

the Court's main conclusions are debated, the decision is most criticized for its narrow construction of the Act and its poor guidance for the Board.⁶²

Catholic Bishop narrowly construed the NLRA to avoid constitutional questions.⁶³ Although this decision was in the context of secondary schools, the Board has been faced with applying this narrow construction to other religiously-operated entities.⁶⁴ Consequently, the Board was left to grapple with how it should understand the Court's decision "to exclude all schools [and entities] permeated by religion from the NLRA."⁶⁵ The Board's decision in *Pacific Lutheran University* was its recent attempt at answering the Court's concerns.⁶⁶

II. YESHIVA UNIVERSITY: FACULTY MEMBERS AS EXEMPT MANAGERIAL EMPLOYEES OR NON-EXEMPT EMPLOYEES UNDER THE NLRA

Similar to constraining the Board's jurisdiction in *Catholic Bishop*,⁶⁷ the Court further limited the Act's coverage by excluding full-time faculty members as "managerial" employees not eligible for the benefits of collective bargaining.⁶⁸ The Court was faced with the difficult task of distinguishing between matters of "managerial prerogative" and "dealing with management."⁶⁹ Specifically, this case "rais[ed] the fundamental question under the NLRA of whether faculty were professional employees [under section 2(12) of the Act] with the right to unionize or whether they were unprotected as supervisors or managerial employees."⁷⁰ The Court rejected the Board's argument that the application of managerial exclusion to full-time faculty members would "frustrate" the national labor policy.⁷¹ Rather, the Court held that the University's faculty members are managerial employees and

62. See Horwitz, *supra* note 61, at 154.

63. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 507 (1979).

64. See NLRB v. Yeshiva Univ., 444 U.S. 672, 674 (1980).

65. *The Supreme Court, 1978 Term, supra* note 49, at 262.

66. Pac. Lutheran Univ., 361 N.L.R.B. No. 157, at 1 (Dec. 16, 2014).

67. *Catholic Bishop*, 440 U.S. at 506.

68. *Id.* at 691-92 (Brennan, J., dissenting); *Yeshiva Univ.*, 444 U.S. at 682.

69. See Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1671 (1983) [hereinafter *Collective Bargaining as an Industrial System*].

70. See Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 CORNELL J.L. & PUB. POL'Y 263, 285 (2007); see also 29 U.S.C. § 152 (2012).

71. See *Yeshiva Univ.*, 444 U.S. at 684-85.

excluded from the Act's coverage.⁷²

Yeshiva University is a private University.⁷³ The bargaining unit for Yeshiva faculty members sought certification as the official bargaining agent for the full-time faculty members.⁷⁴ As predicted, the University refused to recognize the petition, arguing that its full-time faculty were managerial personnel and not "employees" entitled to collective bargaining under the Act.⁷⁵ As support, evidence illustrated that a central administrative hierarchy was used at the University, which meant that ultimate authority was vested in a Board of Trustees and accompanied by a president and four vice presidents.⁷⁶ Importantly, University-wide policies were determined by a central administration with the approval of the Board of Trustees.⁷⁷ Faculty participated in this governance through student-faculty advisory councils and faculty committees.⁷⁸ Although faculty members merely made recommendations to the Dean or Director, an overwhelming majority of their recommendations were implemented.⁷⁹ However, the Board granted the petition and included all full-time faculty in the bargaining unit with the exception of the Deans and Directors.⁸⁰ The Board concluded that faculty participation is "on a collective, rather than individual, basis;" faculty decision-making is made in their own interest rather than that of the employer; and the Board of Trustees has the final authority.⁸¹

On appeal, the Second Circuit rejected the Board's assertion of jurisdiction over the full-time faculty members.⁸² The court concluded that the faculty members were "substantially and pervasively operating the enterprise," and therefore, were "endowed with 'managerial status.'"⁸³ The court determined that the faculty had an extensive and crucial role over the central policies of the institution.⁸⁴

The Supreme Court affirmed the Second Circuit's decision.⁸⁵ In

72. *Id.* at 674.

73. *Id.*

74. *Id.* at 674-75.

75. *Id.* at 675.

76. *Id.*

77. *Id.*

78. *Id.* at 675-76.

79. *Id.* at 677.

80. *Id.* at 678.

81. *Id.*

82. *See id.* at 679.

83. *Id.*

84. *Id.*

85. *Id.*

prior decisions, the Supreme Court defined managerial employees as individuals “who ‘formulate and effectuate management policies by expressing and making operative the decisions of their employer.’”⁸⁶ In *Ford Motor Co.*, the NLRB defined managerial employees as “executive employees who are in a position to formulate, determine, and effectuate management policies.”⁸⁷ Six years after the *Bell Aerospace* decision, Justice Powell reaffirmed the broad managerial employee exclusion in *Yeshiva*.⁸⁸ Although the managerial employees were in an industrial setting in *Bell Aerospace*, the Court analogized to such setting and extended its ruling to full-time college faculty members.⁸⁹ It “determined that the faculty [members] had sufficient control in setting policies to be deemed managerial.”⁹⁰

The Board contended that the status of faculty employees “must be determined by reference to the ‘alignment with management’ criterion.”⁹¹ Based on that standard, the Board concluded that such employees are not aligned with management because they neither exercise independent professional judgment nor even conform to management policies.⁹² In response, the Supreme Court found that “the faculty’s professional interests . . . cannot be separated from those of the institution.”⁹³ Moreover, the Court found that because the business of the University is education, the University “must depend on academic policies that largely are formulated and . . . implemented by faculty governance decisions.”⁹⁴

The Court ultimately expressed that this decision should not be interpreted as a sweeping generalization for all professional employees.⁹⁵ In fact, it clearly determined that employees’ activities that “fall outside the scope of duties routinely performed by similarly situated professionals will be found aligned with management.”⁹⁶ In essence, the Court found that, “[t]o the extent the industrial analogy applies, the faculty determines . . . the product to be produced, the terms upon which

86. See Ben M. Germana, Note, *Protecting Managerial Employees under the National Labor Relations Act*, 91 COLUM. L. REV. 405, 405 (1991) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974)).

87. *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946).

88. Germana, *supra* note 86, at 411-12.

89. *Id.*

90. *Id.*

91. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 684 (1980).

92. *Id.*

93. *Id.* at 688.

94. *Id.*

95. *Id.* at 690.

96. *Id.*

it will be offered, and the customers who will be served.”⁹⁷ Therefore, it follows that, because these powers are undoubtedly managerial in any other context, they are managerial in the University context.⁹⁸

Writing for the dissent, Justice Brennan argued that the majority erred in analogizing “managerial employee” status in the industrial context to that of the academic context.⁹⁹ He reflected on the legislative history surrounding the supervisory and managerial exclusions.¹⁰⁰ The congressional intent behind the exclusion of supervisors under section 2(11) of the Act was to “protect the rank-and-file employees from being unduly influenced in their selection of leaders by the presence of management representatives in their union,” and to ensure that employers are not deprived of the loyalty of their supervisors.¹⁰¹ Similarly, the judicially developed exclusion of managerial employees is to prevent those employees from joining the bargaining unit of rank-and-file who have “an alliance with management.”¹⁰² Put differently, “if [the employee’s] actions are undertaken for the purpose of implementing the employer’s policies, then he [or she] is accountable to management and may be subject to conflicting loyalties.”¹⁰³ Based on these findings, the dissent argued that the majority’s decision failed to “comprehend the nature of the faculty’s role in University governance.”¹⁰⁴

The dissent illustrated the decision-making structure for “mature” Universities as a dual authority system.¹⁰⁵ It noted that “[a]uthority is lodged in the administration, and a formal chain of command runs from a lay governing board down through University officers to [finally] individual faculty members and students.”¹⁰⁶ Although Justice Brennan is not naïve to the faculty’s expertise in the decision-making process, he argued that faculty members only offer their recommendations to serve their own independent interests to create an effective academic environment.¹⁰⁷ Nonetheless, even if the faculty’s recommendations were aligned with administrative policies, due to the University’s

97. See Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 135 (1988) (quoting *Yeshiva Univ.*, 444 U.S. at 686).

98. *Id.* at 135-36.

