April 2015

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD: BRIEF ON BEHALF OF PETITIONER SEIU LOCAL 925 AND SERVICE EMPLOYEES INTERNATIONAL UNION AS AMICUS CURIAE

Maryann Parker
SEIU

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PACIFIC LUTHERAN UNIVERSITY,
Employer,

and

SEIU LOCAL 925,
Petitioner.

Case 19-RC-102521

BRIEF ON BEHALF OF PETITIONER SEIU LOCAL 925 AND SERVICE EMPLOYEES INTERNATIONAL UNION AS AMICUS CURIAE

Judith A. Scott
Maryann Parker
Jennifer Hunter
Elena Medina
Saerom Park
Service Employees International Union
1800 Massachusetts Avenue, NW
Washington, D.C. 20036
(202) 730-7466

Attorneys for Amicus Curiae

Paul Drachler
Martha Barron
Douglas Drachler McKee & Gilbrough LLP
1904 Third Ave, Suite 1030
Seattle, WA 98101
(206) 623-0900

Attorneys for Petitioner
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INTERESTS OF AMICUS CURIAE SERVICE EMPLOYEES INTERNATIONAL UNION AND SEIU LOCAL 925

Applying the National Labor Relations Board’s current standards under NLRB v. Catholic Bishop, 440 U.S. 490 (1979) and NLRB v. Yeshiva, 444 U.S. 672 (1980), the Regional Director properly concluded that the Board had jurisdiction over the petition filed by Service Employees International Union Local 925, and correctly ordered an election among full-time and part-time contingent faculty at Pacific Lutheran University. That decision should be upheld for the reasons stated in SEIU Local 925’s briefs to the Region and the Board. However, given the substantial interest of the Service Employees International Union (“SEIU”) and many of its affiliates, including Local 925, in the standards governing the NLRA rights of employees at colleges and universities across the country, SEIU and Local 925 submit this brief amicus curiae in response to the Board’s questions regarding its standards under those two cases.

SEIU represents over 2 million workers in the United States, Canada, and Puerto Rico, including approximately 20,000 higher education faculty members in the United States. SEIU faculty members work at private and public institutions of higher education, at research universities and community colleges, and at entities both religious and secular. SEIU represents tenured, tenure-track, and contingent faculty who teach on both full-time and part-time schedules. Those professors stand among over 80,000 SEIU members who work on college and university campuses, including medical professionals at university hospitals, support staff and paraprofessionals, cleaners, food service workers, and security officers.

SEIU Local 925 is SEIU’s public services local in Washington State, representing 20,000 workers across the state. Local 925 members work in early learning and childcare, K-12, institutions of higher education, public health, public defense, and in other governmental and non-profit entities serving the public. Local 925 is actively engaged in organizing campaigns of
higher education contingent faculty in Washington State, including the instant petition in PLU, and a pending petition in Seattle University, 19-RC-122863.

The interests of SEIU and SEIU Local 925 in this case also flow from SEIU’s national campaign to organize higher education faculty. At the date of this filing, SEIU and its local unions have six pending petitions concerning over 2,000 professors in Seattle, Oakland, Boston, Washington, D.C., and Baltimore, involving full- and part-time contingent professors at public, secular, and religiously-affiliated institutions. In some cases, the organizing efforts of these employees have been delayed and frustrated by employer challenges to the Board’s jurisdiction over their petitions, or by employer claims that these contingent faculty—by definition, professors who often do not know if they will secure a teaching contract until just days before a term begins—are “managers” who exert meaningful authority over the operations of their employer.

SUMMARY OF ARGUMENT

The Board should abandon the “substantial religious character” test it has adopted for applying Catholic Bishop. Such an inquiry into the nature of the institution as a whole is logically distinct from the question that is relevant under Catholic Bishop: whether the Board can assert jurisdiction over a particular unit of teachers without creating a risk of entanglement between government and religion. It also raises the specter of a wide-ranging, constitutionally problematic inquiry into whether a school is “sufficiently religious.” And it wrongly suggests that Catholic Bishop applies to non-teachers, and thus that cleaners, food service workers, security officers, and other non-teaching employees at religiously affiliated colleges and universities across the country do not have rights under the National Labor Relations Act.
Instead, in applying *Catholic Bishop* the Board should ask whether the teachers in the unit perform religious functions as part of their jobs—specifically, whether it is part of their job duties to teach or inculcate religious beliefs, and whether they can be terminated or disciplined based on religious criteria. This approach should be based on the institution’s own public statements about the nature of the teachers’ jobs. This inquiry, which is similar to the approach the Supreme Court recently took in the “ministerial exception” case *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), would serve as a much more effective “market check” than does the test set forth in the D.C. Circuit’s *Great Falls* and *Carroll College* decisions.

Under this “teacher religious function” test, the Board can assert jurisdiction over contingent faculty at PLU without implicating any of the constitutional problems the Court perceived in *Catholic Bishop*.

In addressing the Board’s questions concerning *Yeshiva*, we take the Supreme Court at its word: that the *Yeshiva* case was meant to create a starting point for assessing the managerial status of university professors, not a rigid test. We decline to sort or prioritize the array of factors that the Board has built up in the 34 years since the *Yeshiva* decision. Instead, we propose an approach stripped down to the two questions regarding managerial status posed by the Supreme Court in *Yeshiva*: Do faculty in the unit substantially and pervasively operate the enterprise that employs them, and are their professional interests inseparable from those of the enterprise? This approach creates space for the Board to consider the factors most relevant to the evolving business of higher education, rather than anchoring its analysis on the facts that happened to be present in *Yeshiva*. 
We begin by describing how the landscape of higher education has changed since the Supreme Court decided *Yeshiva* in 1980. We then propose that the Board include as part of its analysis two factors that have been ignored or not sufficiently prominent in the Board’s jurisprudence. First, the Board must factor in the size and duties of university administrators, the “managerial professionals” that in fact operate the enterprise. Second, the Board should assess the “unbundled” duties of the institution’s contingent professors who have little control over the academic and personnel decisions of their employer. Faculty hired strictly or primarily to teach are academic professionals, but not managers.

**ARGUMENT**

I. **In Applying Catholic Bishop to Determine if a Particular Unit of Teachers Is Exempt from Board Jurisdiction, the Board Should Consider Whether Those Teachers Perform Religious Functions as Part of their Jobs.**

The first question the Board posed in this case—“What is the test the Board should apply under *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), to determine whether self-identified ‘religiously affiliated educational institutions’ are exempt from the Board’s jurisdiction?” — highlights what is wrong with the approach the Board has taken to applying *Catholic Bishop*. That case is not about whether an entire institution is “exempt from Board jurisdiction.” Rather, it is about whether the Board can assert jurisdiction over a particular unit of teachers.

The Board should abandon its “substantial religious character” test in favor of a test, based on the Court’s reasoning in *Catholic Bishop*, that asks whether teachers in the petitioned-for bargaining unit perform religious functions as part of their jobs.
A. *Catholic Bishop* Does Not Exempt Entire Institutions From Board Jurisdiction, But Only Units of Teachers Whose Jobs Include Religious Functions.

*Catholic Bishop* asked “[w]hether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act.” 440 U.S. at 491 (emphasis added). In interpreting the Act to exclude teachers in religious secondary schools, the Court repeatedly emphasized that it was “the teacher’s function in a church school” that led to the “danger that religious doctrine will become intertwined with secular instruction.” *Id.* at 501 (emphasis added); *see also id.* (the “critical and unique role of the teacher in fulfilling the mission of a church operated school”); *id.* (“key role played by teachers” in a religious secondary school).

The Court’s discussion of two specific ways Board jurisdiction over teachers would present a risk of entanglement also made clear that it was the religious aspects of the teachers’ jobs that led to those risks. First, because the teachers could be terminated or disciplined for religious reasons, the Board’s adjudication of unfair labor practice charges might require it to judge the religious good faith of the administrators in making such decisions. *Id.* at 502. Second, because the teachers’ jobs involved “the propagation of a religious faith,” *id.* at 503, the Board’s determination of which terms and conditions of employment were mandatory subjects of bargaining would intertwine the Board with religious matters. *Id.* at 502-03.

When the Court did comment on the “substantial religious character” of the church-operated high schools in that case, *id.* at 504, it did so only by way of explaining why the teachers’ job functions were inherently intertwined with spreading religious values. The “admitted and obvious fact that the *raison d’etre* of parochial schools is the propagation of a religious faith,” *id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971)) was relevant
because it explained why “[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school” and why the Board’s exercise of jurisdiction would present constitutional problems. *Id.*

Properly read, then, *Catholic Bishop* does not “exclude church-operated schools, as entire units, from the coverage of the NLRA.” *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1301 (9th Cir. 1991). And it has no application to employees other than teachers. Rather, “Both the rationale and the language of the *Catholic Bishop* opinion . . . support the limitation of its holding to the employment relationship between church-operated schools and its teachers.” *Id.* at 1302.

Also, importantly, *Catholic Bishop* exempts from Board jurisdiction only teachers who are under an “obligation . . . to imbue and indoctrinate the student body with the tenets of a religious faith.” *NLRB v. Bishop Ford Cent. Catholic High Sch.*, 623 F.2d 818, 823 (2d Cir. 1980). It is the “commitment of the faculty to religious values no matter what subject in the curriculum is taught and the obligation to propagate those values which provides the risk of entanglement.” *Id.* The *Catholic Bishop* Court found that at church-operated high schools, such “propagation” was inherent in the jobs of all teachers. 440 U.S. at 503. But when the Board began to apply *Catholic Bishop* to colleges and universities, it recognized that this is not true for institutions of higher education. It thus announced that it would apply *Catholic Bishop* to colleges and universities only on a “case-by-case basis.” *St. Joseph’s College*, 282 NLRB 65, 68 n.10 (1986). In the context of higher education it is all the more important that the Board determine whether the teachers at issue actually perform religious functions before applying the *Catholic Bishop* exception.
B. The Board’s “Substantial Religious Character” Test and the D.C. Circuit’s “Religious Educational Environment” Test Share a Mistaken Focus on the Religious Character of the Institution as a Whole.

While *Catholic Bishop* focused on the job functions of Catholic high school teachers, it did not establish a generally-applicable test for determining whether a unit of teachers at a religious school was beyond the Board’s jurisdiction. *Carroll College v. NLRB*, 558 F.3d 568, 571 (D.C. Cir. 2009). The task of crafting an appropriate test was left to the Board. In many of the cases in which it has applied *Catholic Bishop*, the Board has focused on the job functions of the petitioned-for unit of teachers. *See, e.g., Livingston College*, 286 NLRB 1308, 1309 (1987) ("Of more significance is the fact that faculty members are not required to conform to AME doctrine or promote the ideals and objectives of the AME Church"). But as it developed its test, the Board began increasingly to frame its inquiry as being about whether the school as a whole has “substantial religious character,” *University of Great Falls*, 331 NLRB 1663, 1664 (2000), and whether the entire “entity is . . . exempt from Board jurisdiction under Catholic Bishop.” *Carroll College*, 345 NLRB 254, 257 (2005).

In reviewing the Board’s *Great Falls* and *Carroll College* decisions, the D.C. Circuit accepted the Board’s framing of the issue as whether the whole institution was exempt from the Act. The D.C. Circuit took issue with what it saw as the excessively probing and wide-ranging nature of the Board’s inquiry and so formulated its own test, which boils down to the question of whether the school “holds itself out to students, faculty and the community as providing a religious educational environment.” *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343-45 (D.C. Cir. 2002).¹