99. See *Yeshiva Univ.*, 444 U.S. at 692-93 (Brennan, J., dissenting).

100. *Id.* at 694.

101. *Id.* at 694-95.

102. See *id.*

103. *Id.* at 696.

104. *Id.*

105. *Id.*

106. *Id.* at 697.

107. *Id.*

decision-making structure, the University will always retain ultimate authority.¹⁰⁸ The dissent noted that “[u]ltimately the performance of [all] employee’s duties will always further the interests of the employer. . . .”¹⁰⁹ Therefore, the managerial exclusion must be based on employees who are “*true representatives of management*,” not merely faculty members who participate in the decision-making process through recommendations at the school’s advisory committee meetings.¹¹⁰ Accordingly, the dissent’s test ensures that the managerial exclusion will only include those faculty members “whose position in the University’s bureaucracy is consistent with a primary orientation toward management.”¹¹¹

However, despite the dissent’s persuasive arguments, the *Yeshiva* Court narrowed the Board’s jurisdiction to exclude full-time faculty members in order to avoid the conflicting interests within a bargaining unit, mainly having rank-and-file employees with faculty members who possess managerial authority.¹¹² The opinion is troubling because, although there is a group of faculty members that exert the type of control that aligns with management, there is also a group of faculty members whose contribution to the decision-making process is minimal and carries little weight to the overall decision-making scheme.¹¹³ Moreover, even if that were not the case, faculty members (or managerial employees) would not be organized in the same collective bargaining unit with rank-and-file workers, as the Board understands that managerial employees often have different concerns from those of the rank-and-file.¹¹⁴

Although the *Yeshiva* full-time faculty members viewed themselves as “professional employees” under section 2(12) of the Act and not as supervisors or managerial employees, as is evident by their vote to unionize,¹¹⁵ the Court’s determination to exclude the faculty members from the bargaining unit and prevent them from exercising section 7 rights under the NLRA will likely influence future perceptions between faculty-administrative relations in the academic arena.¹¹⁶ Now, four decades later, the Board continues to struggle with the Supreme

108. *Id.* at 697-98.

109. *Id.* at 701.

110. *Id.* at 698-99.

111. *See The Supreme Court, 1978 Term, supra* note 49, at 259.

112. *See id.* at 256.

113. *See id.* at 259.

114. *Germana, supra* note 86, at 424.

115. *See Yeshiva Univ.*, 444 U.S. at 702 (Brennan, J., dissenting).

116. *See Lieberwitz, supra* note 70, at 289.

Court's interpretation of "managerial employee" status in connection with faculty members.¹¹⁷ *Pacific Lutheran* is the Board's latest attempt to devise a clear standard that can distinguish employees subject to its jurisdiction from employees who serve as true representatives of their employer, who are exempt from the bargaining privileges provided under the Act.¹¹⁸

III. *PACIFIC LUTHERAN*'S EFFORT TO SATISFY SUPREME COURT LEGAL STANDARDS

In *Pacific Lutheran*, the NLRB provided justification for revisiting its precedent regarding its jurisdictional boundaries over religiously affiliated Universities: The avoidance of "any intrusive inquiry into the character or sincerity of [the] University's religious views."¹¹⁹

Since 1975, the NLRB exerted jurisdiction over religiously affiliated schools using *Catholic Bishop of Chicago*'s "completely religious" standard.¹²⁰ However, this test was later overturned by the Seventh Circuit,¹²¹ and that order was affirmed by the Supreme Court.¹²²

Subsequently, the NLRB adopted the "substantial religious character" test, applied on a case-by-case basis to determine whether there existed a significant risk of infringement on the religiously affiliated University's First Amendment rights.¹²³ Although this test never caught the Supreme Court's formal attention, the D.C. Circuit rejected this approach in *Great Falls*.¹²⁴ Instead, the D.C. Circuit adopted its own three part test.¹²⁵ Some of the Board's regional

117. See *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 15-16 (Dec. 16, 2014).

118. See *id.* at 1.

119. See *id.* at 3.

120. *Catholic Bishop of Chi.*, 220 N.L.R.B. 359, 359 (1975). Established that "the Board's policy is to decline jurisdiction over religiously sponsored organizations 'only when they are completely religious, not just religiously associated.'" *Id.*

121. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 495 (1979).

122. See *id.* at 507 (using a constitutional avoidance principle to hold jurisdiction improper when NLRB's conclusions and processes could not avoid entanglement with university's religious mission).

123. See *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 4.

124. See *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); see also *Pac. Lutheran Univ.*, 361 N.L.R.B. 157, at 4.

125. *Great Falls*, 278 F.3d at 1343 ("[The university] (a) 'holds itself out to students, faculty and community' as providing a religious educational environment; (b) is organized as a 'nonprofit'; and (c) is affiliated with, or owned, operated, or controlled . . . by a recognized religious organization, or with an entity. . . ."). The court summarized this new test as avoiding unnecessary intrusion into the university's free exercise of religion by not asking questions with respect to how "effective the institution [was] at inculcating its beliefs. . . ." *Id.* at 1344.

directors, however, have expressly rejected this approach.¹²⁶ In response, the Board's new test¹²⁷ is a combination of various tests from previous decisions that were submitted by the petitioner and respondent in *Pacific Lutheran*.¹²⁸ The NLRB's tactic was to take advantage of both parties' concerns while also adhering to the principles established by the Supreme Court in *Catholic Bishop*.¹²⁹ There, the Court found that the "test must not impinge on a University's religious rights and must avoid the type of intrusive inquiry. . . . Second, our decision on whether to assert jurisdiction over faculty members must give due consideration to employees' Section 7 rights to decide whether to engage in collective bargaining."¹³⁰

A. Religious Educational Environment: Facts Relating to Pacific Lutheran's Religious Educational Environment Claim

Pacific Lutheran University (PLU) was founded by Lutherans "to serve the church and the community" through education.¹³¹ It is considered "one of the [twenty-six] colleges and Universities affiliated with the Evangelical Lutheran Church in America (the ELCA)."¹³² Moreover, the University is organized as a 501(c)(3) not-for-profit corporation, "consist[ing] of one college and four schools."¹³³ PLU is governed by a thirty-seven member board of regents, of which sixteen

126. See, e.g., *Seattle Univ.*, Case No. 19-RC-122863, 2014 WL 1713217, at *13 (N.L.R.B. Apr. 17, 2014), *remanded*, 2015 WL 456610 (N.L.R.B. Feb. 3, 2015).

127. Both parties involved in *Pacific Lutheran* agreed that the "substantial religious character" was an inappropriate test. *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 5. Their agreement stemmed from the test's lack of predictability, predicated on constantly changing standards of review. See *id.* at 5 n.6.

128. See *id.* at 5. Petitioners argued for an adoption of a "teacher religious function" test. *Id.* Under this test, the Board would review "the employer-teacher relationship" to determine if the proposed faculty unit "play[ed] a 'critical and unique' role in fulfilling the mission of a school designed to propagate a religious faith." *Id.* Petitioners argued that reviewing the faculty's religious function within the university avoided First Amendment concerns. *Id.* Moreover, petitioners argued that their review provided different aspects of the university's religious mission as opposed to a singular "institution as a whole" approach, previously employed by the Board. *Id.* Respondents argued an adoption of the D.C. Circuit's *Great Falls* standard. *Id.* Some supporting briefs, however, disagreed over whether full adoption was necessary because the third prong of the standard could lead to "unconstitutional denominational preference." *Id.* at 5 n.7.

129. *Id.* at 5.

130. *Id.*

131. *Id.* at 11.

132. *Id.*

133. *Id.* These include "the College of Arts and Sciences, the School of Arts and Communication, the School of Business, the School of Education and Movement Studies, and the School of Nursing." *Id.*

members must be a part of the ELCA congregation and six members must be ministers of the ECLA.¹³⁴ However, PLU's articles of incorporation, by-laws, or faculty handbook did not place any religious preferences for full-time contingent faculty.¹³⁵ The petitioned-for faculty unit consisted of 176 full-time contingent faculty members who practiced in all schools during the 2012-2013 academic year.¹³⁶

PLU's mission statement is "to educate students for lives of thoughtful inquiry, service, leadership, and care for other persons, for their communities and for the earth."¹³⁷ Its stated purpose is "establishing and maintaining within the State of Washington an institution of learning of University rank in the tradition of Lutheran higher education."¹³⁸ PLU's faculty handbook provides that the University is "[s]teeped in the Lutheran commitment to freedom of thought" and that "[t]he University values as its highest priority excellence in teaching."¹³⁹ PLU's website provides information regarding its religious courses, upcoming events, and news about the University.¹⁴⁰ Mailings to prospective students mention Lutheranism only in passing and reinforce its mission of academic success.¹⁴¹ PLU's mailings specifically emphasized an acceptance of all students, regardless of faith.¹⁴² No student or faculty member was required to attend religious services.¹⁴³ All such representations were created by PLU and were made available to prospective students, faculty, and the

134. *Id.* The other members of the board of regents have no religious restrictions placed on them. *Id.* Moreover, the President of PLU must only be "a member of a Christian denomination with which ECLA 'has a relationship of full communion.'" *Id.* Finally, PLU's articles of incorporation and by-laws do not place any additional religious requirements on "any other administrative, staff or faculty office holder (with the exception of campus pastors)." *Id.*

135. *Id.* at 12. There were no disciplinary policies in place for faculty members who were not Lutherans; nor did PLU hold "doctrine or membership in a Lutheran congregation [as a requirement] for hiring, promotion, or tenure; nor d[id] it play any role in faculty evaluations or promotions." *Id.* PLU's contingent faculty contracts "d[id] not mention religion ... or Lutheranism." *See id.* at 13.

136. *Id.* at 11. Contingent faculty members are faculty employees "hired on yearly contracts." *Id.* at 20.

137. *Id.* at 11.

138. *Id.*

139. *Id.* (alteration in original).

140. *Id.* at 12. Specifically, PLU's website stated that its "religious courses ask students to engage in the academic study of religion, not in religious indoctrination. . . . This discipline engages students in the scholarly study of sacred texts and practices histories, theologies, and ethics." *Id.* at 11-12.

141. *Id.* at 12.

142. *Id.*

143. *Id.*

general public.¹⁴⁴

Prior to the NLRB's decision, the Board, in dicta, issued specific questions to the parties and the general public addressing the First Amendment jurisdictional concerns.¹⁴⁵ The Board used the briefing and responses filed by all interested parties to create its new test.¹⁴⁶

As a threshold matter, the Board will look to see if the University "holds itself out . . . as providing a religious educational environment."¹⁴⁷ The NLRB's new test avoids First Amendment entanglement issues by reviewing the University's contemporary public representations regarding its religious character.¹⁴⁸ Public representations include, but are not limited to, the University's website, mailing communications to prospective students, job descriptions and hiring advertisements for prospective faculty, press releases and public statements made by University officials, faculty handbooks, articles of incorporation and by-laws, and published mission statements and stated purposes.¹⁴⁹

This provides the NLRB with objective evidence to review the school's religious character while completely avoiding the "intrusive inquiry" that occurred in *Great Falls*.¹⁵⁰ The review's purpose is to use the University's public representations as evidence of their overall religious character.¹⁵¹ Additionally, reviewing the University's public representations acts as a "market check," preventing other Universities from claiming to be religious institutions solely to avoid the NLRB's

144. See *supra* text accompanying notes 132-43.

145. *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 2. The questions pertaining to the First Amendment-jurisdictional issue include:

- (1) What is the test the Board should apply under *NLRB v. Catholic Bishop* to determine whether self-identified "religiously affiliated educational institutions" are exempt from the Board's jurisdiction?
- (2) What factors should the Board consider in determining the appropriate standard for evaluating jurisdiction under *Catholic Bishop*?
- (3) Applying the appropriate test, should the Board assert jurisdiction over this Employer?

Id. (citations omitted).

146. See *id.* at 5; 14.

147. *Id.* at 6.

148. *Id.* at 5-6. In *Pacific Lutheran*, the Board specifically noted that PLU's de-emphasis of Lutheran indoctrination, coupled with its acceptance of other faiths and lack of religious requirements for student, faculty, and most administrative employees, resulted in public representations which tended to prove a glaring insufficiency of a purported religiously-driven academic environment. See *id.* at 13.

149. *Id.* at 6, 12. All representations mentioned were considered by the Board in *Pacific Lutheran*. *Id.* at 6.

150. See *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

151. See *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 10 n.19.

jurisdiction,¹⁵² and is a low threshold for employers to meet.¹⁵³

In applying the facts to *Pacific Lutheran*, the NLRB found that PLU met its threshold requirement.¹⁵⁴ PLU's contemporary public messages and religious references were sufficient to be characterized as an institution that provides a religious educational environment,¹⁵⁵ placing an emphasis on Lutheranism.¹⁵⁶

Once the NLRB feels as though the threshold requirement has been met, it must then examine whether the University holds its faculty out as performing a specific role in creating and maintaining the University's religious educational environment.¹⁵⁷ The NLRB realized the risk of its regional directors "'trolling' through a University's operation to determine whether and how it is fulfilling its religious mission" when attempting to evaluate how faculty promotes the University's religious mission.¹⁵⁸

Therefore, the NLRB applied the same standard it used for its threshold requirement, which focused on how the University presented its faculty through "communications to current or potential students and faculty members, and the community at large. . . ."¹⁵⁹ Similar to the review set forth in the threshold requirement, the Board will not accept "generalized statements" regarding the faculty's role at the University.¹⁶⁰ Only public statements and responsibilities specifically relating to the

152. *Id.* at 9.

153. *Id.* at 7, 13 (stating this requirement "does not require a rigorous showing of PLU's religious character"). Instead, the Board simply reviews the University's public representations and ensures that they are in line with their religious status. *See id.* at 9. If the standard was difficult to meet, the Board would be infringing upon their First Amendment rights. *See id.* at 31 (Johnson, J., dissenting).

154. *Id.* at 12 (Pearce, majority). The NLRB explained that through PLU's articles of incorporation, by-laws, faculty handbook, course catalog, website, and recruitment information, PLU sufficiently presented itself to the world as a religious institution. *Id.* at 12-13. On its website, PLU used messages of its mission statement, religious announcements and other programming centered on religious activities. *Id.* at 13. PLU distributed religious messages in its website, mailings, and speeches, directed to students and their parents. *See id.* at 37 (Johnson, J., dissenting). Also, PLU provided religious services on a daily basis. *See id.* at 12 (Pearce, majority).

155. *Id.* at 12-13.

156. *Id.* at 12-13.

157. *Id.* at 7. The NLRB in *Pacific Lutheran* reasoned that "[its] statutory duty requires . . . an examination of the specific employees in the petitioned-for unit to determine if they are employees eligible for coverage under the Act. . . ." *Id.* This is to "ensure that the petitioned-for employees are not improperly denied the opportunity to vote on representation." *Id.*

158. *Id.* at 8.

159. *Id.* The Board further went on to say that it would focus on the faculty's obligations and responsibilities as educators at the university. *Id.*

160. *Id.*

University's religious mission will suffice.¹⁶¹ The NLRB cited similar forms of proof, which they referenced in the threshold requirement to evaluate the faculty.¹⁶² Similar to the threshold's "market check," the Board stated that faculty-related messages with commitments to "diversity and academic freedom" weakened the University's claim of providing a religious education environment.¹⁶³ The "market check" also served an additional purpose of eliminating those who falsely claimed to be religious so as to avoid Board jurisdiction.¹⁶⁴

If the NLRB exerted jurisdiction over petitioned-for faculty who participate in furthering the University's religious mission, this could "result in interference in [the University's] management prerogatives and 'open the door to conflicts between clergy-administrators and the Board'".¹⁶⁵ However, if the petitioned-for faculty plays no such role, then "assert[ing] . . . jurisdiction does not raise concerns under either the Free Exercise Clause or the Establishment Clause of the First Amendment."¹⁶⁶

In applying the facts of *Pacific Lutheran*, the NLRB held that the University did not hold its faculty out as performing a religious function in furtherance of PLU's religious mission.¹⁶⁷ The Board noted that PLU

161. See *id.* at 8-9. This time, the NLRB cited the reasoning of the D.C. Circuit in *Great Falls*. There, the court determined that "the 'holding out' requirement eliminates the need for a university to explain its beliefs [and] avoids asking how effective the university is at inculcating its beliefs. . . ." *Id.* at 8.