¹ The D.C. Circuit explained its *Great Falls* test as having three prongs: (1) Does the school hold itself out to students, faculty, and the community as providing a religious educational environment; (2) is it a nonprofit, and (3) is it affiliated with, owned, operated, controlled, directly or indirectly, by a recognized religious organization or with
The Board and the D.C. Circuit tests share the flaw of focusing on the religious “character,” or “environment,” of the university as a whole. Not only are the concepts “substantial religious character” and “religious educational environment” highly vague and subjective, but the religiosity of a university as a whole does not answer the question whether the Board’s exercise of jurisdiction over a particular unit of teachers will raise the sorts of entanglement problems the Court identified in Catholic Bishop. Just as the Board has properly asserted jurisdiction over child care teachers whose job was to provide child care and not to proselytize, even though the day care center at which they worked was motivated by religious faith to provide care to children, Salvation Army of Massachusetts Dorchester Day Care Center, 271 NLRB 195, 198 (1984), it is consistent with the Act for the Board to assert jurisdiction over faculty members whose job is to teach and not to propagate religion, even if their university is sincerely motivated by religious faith to provide a higher education dedicated to academic freedom. Indeed, it is telling that in explaining why its religious motivations entitle it to the Catholic Bishop exception, PLU cites Martin Luther’s discussion of a Lutheran cobbler moved by religious belief to make good shoes. Employer’s Request for Review at 20. As sincere as the cobbler’s beliefs and motivation may be, the Board should still be able to assert jurisdiction over his employees, whose job is simply to make shoes.2

an entity whose membership is determined at least in part with reference to religion. 278 F.3d at 1343. But since the overwhelming majority of colleges and universities in the United States are organized as nonprofits and have some religious history and ongoing affiliation, however tenuous, the Great Falls test amounts to a single prong, one focused on the school’s own representations about its “religious educational environment.”

2 We note that any hesitation about the Board’s assertion of jurisdiction over nonprofit institutions in general, see Catholic Bishop, 440 U.S. at 504-05 (“congressional attention [in passing the NLRA] focused on employment in private industry and on industrial recovery”); Great Falls, 278 F.3d at 1344 (“Accordingly, non-profit institutions have a more compelling claim to a Catholic Bishop exemption than for-profit businesses”), has no application to the world of colleges and universities, which are unquestionably engaged in commercial activity on a large scale. The private non-profit higher education sector takes in over $160 billion in net revenues annually. Data from the Integrated Postsecondary Education Data System, National Center for Education Statistics, http://nces.ed.gov/ipeds/.
The Board’s “substantial religious character” test and the D.C. Circuit’s “religious educational environment” test also both suffer from the flaw that they suggest that if a school has the requisite religious character, then all of its employees regardless of their function are not covered by the NLRA. While some schools have certainly urged this result, see Saint Xavier University, 13-RC-092296 (unit of housekeepers), the Board has not so held, nor should it. It would frustrate the purposes of the Act for the overall religious nature of a university to determine whether a unit of non-teachers whose jobs are indistinguishable from those at secular schools could exercise their rights under federal law.

C. The Experience of SEIU Locals in Representing Non-Teaching Staff at Religiously Affiliated Colleges and Universities Demonstrates that Such Representation Furthers the Purposes of the Act Without Creating Excessive Entanglements.

SEIU Local 32BJ represents some 1,500 non-teaching staff, including cleaners, cafeteria workers, and security guards at over a dozen religiously-affiliated colleges and universities. These schools are often major employers in their metropolitan areas. They include Boston College, Providence College, St. John’s University, Fordham University, Yeshiva University, Duquesne University, Villanova, Georgetown, and Catholic University. Local 32BJ also represents workers at secular colleges and universities in the same geographic areas. The workers Local 32BJ represents perform the same functions—cleaning, preparing and serving food, and

Qualms about the Act’s extension to nonprofits explicitly undergirds the Board’s decision not to assert jurisdiction over churches and other religious organizations. See, e.g., St. Edmund’s Roman Catholic Church, 337 NLRB 1260 (2002); Riverside Church, 309 NLRB 806 (1992). This line of cases is distinct from, and should not affect, the Catholic Bishop line. Churches and similar institutions are exempt from Board jurisdiction because of the Board’s conclusion that they are not engaged in commercial activity. Riverside Church, 309 NLRB at 807. Given that reasoning, it makes sense that all the employees of such entities are exempt from Board jurisdiction. But under Catholic Bishop it is the risk of entanglement if the Board asserts jurisdiction over particular teachers that is at issue. Thus it does not make sense to exempt an entire institution based on a properly performed Catholic Bishop analysis. In the District of Columbia, for instance, Jesuit-affiliated Georgetown University is the largest non-governmental employer, and Catholic University is the tenth. District of Columbia 2013 Comprehensive Annual Financial Report at 184, available at http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/Demographic%20and%20Economic%20Information_0.pdf.
providing security services—whether they work at religiously-affiliated universities or purely secular universities. For many years, 32BJ and its predecessors have bargained on behalf of these workers, both with universities and with contractors, over the same issues whether the schools are secular or maintain a religious affiliation: wages, benefits, hours of work, just cause protection, layoff and recall rights, grievance and arbitration systems, and seniority. In fact, with the exception of seasonal lay-offs and tuition reimbursement benefits, the issues for cleaners, security officers, and food service workers are the same whether the employees work at a university or a downtown office building (in fact, sometimes universities have satellite campuses in downtown office buildings).

Local 32BJ’s bargaining history at religiously-affiliated colleges and universities demonstrates that giving employees at these institutions the right to engage in collective bargaining does not lead to excessive entanglement. Consistent with federal labor policy, the parties have tended to “exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions.” 29 U.S.C. § 174(a)(1). While the Union has sometimes had occasion to file charges with the Board accusing one or more of these institutions of failing to bargain in good faith, those charges have been resolved without any need for the Board to consider the religious mission of these schools.4

4 Other SEIU local unions represent faculty at various colleges and universities, including some with religious affiliations, such as Georgetown University. The topics over which the union bargains on behalf of faculty members at both religiously affiliated and secular schools include pay, benefits, time off, funding for professional development, assignments, evaluations, discipline, grievances and arbitration, faculty workload, labor-management committees, access to office space, seniority, non-discrimination, and deduction of dues, fees, and contributions. Bargaining over these matters for faculty members presents no greater risk of excessive entanglement than when health care employees bargain with religiously affiliated health care institutions. See St. Elizabeth Community Hospital, 259 NLRB 1135 (1982), enf’d. 708 F.2d 1436 (9th Cir. 1983) (finding no constitutional obstacle to asserting jurisdiction over hospital owned and operated by a pontifical order of the Roman Catholic Church).
The Board has previously noted that “there is abundant evidence that, in collective bargaining, unions are able to obtain higher wages for the employees they represent … when the employees of employers in the same competitive market are unionized.” United Food and Commercial Workers Locals 951, 7 and 1036 (Meijer, Inc.), 329 NLRB 730, 734 (1999). Thus, it follows that if the Board were to find that the service workers at religiously-affiliated colleges and universities do not have the right to engage in collective bargaining, not only would it likely drive down their wages and benefits, but it would have a ripple effect, driving down the wages and benefits of cleaners, security officers, and food service workers in those labor markets where religiously-affiliated universities are major employers.

One illustration of the irrationality of a rule that would exempt religious universities as a whole from the Board’s jurisdiction comes from the fact that many universities contract out the work of cleaners, food service workers, and security guards. The job functions of those workers do not change whether they are employed by the university itself or by private contractors; nor should the workers’ rights to form a union. But whereas a religiously-affiliated university might argue that Catholic Bishop should apply to prevent its own cleaning staff or other non-teaching employees from forming a union, see Saint Xavier, 13-RC-092296, there could be no such claim about cleaners employed by a contractor to clean the same university buildings.

D. The Board Should Adopt a “Teacher Religious Function” Test, Focusing on Whether, According to the School’s Own Public Statements, the Teachers in the Petitioned-For Unit Perform Religious Functions.

The Board should abandon the “substantial religious character” test in favor of a “teacher religious function” test that asks whether the teachers in the petitioned-for bargaining unit perform religious functions. Specifically, the Board should examine whether the teachers are hired or can be disciplined or fired based on religious criteria, and whether they are required as
part of their jobs to promulgate religious beliefs. The examination should be based primarily on a school’s own public statements about its teachers’ job functions. This evidence could include job descriptions; employment contracts; faculty handbooks; and school statements to accrediting bodies, the public, and prospective faculty and students as to whether the teachers are required or expected to teach religious doctrines or beliefs.

1. The “Teacher Religious Function” Test is Consistent With Catholic Bishop.

As discussed above, Catholic Bishop turned on the “critical and unique role” teachers play “in fulfilling the mission of a church-operated [high] school.” 440 U.S. at 501. Specifically, because the Catholic Bishop teachers could be disciplined or terminated based on religious criteria and were required as part of their jobs to “propagat[e] a religious faith,” id. at 503, the Board’s exercise of jurisdiction over them could entangle the government with religion. The “teacher religious function” test, focusing on whether teachers are hired or can be disciplined or fired based on religious criteria, and whether their job functions include teaching religious beliefs, would thus identify those cases that involve the risks at issue in Catholic Bishop.

5 For instance, to be accredited by the Northwest Commission on Colleges and Universities (NWCCU), a school must complete a Self-Evaluation Report in which it addresses five “Standards for Accreditation.” Each Standard is made up of a number of “criteria.” One of these (criteria 2.A.23) requires that if a school “requires its constituencies to conform to specific codes of conduct or seeks to instill specific beliefs or world views, it gives clear prior notice of such codes and/or policies in its publications.” Criteria 2.A.28 specifies that “While the institution and individuals within the institution may hold to a particular personal, social, or religious philosophy, its constituencies are intellectually free to examine thought, reason, and perspectives of truth. Moreover, they allow others the freedom to do the same. NWCCU, Standards for Accreditation (Revised 2010) at 4, available at http://www.nwccu.org/Pubs%20Forms%20and%20Updates/Publications/Standards%20for%20Accreditation.pdf.

PLU is accredited by NWCCU, suggesting that it must have represented itself as complying with both of these requirements. PLU’s accreditation Self-Evaluations are not part of the record in this case. Some of its past Self-Reports are available on its website, see http://www.plu.edu/accreditation/, but none of these address criteria 2.A.23 or 2.A.28.

The test proposed here would also avoid the entanglement problems the D.C. Circuit perceives in the “substantial religious character” test. By looking specifically at teachers’ functions and relying on the university’s own public representations, the Board would avoid the entanglement problems the D.C. Circuit perceives in its attempts to assess the degree of a school’s “religious character.” For instance, in this case, PLU asserts that it does have substantial religious character because the education it provides is inspired by Lutheran values as it understands them, one of which is academic freedom. But there is no need for the Board to resolve a debate over whether academic freedom is a Lutheran or secular value, or both. That metaphysical dispute does not affect the answer to the relevant question: whether the jobs done by PLU contingent faculty are such that the Board’s assertion of jurisdiction over them would create a risk of entanglement.

Shorn of language about the religious character of a school, it would also be clear that a Board decision to exercise jurisdiction over teachers at a religiously-affiliated school does not constitute “discrimination” against that school for being “not religious enough.” Cf. Great Falls, 278 F.3d at 1346 (stating that limiting the Catholic Bishop exception to religious institutions “with hard-nosed proselytizing” might violate the Establishment Clause command not to prefer some religions to others). The Board does not discriminate when it asserts jurisdiction over units of employees who are covered by the clear language of the Act and whose jobs present no Catholic Bishop problems, any more than it “discriminates” against profitable corporations when it asserts jurisdiction over entities whose revenues exceed its jurisdictional floors.
Our proposed test would serve as a far more effective “market check” than does the D.C. Circuit’s “religious educational environment” test. The D.C. Circuit reasoned that its test would ensure that “institutions availing themselves of the Catholic Bishop exemption are bona fide religious institutions” because a public identification of a school as religious would “come at a cost” in that it would “dissuade” some students and faculty from wanting to attend or work at the school. 278 F.3d at 1344. But the real “market check” dynamics are well illustrated by this case. Potential students or faculty members seeking to avoid (or find) a religious school would be unlikely to be dissuaded (or persuaded) by PLU’s abstract statements about its fealty to its Lutheran history and traditions, especially in light of the fact nearly all private colleges and universities have religious histories. Rather, these potential students or faculty members would want to know about whether teachers are hired or evaluated on the basis of religious criteria and whether they are expected to inculcate religious beliefs in their classes. This is precisely why accreditation standards require universities which “seek to instill specific beliefs or world views” to give “clear notice” of that in their publications. NWCCU Accreditation Criteria 2.A.23, supra note 5.