162. *Id.* at 9.

163. *Id.* at 8-9.

164. *Id.* at 9.

165. *Id.* at 8; see also *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 503 (1979). Objective evidence examples of the faculty's responsibilities include, but are not limited to "[1] integrating . . . religious teachings into coursework, [2] serving as religious advisors to students, [3] propagating religious tenets, or [4] engaging in religious indoctrination or religious training. . . ." *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 9. Similarly, objective evidence exists where a university "require[s] its faculty to conform to its religious doctrine or to particular religious tenets or beliefs in a manner that is specifically linked to their duties" as faculty. *Id.* at 33 (Johnson, J., dissenting).

166. *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 8 (Pearce, majority). The Board went on to explain that this is because faculty members who do not aid the university in furtherance of its religious mission "are indistinguishable from faculty at colleges and universities which do not identify themselves as religious institutions and which are indisputably subject to the Board's jurisdiction." *Id.*

167. *Id.* at 13. The NLRB explained that PLU's articles of incorporation and by-laws "governing the faculty [responsibilities and duties were] silent with respect to [the faculty's] role in fostering [its Lutheran] heritage." *Id.* A review of the faculty handbook yielded no encouragement for "faculty members to perform any religious functions." *Id.* Similarly, PLU's website made no mention of how its faculty played a role in fostering the University's Lutheran mission. *Id.* PLU's admission materials failed to describe how the professors at the university affect the school's religious message. *Id.* PLU did not require its professors to serve as religious advisors or to incorporate religious tenets into their teachings. *Id.*

specifically proclaimed in various messages to the public that it “welcome[d] the diversity of its faculty and the various perspectives they bring.”¹⁶⁸ PLU did not include adherence to Lutheranism, or a lack thereof, in considering potential faculty members for “hiring, promotion, tenure, or evaluation decisions.”¹⁶⁹ The Board noted that faculty who do not perform functions in furtherance of the University’s religious mission are no different from normal faculty practicing at secular institutions—institutions that the NLRB regularly exerts jurisdiction over.¹⁷⁰

B. Managerial Employees

Prior to *Pacific Lutheran*, the Board used *Yeshiva* when examining faculty employees to determine their status as managers.¹⁷¹ There, the Supreme Court used an industrial analogy¹⁷² to apply the section 7 issue within the University context.¹⁷³ Through this analogy, the Court explained that faculty managerial employees used independent discretion to “formulate and effectuate management policies by expressing and making operative the decisions of its their employer.”¹⁷⁴ In reviewing the faculty’s actual authority, the Court held that “the relevant consideration is effective recommendation or control rather than final authority.”¹⁷⁵ Prior to *Pacific Lutheran*, the Board’s faculty participation analysis grew burdensome and seemingly endless while also never giving more weight to any specific decision.¹⁷⁶

168. *Id.*

169. *Id.* (explaining one specific job posting which outlined criteria for hire yet made no mention of religious requirements on applicant’s behalf). Prospective faculty were not required to be Lutheran and were not required to convert to Lutheranism. *See id.* No contingent faculty member needed to attend Lutheran services on campus and no contingent faculty member was required to observe Lutheran holidays. *See id.*

170. *See id.* at 14.

171. *See* NLRB v. *Yeshiva Univ.*, 444 U.S. 672, 674, 694 (1980).

172. *See Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 16. The Board explained that universities were governed differently than the typical leadership hierarchy found in the industrial context. *Id.* at 14. For example, universities are usually governed through a central administration, which delegates certain responsibilities and policy developments to one or more collegial bodies. *See id.* This is vastly dissimilar to the typical pyramid governance structure found in the industrial setting. *See id.*

173. *Id.* (“[T]he ‘business’ of the university is education.”).

174. *Id.*

175. *Id.* at 14-15 (quoting *Yeshiva Univ.*, 444 U.S. at 683 n.17). *Yeshiva* held that the faculty employees were managers even if their decisions were sometimes vetoed by the administration. *Id.* at 15.

176. *See id.* at 15. In cases after *Yeshiva*, the NLRB examined faculty participation in

The petitioned-for unit consisted of 176 contingent faculty.¹⁷⁷ PLU is governed by a thirty-seven member board of regents which oversees the administration of the University.¹⁷⁸ PLU's University committee is made up of the faculty assembly, the president, and a non-faculty member, which oversees specific areas of the University.¹⁷⁹ Within this governmental structure exists the petitioned-for unit, which is the full-time contingent faculty.¹⁸⁰ Full-time contingent faculty members are hired on a yearly contractual basis, yet most of the petitioned-for unit had been employed by PLU for "decades."¹⁸¹

Full-time contingent faculty participation in University governance was limited by the nature of their position and by specific restrictions placed by PLU and the faculty assembly.¹⁸² This effectively excluded¹⁸³ their input in areas involving academic concerns, such as "long-range planning, diversity, budget[ing], retirement fund, strategic enrollment management, University media, institutional animal care and use, and campus ministry."¹⁸⁴ At the division level, full-time contingent faculty could participate in organizational units which "originate curriculum

"academic decision making" areas, such as:

[1] curriculum; [2] certificate/program/degree offerings; [3] university/academic structure; [4] graduation requirements/lists; [5] honors [programs]; [6] university catalogues; [7] admissions; [8] enrollment; [9] matriculation; [10] student retention; [11] tuition; [12] finances; [13] hiring/firing; [14] promotions; [15] tenure; [16] salary; [17] evaluations; [18] sabbaticals; [19] teaching methods; [20] teaching assignments; [21] grading policy; [22] syllabi; [23] course size; [24] course load; [25] course content; [26] textbooks; [27] academic calendar; and [28] course schedules.

Id. at 15.

177. *Id.* at 11.

178. *Id.*

179. *Id.* at 21.

180. *Id.* at 20. Additionally, PLU employs part-time contingent faculty, regular tenure track faculty, tenure eligible faculty, administrative faculty, and emeriti faculty. *Id.* at 20 n.48.

181. *Id.* at 20. The contingent faculty at PLU do not receive the same benefits as tenured faculty. *Id.* at 23.

182. *Id.* at 20-21. The faculty assembly is the governing body in which PLU's faculty can participate. *Id.* at 20. It consisted of faculty standing committees and university committees, each playing their specific roles in PLU's governance. *Id.* at 21.

183. The faculty standing committees' membership is limited to regular faculty, as "contingent faculty are expressly barred from serving" on any committee. *Id.* at 21. Recommendations from these committees were "purely advisory" since all recommendations were sent to the "president's council, which consists of the president, provost, and vice presidents." *Id.*

184. *Id.* Until 2013, contingent faculty "were barred from serving on university committees." *Id.* PLU's university committees were mainly staffed by members of the faculty standing committees, which essentially precluded contingent faculty participation. *Id.* at 21 n.52. Faculty standing committee appointments last for three years, as compared with a contingent faculty member's year-to-year job status. *Id.* at 21. Similarly, at the division level, full-time contingent faculty are prevented from voting on personnel matters. *Id.* at 22.

revisions and revisions to academic policies, establish graduation standards, determine student scholarship standards and recipients, and participate in the selection of new faculty.”¹⁸⁵ Within the faculty assembly, contingent faculty may vote and participate, but only if they are considered full-time.¹⁸⁶ However, contingent faculty cannot vote on any personnel matters before the assembly.¹⁸⁷

Prior to the NLRB’s decision in *Pacific Lutheran*, the Board issued specific questions to the parties and the general public,¹⁸⁸ addressing the Board’s managerial status review of faculty employees within the

185. *Id.* at 21. However, PLU failed to explain how full-time contingent faculty actually participated in these processes. *Id.* Full-time contingent faculty helped develop new “proposals for new majors, minors, departments, divisions, and schools. . . .” *Id.* Board member Miscimarra viewed this evidence as mere “paper authority” because of PLU’s failure to explain how its full-time contingent faculty actually exercised their participation. *Id.* at 27 (Miscimarra, concurrence and dissent).