When it comes to those more concrete questions, the PLU website lands decidedly on the side of reassuring students that its faculty will not propagate religious beliefs: “Lutheran heritage is very important to our school, that doesn’t mean it will be forced on you.” Regional Director’s Decision & Direction of Election at 4 (NLRB Region 19, June 7, 2013) (hereinafter “Dec. & Dir. of Election”). PLU’s publications do not suggest that its professors will teach religious beliefs. Rather, the religion department’s website promises no “religious indoctrination.” Id. Potential faculty would likewise find in PLU’s job postings, teaching contracts, and faculty handbook no mention of religious requirements or functions. Id. at 5. This more robust market check would
allow the Board to take schools at their word about whether their teachers perform religious functions.

3. The “Teacher Religious Function” Test is Similar to the Approach the Supreme Court Took in *Hosanna-Tabor*.

The Supreme Court adopted an approach similar to the one we advocate here in its recent *Hosanna-Tabor* decision. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694 (2012). In that case, a “called teacher” at an elementary school operated by a church was terminated after she took disability leave. The EEOC brought suit claiming that her termination was in retaliation for her exercise of her rights under the Americans with Disabilities Act. The employer maintained that the teacher was a “minister” and that her termination was for a religious reason, namely that her threat to sue unless she was allowed to return to work violated the church’s belief that Christians should resolve disputes internally.

The Supreme Court held that the suit was barred by the “ministerial exception,” a First Amendment doctrine that creates an exemption to employment discrimination legislation for claims by ministers against their religious employers. Permitting the government to intrude into the decision as to whether a church should hire or terminate a minister would, the Court said, “depriv[e] the church of control over the selection of those who will personify its beliefs.” 132 S. Ct. at 706. Justice Alito elaborated, in a concurrence joined by Justice Kagan, that a court probing into the “real” reason for the termination would have to make “judgment[s] about church doctrine,” and that the “mere adjudication of such questions would pose grave problems for religious autonomy.” *Id.* at 715. These concerns echo those expressed by the *Catholic Bishop* Court that permitting the Board to adjudicate unfair labor practice charges involving teachers at
religious schools would involve Board “inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission.” 440 U.S. at 502.

Having decided there was a ministerial exception, the Court in Hosanna-Tabor went on to determine whether it applied in that case. The Court did not simply take the employer at its word that the teacher in question was a “minister,” even though Justice Thomas wrote separately to argue that the Religion Clauses require courts to “defer to a religious organization’s good-faith understanding of who qualifies as a minister.” 132 S.Ct. at 710. The Court instead performed a targeted but substantive exploration that included a discussion of the teacher’s job functions and training. The Court discussed the fact that the school publicly held out the plaintiff as a minister and that her job description made clear she had “ministerial responsibilities”; that she had undergone a significant amount of religious training and a “formal process of commissioning”; that she held herself out as a minister; and that her job duties “reflected a role in conveying the Church’s message and carrying out its mission.” Id. at 707-08. In light of all this, the Court concluded she was covered by the ministerial exception. Id. at 708.

Hosanna-Tabor demonstrates that the “teacher religious function” test does not improperly entangle the Board or the courts with the employer’s religious beliefs. The Hosanna-Tabor Court appropriately inquired into the title the employer had given the teacher, into the “substance reflected in [her] title,” and into the specific “religious functions she performed for the church.” Id. at 708. The Board in applying Catholic Bishop can thus similarly ask whether the employer holds out its teachers as performing religious functions.
E. The “Teacher Religious Function” Test Shows that the Board Should Assert Jurisdiction over the Contingent Faculty at PLU.

As applied to the instant case, the “teacher religious function” test shows that the Board’s assertion of jurisdiction over the contingent professors at PLU would be entirely consistent with the Act. As the Regional Director found, “no adherence to Lutheran doctrine or membership in a Lutheran congregation is required for hiring, promotion, or tenure, nor does it play any role in faculty evaluations.” Dec. & Dir. of Election at 5. The teaching contracts of the contingent faculty “do not mention God, religion in general (except the religion department), or Lutheranism in particular. The faculty witnesses stated that they were never instructed to disseminate the Lutheran faith.” Id. There is “no provision in the University’s policies for disciplining or firing faculty if they do not hold to Lutheran values.” Id. at 16. The University’s religion department website states that “religion courses ask students to engage in the academic study of religion, not in religious indoctrination.” Id. at 4. At base, “faculty are subject to no religious requirements.” Id. at 16. Thus there is no risk of entanglement if the Board exercises jurisdiction over the petitioned-for unit of contingent faculty.

II. The Board’s Application of Yeshiva Should Reflect the Realities of the Modern Higher Education Landscape.

Applying the Board’s current analytical framework, the Regional Director properly concluded that the full-time contingent—also referred to as non-tenure-track—faculty at PLU are not managerial employees. Although this outcome was correct, the factors and criteria applied by the Regional Director fail to capture the realities of the modern higher education landscape, which has shifted dramatically in the 34 years since the Supreme Court decided Yeshiva.

In 1975, when the Board granted Yeshiva University Faculty Association’s representation petition, tenured or tenure-track faculty comprised the majority of instructional
staff at nonprofit colleges and universities in the United States. By 2009, however, more than two-thirds of faculty members were ineligible for tenure. The dramatic rise in contingent faculty is attributable to fundamental changes in institutions of higher learning. Nonprofit colleges and universities have become more hierarchical due to the corporatization of higher education, the “unbundling” of faculty duties, and the ensuing re-conceptualization of the role of “shared governance.” In this new system, non-tenure-track educators have been relegated to a second-tier faculty status. Although tenured and tenure-track faculty have maintained a wider sphere of influence, their authority has likewise been eroded.