186. *Id.* at 22.

187. *Id.*

188. *Id.* at 2. The questions pertaining to the evaluation of faculty employees’ managerial status included (remaining questions 4-12):

(4) Which of the factors identified in *NLRB v. Yeshiva University* . . . and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?

(5) In the areas identified as “significant,” what evidence should be required to establish that faculty make or “effectively control” decisions?

(6) Are the factors identified in the Board case law to date sufficient to correctly determine which faculty are managerial?

(7) If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?

(8) Is the Board’s application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context, or (b) can the Board more closely align its determinations in an academic context with its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?

(9) Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?

(10) Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board’s analysis?

(11) As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty—such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty—depending on the faculty’s structure and practices?

(12) Did the Regional Director correctly find the faculty members involved in this case to be employees?

Id.

University context.¹⁸⁹

In *Pacific Lutheran*, the NLRB discussed an education trend called “The Corporatization of Higher Education,” which touched on increased hiring of contingent faculty.¹⁹⁰ University governing structure has vastly changed and has since developed a more economic pragmatic approach.¹⁹¹ However, some professors of law believe that religious institutions are simply “theologically scandalous.”¹⁹²

The NLRB reviews the petitioned-for faculty unit “in the context of the University’s decision making structure and the nature of the faculty’s employment relationship with the University.”¹⁹³ Full time contingent faculty are considered managers when employers prove that faculty exercise both actual and effective control over central policy areas of University governance and operation.¹⁹⁴ The following areas are considered: “academic programing;¹⁹⁵ enrollment management;¹⁹⁶ finances;¹⁹⁷ academic policies;¹⁹⁸ and personnel policy¹⁹⁹ and

189. *Id.* at 1-2.

190. *See id.* at 19; *see also* BENJAMIN GINSBERG, *THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS* 10, 16 (2011) (explaining rise of administrative vetoes to faculty supported movements in education); JOHN W. CURTIS & MONICA F. JACOB, *AM. ASS’N OF UNIV. PROFESSORS, AAUP CONTINGENT FACULTY INDEX* 15 (2006); (describing the increase in hiring of contingent faculty); Rebecca Clay, *The Corporatization of Higher Education: The Intermingling of Business and Academic Culture Brings both Concerns and Potential Benefits to Psychology*, 39 *MONITOR ON PSYCHOL.* 50, 50 (2008) (describing the shift in hiring preferences amongst higher education to faculty employees on contingent basis, appointed with no prospect of tenure and often no guarantee of employment beyond the academic year.).

191. *See* Michael W. Klein, *Declaring an End to “Financial Exigency”? Changes in Higher Education Law, Labor, and Finance, 1971-2011*, 38 *J.C. & U.L.* 221, 250, 271 (2012) (arguing that a universal cultural shift exists amongst universities to hire more contingent faculty based on lower rates of pay, administrative cost reduction, and greater institutional flexibility to respond to economic issues, such as low enrollment).

192. *See* David L. Gregory & Charles J. Russo, *The First Amendment and the Labor Relations of Religiously-Affiliated Employers*, 8 *B.U. PUB. INT. L.J.* 449, 466 (1999); *see also* Gregory & Russo, *Overcoming NLRB v. Yeshiva University by the Implementation of Catholic Labor Theory*, 41 *LAB. L.J.* 55, 62 (1990). Both professors argue that “[f]rom the integrated perspective of Catholic social teaching, workers cannot be artificially trifurcated into ‘supervisors’ and ‘managers’ and ‘employees’ for the purposes of denigrating their core rights as workers qua workers to unionize. . . .” *Id.*

193. *Pac. Lutheran Univ.*, 361 *N.L.R.B. No.* 157, at 20.

194. *See id.*

195. This area includes decisions affecting the university’s: (1) research programs, (2) major and minor curriculum offerings, (3) certificate programs, and (4) standards. *Id.* at 17. This decision-making area speaks directly to the “product” to be produced by the university. *Id.*

196. This area includes decisions affecting the “size, scope, and make-up of the university’s student body.” *Id.* at 17. The industrial comparison that can be made to this decision-making area is student enrollment decisions directly affecting “the customers who will be served—i.e., its students.” *Id.*

197. Faculty must exercise decision-making power or effective recommendations for income

decisions.²⁰⁰ Generalized claims of faculty participation, based on mere paper authority, will be rejected by the Board.²⁰¹ Rather, only examples of faculty exercising their authority over academic concerns can prove managerial status.²⁰²

This test consolidates the areas of review for the Board to focus on making managerial reviews within the University context simpler and less burdensome for the Board.²⁰³ As a result of *Pacific Lutheran's* new test, the Board directed regional directors to specific areas of decision making, emphasizing greater weight on the first three areas than the remaining two.²⁰⁴ The Court was guided by *Yeshiva* in developing its new test.²⁰⁵ *Pacific Lutheran* expressly adopted *Yeshiva's* principles, which emphasized effective control over matters affecting the entire University.²⁰⁶ Specifically citing the industrial analogy quoted in *Yeshiva*, *Pacific Lutheran* found that contingent faculty are wholly aligned with management when they “determine the product to be

and expenditure decisions, such as setting the tuition price, contemplating additional fees, and determining the particular services that should be funded. *Id.* These are all financial decisions that affect the university as a whole. *See id.*

198. This is considered a secondary decision-making area and includes: “[T]eaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content.” *Id.* at 17.

199. This is considered a secondary decision-making area and includes decisions affecting the university’s “hiring, promotion, tenure, leave, and dismissal.” *Id.* at 18.

200. *Id.* at 20. The Board considered the first three decision-making areas as “[p]rimary areas of decision making,” which will be weighed more heavily in the Board’s consideration of managerial status. *Id.* at 17. In making this determination, the Court held that “professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research.” *Id.* at 15 (quoting *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 n.31 (1980)).

201. *Id.* at 18.

202. *Id.* The Board examined the faculty’s actual control over these areas and only accepted decisions which were implemented with limited or no additional approval or review from a secondary party. *See id.* To be “‘effective,’ recommendations must almost always be followed by the administration.” *Id.* at 18.

203. *See id.* at 15. Since *Yeshiva's* decision, the Board decided numerous cases which all undertook an extremely burdensome review of almost every aspect of the faculty’s duties, responsibilities, and expectations. *See id.* (“The breadth of the examination has been sweeping.”).

204. *Id.* at 20. Previously, the NLRB was criticized by the courts for “failing to provide sufficient guidance regarding the importance and relative weight of the factors examined.” *Id.* at 16; *see also* *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004).

205. *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 16.

206. *See id.* (citing *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 679 (1980)) (“Only if an employee’s activities fall outside the scope of the duties routinely performed by similarly situated professionals will [they] be found aligned with management.”). Activities regularly performed by similarly situated contingent faculty professionals include “determin[ing] the content of their own courses, evaluat[ing] their own students, and supervis[ing] their own research.” *Id.* at 15 (quoting *Yeshiva*, 444 U.S. at 690 n.31).

produced, the terms upon which it will be offered, and the customers who will be served.”²⁰⁷

In applying the facts to *Pacific Lutheran*, the NLRB held that PLU’s full-time contingent faculty were not managerial employees, and therefore could petition for a supervised election.²⁰⁸ The Board analyzed where the petitioned-for unit fits within PLU’s governance structure, and determined that PLU had not proven that its full-time contingent faculty exercised any actual or effective control over major areas of decision-making.²⁰⁹ PLU’s evidence lacked any affirmative proof that full-time contingent faculty served within the Faculty Assembly, on faculty standing committees, or on academic advisory committees.²¹⁰ Aside from the areas the full-time contingent faculty failed to participate in, the Board also reviewed PLU’s situation as if the petitioned-for unit had such control, and still found them not to be managers based on their lack of “actual control” or “effective recommendation” power.²¹¹ Therefore, with its new test established for determining managerial status, the Board denied PLU’s managerial argument and granted the petitioned-for unit an NLRB-supervised election.²¹²

IV. SEATTLE UNIVERSITY:²¹³ BEFORE AND AFTER

Seattle University (SU) is a non-profit, private, and Catholic University under the auspices of ordained Catholic priests, the Society of

207. *Id.* at 16 (quoting *Yeshiva*, 444 U.S. at 686).

208. *See id.* at 25.

209. *Id.* at 24-25.

210. *Id.* at 24. The Board focused on the evidence presented by PLU and found that “there is no evidence that contingent faculty are involved in decisions affecting PLU’s finances,” or enrollment management policies. Additionally, decisions affecting “proposals from divisions, schools, and their departments are typically forwarded to the faculty standing committee. . . .” *Id.*

211. *Id.* at 25. The Board reviewed PLU’s full-time contingent faculty’s participation within the faculty assembly and determined it to be limited to only votes which require the full assembly’s participation. *Id.* Further analysis of the assembly “reveale[d] that it [was] little more than a conduit to transmit previously agreed-upon recommendations to the administration.” *Id.* This governance structure proved that the faculty assembly’s recommendations were not “effective” without approval from the PLU’s administration, which could effectively veto, alter or ignore any recommendations made by the faculty assembly. *See id.* To the extent that PLU’s full time contingent faculty even participated in the faculty assembly, the faculty assembly itself did not provide a sufficient decision-making process for the contingent faculty to be considered managers within the meaning of the NLRB’s precedent. *Id.*

212. *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 1, 25.

213. *Seattle University* was awaiting review before the NLRB at the time *Pacific Lutheran* was decided. *See id.* at 2 n.2.

Jesus (Jesuits).²¹⁴ SU's purpose can be found in its articles of incorporation and reads, "the instruction of students and graduate scholars in various branches of the arts and sciences and related subjects, and to confer degrees, diplomas, and certificates to such persons as shall in the judgment of the faculty merit the same."²¹⁵ SU's mission statement, which was displayed on its website, University pamphlets, and on campus, provides, "Seattle University is dedicated to educating the whole person, to professional formation, and to empowering leaders for a just and humane world."²¹⁶

SU's accreditation submissions stated plainly that it did "not seek to instill a specific belief system, world view or statement of faith" within the minds of its students.²¹⁷ However, due to a Catholic policy against the use of contraception, SU has banned the sale of contraceptives on campus.²¹⁸ Moreover, the School of Nursing does not teach or train its students on abortions due to Catholic theology against abortion.²¹⁹

SU's Board of Members,²²⁰ its president,²²¹ and seven individuals who serve on the Board of Trustees²²² must be Jesuit.²²³ However, no Jesuit hiring preferences exist for any other faculty member,²²⁴

214. See Seattle Univ., Case No. 19-RC-122863, 2014 WL 1713217, at *2 (N.L.R.B. Apr. 17, 2014), *remanded*, 2015 WL 456610 (N.L.R.B. Feb. 3, 2015). SU has five colleges: Arts and Sciences, Science and Engineering, Education, Nursing, and a small undergraduate college which offers high school and undergraduate education; and three schools: Business and Economics, Law, and Theology and Ministry. *Id.* at *2, 2 n.5. The Seattle archdiocese can, at any time, remove SU from the U.S. Catholic Universities' registry. *Id.* at *4.

215. *Id.* at *2.

216. *Id.* In addition to its mission statement, SU normally provides a "vision statement" to supplement the mission statement's message: "We will be the premier independent university of the Northwest in academic quality, Jesuit Catholic inspiration, and service to society." *Id.*

217. *Id.*

218. *Id.* at *5 ("The University Health Center, however, does prescribe and dispense [certain] forms of birth control 'for medical reasons.'").

219. *Id.*

220. The Board of Members' sole responsibilities are limited to "naming three Jesuits to the Board of Trustees, approving any changes to the bylaws or articles of incorporation, and approving the sale or lease of any property worth more than \$300,000." *Id.*

221. SU's president's immediate supervisor is "the Jesuit provincial for the region," which means this individual could technically remove SU's president if he or she chose to do so. *Id.* at *4. According to the evidence, SU's president begins all presidential cabinet meetings with a prayer. *Id.* at *3.

222. SU's Board of Trustees has total governing authority over the University. See *id.* at *5. It is made up of up to thirty-five members who delegate the day-to-day governance of SU to the president. *Id.* The Board hires the president. *Id.*

223. *Id.* at *3.

224. At the time of this hearing, ten faculty members were Jesuits. *Id.* at *5.

administrator, or employee.²²⁵ The faculty handbook makes no mention of God or Christianity,²²⁶ and interviewers are forbidden to ask interview questions relating to the interviewee's religious beliefs.²²⁷ "Neither the Catholic Church nor the Society of Jesus provides any funding" to SU.²²⁸

The Director began his analysis of SU's religious character by discussing its then existing precedent; specifically, the "substantial religious character test," outlined in *Catholic Bishop* and *St. Joseph's*.²²⁹ Moreover, in discussing its applicable law, the Director expressly rejected the D.C. Circuit's test crafted in *Great Falls*.²³⁰

225. See *id.* at *3. In addition, students do not receive an admission preference for being Catholic, since thirty percent of the then student population was Catholic. *Id.* Neither students nor faculty are required to attend the daily masses which are held on campus. *Id.*

226. *Id.* at *4. The only indication of religion is found in the General Considerations section of the faculty handbook, which reads "the religious dimension of human life is fundamental to the identity of a Jesuit university . . . [e]ach member of the faculty is expected to show respect for the religious dimension of human life." *Id.* Interestingly, Pope John Paul II authored *Ex Corde Ecclesiae*, a message to all Catholic Universities and schools regarding what their purpose should be. John Paul II, *Ex Corde Ecclesiae: Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities*, THE HOLY SEE, intro., ¶ 9 (Aug. 15, 1990), http://w2.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae.html. In this writing, the Pope outlines a different mission than Seattle University, which was for all Catholic Universities: "to promote *dialogue between faith and reason*, so that it can be seen more profoundly how faith and reason bear harmonious witness to the unity of all truth." *Id.* at intro., ¶ 17 (emphasis in original). Further, "Catholic teaching and discipline are to influence all university activities . . . [and] [a]ny official action or commitment of the University is to be in accord with its Catholic identity." *Id.* at pt. 2, art. 2, § 4. Pope John Paul II addresses how the university's teachers "should seek to improve their competence and endeavor to set the content, objectives, methods, and results of research . . . within the framework of a coherent world vision." *Id.* at pt. 1.A, art. 2, ¶ 22. All Catholic teachers are to respect, Catholic doctrine and morals and are to practice indoctrination methods for students who wish to receive it. *Id.* at pt. 2, art. 4, §§ 3-4. Pope John Paul II discusses teachers who are not Catholic but are still required to recognize and respect the teachings of the church. *Id.* at pt. 2, art. 4, § 4.

227. *Seattle Univ.*, 2014 WL 1713217, at *3. Moreover, the full time faculty job postings provided as evidence to the regional director made no reference to Catholicism, God, Christianity, or Jesuits. *Id.* at *4. Faculty are not evaluated on the basis of religion. See *id.*

228. *Id.* at *5.

229. *Id.* at *12. In this case, the College was founded by the Sisters of Mercy; the Mother General of the Sisters of Mercy was the chair of the Board of Trustees, and all trustees and most of the administration were Sisters. *Trs. of St. Joseph's Coll. v. Faculty Ass'n of St. Joseph's Coll.*, 282 N.L.R.B. 65, 65 (1986). Faculty were required to include teachings of the order itself and were prohibited from teaching anything contrary to such. *Id.* at 68. Any faculty member found to be teaching subjects not in conformity with the order were subject to termination by the Bishop of Portland. *Id.* at 66. Due to the Order's high involvement in governance and strict requirements of compliance with indoctrination and conformity of religious teachings of the order, the Board declined to exercise jurisdiction. See *id.* at 68. The Board's reasoning was based on *St. Joseph's* substantial religious character. *Id.* at 71.