A. Contingent Faculty Appointments have Increased Exponentially in the Past Three Decades.

Since Yeshiva was decided, there has been widespread adoption of the contingent faculty model, which entails non-tenure-track “faculty members working on a continuing basis—full-time or part-time, in per-course or contractually limited appointments—without job security or the prospect of advancement to tenure lines or tenure equivalents.” In 1969, the vast majority—nearly 80 percent—of faculty members were employed in tenured and tenure-track positions. The precise opposite is true of today’s nonprofit colleges and universities where non-tenure-track

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positions account for more than 67 percent of faculty appointments.\textsuperscript{10} For-profit universities, meanwhile, rely almost exclusively on contingent faculty.\textsuperscript{11}

Full-time non-tenure-track faculty appointments, in particular, are a relatively recent phenomenon. In 1969, full-time contingent faculty members represented only 3 percent of the faculty workforce. By 2003, they constituted 59 percent of new hires.\textsuperscript{12}

Moreover, as the proportion of tenured and tenure-track faculty positions has declined, the number of part-time, also referred to as adjunct, faculty has mushroomed. Part-time educators now comprise the majority of the faculty at private, nonprofit comprehensive universities.\textsuperscript{13} In fact, the number of adjunct faculty at nonprofit educational institutions has increased by more than 400 percent from 1970 to 2003, a growth rate that has radically outpaced full-time faculty appointments.\textsuperscript{14}

Across institutional types, three of every four faculty appointments are for either full-time or part-time non-tenure-track positions.\textsuperscript{15} In other words, the contingent faculty workforce is now a mainstay of the academic profession.

\textbf{B. Institutional Changes Are Driving the Growth of the Contingent Faculty Model.}

In \textit{Yeshiva}, the “the faculty [was] the school,” 444 U.S. at 676 n.4. But universities have changed substantially since then.

\begin{itemize}
  \item \textsuperscript{10} Id.
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} Pullias Center for Higher Education, \textit{supra} note 6, at 2.
  \item \textsuperscript{14} Id. at 1.
  \item \textsuperscript{15} Adrianna Kezar, \textit{Embracing Non-Tenure Track Faculty: Changing Campuses for the New Faculty Majority} x (Adrianna Kezar ed., 2012).
\end{itemize}
1. **Educational Institutions Have Become More Corporate in Function and Structure.**

The corporatization of higher education began in the early- to mid-1970s when colleges and universities began to embrace private sector business and management models. Educational institutions adopted corporate systems, in part, as a response to fluctuating enrollment demands and increasing competition from new institutional types, such as community colleges, non-baccalaureate degree programs and for-profit universities. However, the shift was also dictated by external economic forces, namely declining government appropriations for higher education. As public funds became scarcer, nonprofit colleges and universities began courting private donors, corporations, and foundations to bolster their endowments. In the ensuing four decades, institutions of higher learning have also found ways to transform knowledge into a revenue-generating commodity—capitalizing on patentable research and copyrightable teaching materials. Indeed, “today’s educational institutions are busily striving to profit from teaching, research and all the other activities on campus—offering corporations the right to endow professorships, sponsor courses, bring the university’s scientific discoveries to market, [and] even advertise in campus bathrooms.”

As institutions of higher learning have become more entrepreneurial, corporate influences have also influenced the way they are structured. Rather than being run by committees of professors, colleges and universities today are operated primarily by “managerial professionals”

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who occupy “positions of bureaucratic power within [the] organization’s formal hierarchy.”

These high-level, career administrators oversee the work of professional personnel, such as admissions officers, human resources staff, and information technology specialists, to name a few. Together, these non-instructional professionals enable the institutions’ “practicing professionals”—the tenured, tenure-track, and non-tenure-track professoriate—to “use their professional expertise to perform the organization’s operational work,” primarily, education and research. Stated more succinctly, today’s university faculty comprises one tier within a formal, top-down, multi-tiered hierarchy where the business of designing and implementing an educational product is decoupled from the practice of teaching.

These trends are also evident at the highest levels of university administrations. “Increasingly, the presidents of higher education institutions are both seeing themselves as, and being labeled as, CEOs.” A larger proportion of governing board members, meanwhile, have substantial corporate training and experience. For instance, current and former private sector professionals comprise the majority of the voting membership on PLU’s Board of Regents, the university’s policy making and governing body.

Like other governing boards, PLU’s Board of Regents is responsible for “chart[ing] a course for the university and striv[ing] to provide essential funds.” Because instructional costs consume a significant proportion of academic budgets, educational institutions make managing labor costs a budgetary priority. “Recent surveys of presidents and chief financial officers within higher education show declining support for tenure and a desire for greater institutional

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21 Id.
22 Rhoades & Slaughter, supra note 18, at 38-39.
24 Id.
flexibility around employment: 17% of presidents said they would eliminate tenure, 11% would hire more adjuncts, 38% would increase teaching loads, and 66% preferred long-term contracts over tenure appointments.”25 The contingent faculty model satisfies nearly all of these objectives by providing a cheap, relatively expendable source of labor, similar to the at-will employment model embraced by the private sector.

2. Educational Institutions Have Become More Stratified as They Have “Unbundled” Faculty Roles.

The traditional faculty model features a tenured or tenure-track faculty member whose work consists of a bundle of separate duties, specifically teaching, research, and service.26 In addition to instructional and research tasks, traditional faculty members are responsible for “institutional components like formal participation in department or campuswide governance committees or task forces or serving as faculty adviser to a student organization or club; off-campus activities designed to develop new on-campus academic programs; local community service and boosterism (representing the college within the geographic community), perhaps service as an unpaid consultant to a community organization; direct service to the state, regional, or national professional associations in one’s discipline; and service on an accrediting team of a regional or a specialized accrediting association.”27 In today’s educational institutions, a significantly greater proportion of faculty work is “unbundled,” meaning divided, into separate components completed by specialized personnel appointed to implement each respective task. As

26 Schuster & Finkelstein, supra note 17, at 76.
27 Id. at 77.
faculty members “work has been unbundled into teaching-, research-, or service-only roles,”28 their sphere of influence has diminished accordingly.