230. See *Seattle Univ.*, 2014 WL 1713217, at *13. The Director held, "the Board has not adopted the D.C. Circuit's test and therefore, it does not govern my decision here." *Id.*

In reviewing the SU's religious educational environment, the Director specifically cited SU's financial independence from the Catholic Church and the Society of Jesus.²³¹ Additionally, the Director noted that SU's purpose and mission statement were silent as to any mention of God, Catholicism, the Society of Jesus, or Christianity, while its vision statement specifically proclaimed SU's independence as a University.²³²

Although the Director considered the provincial of Jesuits to have "indirect power over the governance of the University through his power to remove the president" of SU, this was considered a non-factor because members of the petitioned-for unit were not hired or retained through the president.²³³ Instead, the Director put more weight behind the fact that the petitioned-for contingent faculty members were not required to follow any religious requirements.²³⁴ In his conclusion, the Director held that "no significant risk of constitutional infringement from exercise of jurisdiction under the Act" existed, and therefore found that the NLRB's jurisdiction over SU was appropriate.²³⁵

The petitioned-for unit seeking representation consisted of contingent faculty members.²³⁶ Faculty can participate in SU's governance through its Academic Assembly, which consists of nineteen elected members, none of which were contingent faculty members.²³⁷ The Academic Assembly does not offer original suggestions on academic policy matters.²³⁸ Moreover, all proposals sent to the provost

231. *See id.* at *5. The Director focused on SU's lack of funding from either group. *Id.* Moreover, although SU's president and Board of Members were required to be Jesuit, he noted that "only a minority of its Board of Trustees must be Jesuit, and there [were] no requirements that any other Trustee be Catholic." *Id.* at *13.

232. *Id.* at *2.

233. *Id.* at *13.

234. *Id.* at *14. The Director discussed the lack of hiring preferences for Jesuits, the lack of disciplinary action for failing to be a Jesuit, and the lack of members of the Jesuit faith within the petitioned-for unit. *Id.* at *14.

235. *Id.*

236. *Id.* at *1.

237. *See id.* at *6. These members each represent the school in which they teach and are elected by their fellow faculty members who teach in that school. *Id.* Although, a provost testified at trial that two of the nineteen seats on the Academic Assembly were set aside for non-tenure track faculty, the Academic Assembly's by-laws were silent on this issue. *Id.* Members of the Academic Assembly serve three-year terms and contingent faculty members are hired on a year-to-year contractual basis. *Id.*

238. *See id.* at *6. Rather, only proposals from specific schools or divisions originate these changes and those are immediately sent to the Program Review Committee, which reports to the Academic Assembly. *Id.* It is the Academic Assembly that finally sends a recommendation of such proposal to the provost. *Id.* The Program Review Committee is limited in membership to tenured faculty. *Id.*

by the Academic Assembly are subject to the provost's approval or veto.²³⁹ The Academic Assembly, is one of many standing committees, of which most are limited in membership to tenured faculty.²⁴⁰ Within each department of SU, department meetings are held, which handle matters such as tenure recommendations.²⁴¹

In reviewing SU's claim that the petitioned-for unit were managerial employees, the Director cited the *Yeshiva* case to find the applicable law.²⁴² The Director noted the Court's suggestion in *Yeshiva* that "in some contexts 'a rational line could be drawn between tenured and untenured faculty members.'"²⁴³ After discussing the facts of *Yeshiva*, the Director went on to discuss SU's contingent faculty's control over "academic, as opposed to non-academic, matters."²⁴⁴ Additionally, the Director mentioned that "[t]he Board looks not just to the authority of faculty on paper, but their actual authority in practice."²⁴⁵ Finally, the Director placed the burden of proving managerial status on SU—the party asserting the claim.²⁴⁶

The Director cited SU's by-laws which "require that tenured faculty make up a majority of the representatives from each school, contingent faculty cannot ever make up more than a minority of the assembly; currently only 2 of the 19 members are contingent faculty."²⁴⁷ Referencing the year-to-year contractual status of SU's contingent

239. *Id.* at *6.

240. *Id.* at *6. All standing committee appointments have multiyear terms. *Id.* "The University Rank and Tenure Committee . . . [and all committees] within the College of Science and Engineering, are limited to tenure-track faculty." *Id.* However, a non-tenure track subcommittee exists within the Arts and Sciences faculty assembly. *Id.*

241. *Id.* at *7. Department faculty tenure review committees are limited in membership to tenured faculty. *Id.*

242. *Id.* at *14. Specifically, the Director cited the importance placed by the Court in *Yeshiva* over reviewing a petitioned-for faculty unit's control on matters affecting the curriculum. *Id.* at *15.

243. *Id.* at *14 (quoting *NLRB v. Yeshiva Univ.*, 444 U.S. 682, 672, 690 n.31 (1979)).

244. *Id.* (citing *Lewis & Clark College v. Lewis & Clark Chapter, Am. Ass'n of Univ. Professors*, 300 N.L.R.B. 155, 161 (1990)). The Director discussed how the faculty functioned within SU's governance structure, focusing on SU's committee structure and whether or not the petitioned-for unit has a majority or minority of the committees. *See id.* It also looked to whether the recommendations from those committees have to be approved by administration. *Id.*

245. *Id.* (citing *Cooper Union for the Adv. of Sci. & Art v. Cooper Union Fed'n of Coll. Teachers*, 273 N.L.R.B. 1768 (1985) (decided after *Yeshiva*)).

246. *See id.* (citing *Montefiore Hosp. & Med. Ctr. v. N.Y. State Fed'n of Physicians & Dentists*, 261 N.L.R.B. 569, 572 n.17 (1982)).

247. *Id.* at *15. The Academic Assembly has power to adjust the university's "curriculum, grading policies, and matriculation standards." *Id.* In addition, the petitioned-for unit cannot "serve on the Program Review Committee, through which all proposals for curricular change pass before going to the provost, or on the Rank and Tenure Committee." *Id.*

faculty, the Director stated that this would be difficult for the petitioned-for faculty unit of contingent employees.²⁴⁸ Crucial decision making areas, such as tuition price or student body size, are completely outside the contingent faculty's control.²⁴⁹ The Director held that all Academic Assembly decisions must be approved by the administration, making the Academic Assembly's recommendations only advisory.²⁵⁰ With all of this evidence in mind, the Director concluded in holding that the petitioned-for unit of contingent faculty members were not managerial employees.²⁵¹

In *Seattle University*, the NLRB reviewed the Regional Director's decision.²⁵² In reference to the *Pacific Lutheran* decision, "the Board remands this proceeding to the Regional Director for further appropriate action consistent with *Pacific Lutheran*, including reopening the record, if necessary."²⁵³

CONCLUSION

The union-organizing architecture within Universities may change after the Board's decision in *Pacific Lutheran*.²⁵⁴ While the Supreme Court has yet to have the opportunity to review the Board's new approach towards full-time faculty in religiously-affiliated Universities, the Board is steadily moving forth with its new framework.²⁵⁵ *Seattle University* is just one example of the Board's confidence that any inquiry into religious functions of faculty members poses no threat of First Amendment excessive entanglement.²⁵⁶ As a result of the Supreme Court's criticisms, the Board has refined its approach and narrowed its inquiry.²⁵⁷

248. *Id.*

249. *Id.*

250. *See id.*

251. *See id.* at *16.

252. *Seattle Univ.*, Case No. 19-RC-122863, 2015 WL 456610, at *1 (N.L.R.B. Feb. 3, 2015).

253. *Id.* The NLRB discussed *Pacific Lutheran's* new standard for religiously affiliated schools using a modified *Catholic Bishop* standard. *Id.* Additionally, the NLRB stated that *Pacific Lutheran* used a modified *Yeshiva* standard to determine when faculty members are considered managerial employees. *Id.*

254. *See* Scott Jaschik, *NLRB Ruling Shifts Legal Ground on Faculty Unions at Private Colleges*, INSIDE HIGHER EDUC. (Jan. 2, 2015, 3:00 AM), <https://www.insidehighered.com/news/2015/01/02/nlr-b-ruling-shifts-legal-ground-faculty-unions-private-colleges>.

255. *See id.*

256. *Seattle Univ.*, 2014 WL 1713217, at *12.

257. *See id.* at *12-13.

These issues have been deeply embedded in labor relations jurisprudence for over thirty-five years,²⁵⁸ and collective bargaining in the University context has resurfaced.²⁵⁹ The *Pacific Lutheran* test not only offers an efficient way to work through the jurisdictional issue, but also remains aligned with the purpose of section 7 of the NLRA, which is to ensure employees “have the right to self-organ[ize], to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining. . . .”²⁶⁰

After *Pacific Lutheran*, the University’s first argument, that the Board does not have jurisdiction over its full-time faculty members because it is a “self-identified” religious University, now carries little weight. To the extent that a University’s activities are dedicated to sectarian religious purposes, the Board emphasizes that its jurisdictional reach would not become entangled with unconstitutional adjudication because its inquiry will determine if the petitioned-for bargaining unit is involved in the religious function of the University.²⁶¹ In addition, the Board is aware of the sensitive rights guaranteed by the Religion Clauses, and as a result, does not direct its inquiry any deeper than merely what the University holds itself out to be with respect to its religious teachings and functions.²⁶² Accordingly, because the contemporary structure of a University can be compared to that of an industrial corporation,²⁶³ the Board is simply attempting to carry out the Act’s purpose without being over-inclusive and extending jurisdiction over employees that would impinge on the freedom of church authorities.

Pacific Lutheran University’s reliance on the managerial status of faculty members is also unpersuasive. In response, the Board made a valid effort at devising a comprehensive test to put an end to the discrepancy that exists on whether an employee is a managerial or professional employee.²⁶⁴ The Board highlighted that “managerial” status shall not be broadly defined but, rather, shall be a narrow

258. See James C. Pennington & John Richard Carrigan, *The NLRB goes Back to Church (Schools), Gets Entangled*, OGLETREE DEAKINS (Sept. 1, 2015), <http://www.ogletreedeakins.com/shared-content/content/blog/2015/september/the-nlr-b-goes-back-to-church-schools-gets-entangled>.

259. See *id.*

260. See 29 U.S.C. § 157 (2012).

261. See *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, at 5 (Dec. 16, 2014).

262. See *id.* at 6.

263. See generally *id.* at 14-17, for a discussion of the comparison.

264. See *id.* at 1.

exception.²⁶⁵ Importantly, the Board acknowledged that bargaining units shall include employees with similar interests and goals.²⁶⁶ Therefore, the Board's new test is focused on the decision-making power of the faculty member and whether the petitioned-for employee has the requisite control that would exempt him or her from the unit.²⁶⁷ In effect, only those faculty members who are engaged in the critical decision-making process and illustrate substantial control to carry out the University's purpose will carry managerial status, exempt from the NLRA. Because the ultimate goal is to provide employees with the opportunity to be heard in the workplace, the Board's recent test will work to include those employees who are entitled to section 7 rights and exclude those employees who are exempt.²⁶⁸

To be sure, *Pacific Lutheran's* new test is heavily skewed in the NLRB's favor. Modern day higher education administrators, appealing to a wide range of students, are indispensable to stabilize enrollment. The days of championing religion at the forefront of a University's mission are practically over. However, as Universities attempt to respond to this economic trend, through a more open and accepting educational and ecumenically religious philosophy, the NLRB is holding Universities accountable to its jurisdiction.²⁶⁹ Unfortunately, the NLRB could be compromised to leverage today's cultural attitude towards religion against all religiously affiliated schools.

People may have little sympathy for the religiously affiliated Universities. Pope Leo XIII and many legal scholars, for more than a century, have argued that the Catholic Church is acting hypocritically in its aggressive campaign to oppose worker unionization.²⁷⁰

How is it that despite more than a century of unequivocal social teaching recognizing the dignity of all workers, including those in Church-affiliated institutions to organize and bargain collectively, some persons in Church leadership positions seek recourse to secular civil law to trump Church teaching? If the Church, as a major

265. See generally *id.* at 16-20, for a discussion of the Board's method of examining whether or not faculty members are considered "managerial."

266. See *id.* at 16.

267. *Id.* at 14.

268. See *id.* at 8-9, 11.

269. See, e.g., *Seattle Univ.*, Case No. 19-RC-122863, 2014 WL 1713217, at *1, 11 (N.L.R.B. Apr. 17, 2014), *remanded*, 2015 WL 456610 (N.L.R.B. Feb. 3, 2015); *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157 (Dec. 16, 2014).

270. See Gregory & Russo, *The First Amendment and the Labor Relations of Religiously-Affiliated Employers*, *supra* note 192, at 456-58, 456 n.40.

employer in the United States, is going to give effective witness to the social and moral teachings that it eloquently professes, then it must do more than provide pro-forma lip-service to the rights of its employees who wish to organize and bargain collectively.²⁷¹

Religiously-affiliated Universities respond by claiming that their fight is one principally based on opposition to government intervention, rather than against the worker.²⁷² Interestingly, Pope John Paul II argued for cooperation: “Catholic Universities will, when possible and in accord with Catholic Principles and Doctrine, cooperate with government programmes . . . on behalf of justice, development and progress.”²⁷³ Cooperating with the NLRB would be in the interest of progress while also promoting the Catholic Church’s approval of worker unionization.

Yet, a “grand compromise” may be in order. Unions should seriously consider forgoing NLRB jurisdiction in return for voluntary recognition. Disputes would be resolved by a voluntarily agreed upon arbitrator. This alternative solution could satisfy the interests of both parties while also fully conforming to the social justice teachings of the Catholic Church.

Otherwise, *Pacific Lutheran* portends an opening skirmish in a reopened war. On a classic macro level, it portends labor law Armageddon. Coterminous with many of the major policy victories of the Reagan Administration, the pernicious synergy with *First National Maintenance v. NLRB* is a stark celebration of carte blanche management rights.²⁷⁴ Employers can close substantial parts of their businesses for purely economic reasons, while largely avoiding any substantive bargaining with the union regarding the core decision to undertake partial closings.²⁷⁵ The employer’s need to “operate freely” “outweighs the incremental benefit” that might be gained through the participation of the union in making the core strategic decision.²⁷⁶ The Supreme Court held “that the decision itself is *not* part of the § 8(d)’s ‘terms and conditions,’” of employment.²⁷⁷

Hobby Lobby and *First National Maintenance* will soon find one another very compatible through *Pacific Lutheran*. When the extended corporate family of the Hobby Lobby, an enterprise with 500 stores and

271. *Id.* at 466.

272. *See id.* at 462 n.84.

273. John Paul II, *supra* note 226, at pt. 2, art. 7, § 2.

274. *See First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981).

275. *Id.*

276. *Id.*

277. *Id.*

thousands of employees, leverage their enormous power,²⁷⁸ no more than a handful of Hobby Lobby employees will see much of a future in the face of Hobby Lobby employer prerogatives. With religious freedom at the heart of human rights, *Hobby Lobby's* influence, invoking core religious rights as our most important human rights,²⁷⁹ could manifest itself in a plethora of ways: e.g., tithing could become more than a scripturally-rooted practice. Perhaps it would be the transparent equivalent of bargaining over the “effects” of a *First National Maintenance* strategic partial closing decision. Those executives who do not tithe may be ignored completely upon the conferral of retention bonuses.

Human beings with contrary or no religious belief, stand little chance of evangelizing their Hobby Lobby employees understandably apprehensive of so much corporate power and religious belief coalescing in the very near future.

Mandating compulsory membership in the religion subscribed to by the senior executives of a corporation will sweep away more than two centuries of First Amendment jurisprudence. If that is unimaginable, the same could have been said of much of the Supreme Court's dockets over the course of the past few decades.

278. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2765 (2014).

279. *Id.*