Unbundling is not a new concept. Teaching, which involves material preparation, instruction, student interaction and assessment, has often been segmented into discrete tasks.29 Teaching assistants are a common example of a way in which research universities “increase[] class size by dissociating the professor from assessment and interaction with students and limiting her or his expensive labor to preparation and delivery.”30 In the past three decades, however, technological innovations have rapidly accelerated the pace and extent of the unbundling of traditional faculty tasks. Online and distance education, in particular, enable schools to decouple instruction from curriculum development and assessment. Thus,

as far as the scope and substance of faculty work is concerned, the external forces, especially the advent of on-line and distance education, clearly all reinforce the unbundling of faculty work roles (teaching split off from research and service) and the differentiation of professional tasks. Moreover, the restructuring of work roles and the resort to new types of appointments reinforce each other. That is, restructured (more specialized) work roles encourage the new kinds of part-time and temporary full-time appointments, while these new types of restructured appointments, in turn, foster significantly different, more specialized work roles.31

In other words, the unbundling of faculty work creates stratification within the faculty, specifically, but also within the educational institution, more broadly. Within the faculty, it perpetuates contingent faculty appointments. Yet, it also necessitates the hiring of non-instructional professional staff, such as course facilitators and IT personnel. Indeed, from 1997

28 Kezar, supra note 9, at 3.
29 Schuster & Finkelstein, supra note 17, at 108.
30 Id.
31 Id. at 36.
to 2007, the number of non-instructional professional staff at colleges and universities grew by almost 50 percent.\textsuperscript{32}

As faculty work becomes more fragmented, a smaller proportion of the faculty participates in service roles. By way of comparison, in 1969, approximately one-half of faculty members reported spending 10 percent or less of their time in administration; by 1998, more than two-thirds of full-time faculty reported spending 10 percent or less of their time on such activities.\textsuperscript{33} As a result, educational institutions have become fragmented workplaces, in which both managerial and practicing professionals occupy more specialized, narrow roles within the academic hierarchy.

3. The Reality of “Shared Governance” Has Changed Significantly Due to the Bureaucratization of the Modern Academic Workplace.

The corporatization of higher education coupled with the unbundling of faculty duties has transformed the function of “shared governance” within educational institutions. “The concept of shared governance between a university’s administration and its faculty, as envisioned in numerous statements since 1920 that led to the American Association of University Professor’s classic 1966 \textit{Statement on Government of Colleges and Universities}, is that the faculty takes the lead on matters of curriculum, pedagogy, and personnel, in which they are the experts, while the administration runs the business end, its forte.”\textsuperscript{34}

At today’s universities, however, the term “shared governance” is misleading. Tenure-line faculty exercise a decreasing level of control over historically faculty-led decisions, such as curriculum delivery. Increasing numbers of “managerial professionals” such as deans, provosts,

\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.} at 92.
\textsuperscript{34} Don Eron, \textit{The Case for Instructor Tenure: Solving Contingency and Protecting Academic Freedom in Colorado}, \textit{in} Equality for Contingent Faculty: Overcoming the Two-Tier System 45 (Keith Hoeller ed., 2014).
and vice-presidents, exercise more unilateral authority over these institutional decisions because they implicate strategic considerations, including revenue-generating or cost-reducing potential, that extend beyond traditional instruction.  

“Shared governance” is a particular misnomer with respect to contingent faculty. According to a 2011 study conducted by the AAUP, even when full-time contingent faculty are involved in governance activities, the scope of their participation and recognition is circumscribed: nearly 38 percent reported that participating contingent faculty members must satisfy certain prerequisites, such as a specified minimum teaching load or a particular type of appointment; 68 percent indicated that full-time contingent faculty members were excluded from certain governance processes, such as personnel committees; and 88 percent reported that non-tenure-track faculty are not compensated for their service contributions. At PLU, specifically, full-time contingent faculty may not vote on personnel recommendations; thus, they may not participate in the election of chairs or deans or in the hiring of new faculty. They are also not eligible to serve on standing faculty committees. Although PLU makes much of the fact that full-time non-tenure-track professors serve on the Faculty Assembly, these educators enjoy substantially less academic freedom due to their precarious employment status. With respect to the part-time contingent faculty at PLU, there is not even a pretense of “shared governance.” They are typically excluded from governance functions. As a result, non-tenure-track faculty members occupy a second-tier faculty status in which they have less authority and less academic protection.

35 Rhoades & Slaughter, supra note 18, at 48-49.
38 Id.
C. Contingent Faculty Work Low-Wage, Precarious Jobs, and Their Interests Are Not Aligned with University Management.

As a result of these driving forces, contingent professors no longer reflect a trend in higher education; they represent the face of academia. Yet, unlike a tenured or tenure-track appointment, a contingent faculty position is not a secure, middle-class job. To the contrary, the central hallmarks of this new workforce are low pay, job instability and immobility, and second-tier faculty working conditions.

The poor working conditions and status of contingent faculty are completely at odds with the relative comfort and security of the professional administrators who in fact manage the business of nonprofit colleges and universities. Even if contingent professors control academic matters within the ambit of their teaching duties, their professional interests are not at all aligned with the interests of the actual managers who decide – too often mere days before the start of classes – if their contracts will be granted or renewed for the upcoming term.

1. Contingent Faculty Members are Paid Significantly Less than their Tenured and Tenure-track Counterparts.

Despite their educational pedigree, contingent faculty members are often low wage earners. Due in large part to the unbundling of faculty duties, non-tenure-track faculty members spend a greater proportion of their working hours in the classroom. However, they are paid considerably less than their tenured and tenure-track counterparts.\(^\text{39}\) Not only is adjunct faculty members’ base pay much lower, they are also economically disadvantaged by the fact that they are often ineligible for healthcare or retirement benefits through the educational institutions that employ them.\(^\text{40}\)

\(^{39}\) Berry, *supra* note 16, at 8.
Although the annual pay of a tenured professor at a private research university is well over $100,000,\(^{41}\) the 2010 median salary of a full-time non-tenure-track professor was $47,500.\(^{42}\) Part-time contingent faculty members fare much worse. Unlike salaried educators, part-time “contingent faculty usually are paid a piece rate, a fixed amount of compensation for each unit produced, regardless of how much time it takes to produce.”\(^{43}\) In 2010, the average rate of pay per three-credit course was $2,700.\(^{44}\) Thus, to earn the equivalent of even their full-time contingent colleagues, part-time contingent faculty members would have to teach 17 three-credit courses per academic year—nine more classes than the standard, full-time course load for that period.\(^{45}\)

The absence of benefits exacerbates the financial instability of adjunct faculty members. Approximately 79 percent do not receive healthcare benefits through their college or university and an estimated 86 percent do not receive retirement benefits or the option to buy into a group retirement plan.\(^{46}\) As a result, it is not uncommon for adjunct faculty members to rely on public assistance programs, such as food stamps and Medicaid, to fill the gap.\(^{47}\)


\(^{44}\) Curtis & Thornton, *supra* note 42, at 9.

\(^{45}\) House Committee on Education and the Workforce, *supra* note 43, at 5.

\(^{46}\) Adjuncts & Contingents Together, *supra* note 40.

\(^{47}\) House Committee on Education and the Workforce, *supra* note 43, at 5.
2. Contingent Faculty Members Lack Job Security and Advancement Opportunities.

The contingent faculty workforce represents a permanent fixture at colleges and universities across the nation; however, non-tenure-track faculty members rarely have the peace of mind that comes with permanent employment. To defray costs and adapt to declining government and endowment revenues, colleges and universities have embraced non-tenure-track educators as a source of cheap, expendable labor. Indeed, the contingent faculty model is purposefully structured to satisfy these twin goals: it enables educational institutions to offer short-term appointments, with limited job security, and no guarantee for advancement into tenure lines.

Most full-time contingent faculty members are hired for one-year appointments; thus, they are, by their very nature, temporary employees.\(^{48}\) Regardless of whether their contracts are renewed, their precarious employment status inevitably “constrains the academic freedom and undermines the effectiveness of the individuals holding them.”\(^{49}\) Adjunct faculty educators experience the additional vulnerability of being employed on a semester-by-semester basis.\(^{50}\)

Moreover, for full-time and part-time contingent faculty alike, university administrators routinely fail to hire or reappointment contingent faculty members until the days immediately preceding a new semester. Consequently, these practicing professionals are effectively excluded from pre-semester staff development, class preparation, school-wide and/or departmental orientation, curriculum development, and mentoring opportunities.\(^{51}\)

\(^{48}\) Curtis & Thornton, supra note 42, at 13.

\(^{49}\) Id.

\(^{50}\) Kezar & Maxey, supra note 7, at 1.

\(^{51}\) Id.
As one report aptly noted, “a contingent academic position is not simply a ‘temporary’ way station on the road to a tenure-track faculty career.” According to a 2010 survey conducted by the Coalition on the Academic workforce, 89 percent of respondents had been teaching in a full-time contingent position for at least three years. Thirty-nine percent of that subset had been teaching for at least a decade.

3. Contingent Faculty Members Occupy a Second-Tier Faculty Status.

Despite their increased presence on college campuses, contingent faculty members, by and large, occupy a marginalized status within the academic institutional hierarchy. They are frequently excluded from faculty committees, orientation programs, professional development opportunities and, for adjunct faculty, formal evaluation by administrators and/or faculty peers. Because of the unbundling of faculty duties, adjunct faculty members, in particular, provide instruction, but little more. They rarely provide input into curriculum development and design; indeed, part-time faculty members are generally excluded from departmental meetings. Non-tenure-track faculty members do not have comparable access to office space, computers and copiers, or other instructional materials, all of which compromise the standard of instruction they can provide students.

D. The Board Should Recognize These Significant Structural Changes in Higher Education and Modernize its Analysis under Yeshiva.

Rather than crafting an approach for determining managerial status based on the critical questions set forth in Yeshiva, the Board has elevated the specific facts which happened to be...
present in *Yeshiva* to factors in a test. The result is an unworkable exercise of fitting current facts into lines drawn decades ago in a very different academic landscape, or the marginalization of certain relevant facts altogether. The *Yeshiva* Court did not mandate the Board’s current approach; it viewed its decision as a “starting point only” recognizing that “other factors not present here may enter into the analysis in other contexts.” 444 U.S. at 691 n. 31. The holding of *Yeshiva* allows ample room for the Board to take into account the significant ways in which higher education institutions and the nature of faculty’s professional responsibilities have evolved—changes that directly affect the managerial status analysis for faculty.

We urge the Board to recognize these changed circumstances and modernize its approach in two ways. First, the Board should focus on the role of the university’s managerial professionals in the administrative apparatus and the extent to which they independently control the affairs of the institution. In the great majority of cases, faculty have an important advisory role but do not exert the kind of control over employer policies required to deem them managers under the high standards set in *Yeshiva*. Second, given the extent to which universities have stratified their faculty by employing professors with “unbundled” job responsibilities, the Board should acknowledge that professors hired primarily to teach—while they are professionals engaged in important work—are not managers.

1. **Yeshiva** Requires the Board to Apply the Well-Established Legal Principles of the Managerial Status Test to Faculty.

The Board, with approval from the courts, has long defined managerial employees as those “who formulate and effectuate management policies by expressing and making operative the decisions of their employer.” *General Dynamics Corp.*, 213 NLRB 851, 857 (1974) (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323 n.4 (1947)); see also *Bell Aerospace*, 416 U.S. 267 (1974) (citing cases where courts have approved the Board’s definition of this
exclusion). Managerial status is “reserved for . . . those who are closely aligned with management as true representatives of management.” *Bell Aerospace*, 219 NLRB 384, 385 (1975).

The Supreme Court in *Yeshiva* required the Board to apply this same legal standard in determining whether a unit of all full-time faculty at Yeshiva University were managerial. The *Yeshiva* Court considered two questions. First, it asked if any of the professors in the unit formulate and effectuate management policies by expressing and making operative the decisions of their employer. Second, the Court considered whether the professional interests of any bargaining unit employees were so closely aligned with management that the risk of divided loyalty would lead to the types of harms the Board sought to prevent in creating the managerial exclusion. *Yeshiva*, 444 U.S. at 686-88. The second inquiry served to check that the underlying purpose of the managerial exclusion would be served: namely, ensuring that those employees whom the employer necessarily relies upon to take discretionary actions that formulate and

58 The Court recognized that “there may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit.” *Yeshiva*, 444 U.S. at 691 n.31. However, as the Board had approved a broad unit including all full-time faculty, the Court expressed no opinion on the factors that might be relevant at different kinds of institutions or with regard to different kinds of faculty, other than to suggest that its analysis was a “starting point only and that other factors not present here may enter into the analysis in other contexts.” *Id.*
effectuate management policies are completely removed from the risk of divided loyalty. *Id.* at 689-90. That “check” squares with the Court’s caution that not all professionals should be considered aligned with management, only those whose “activities fall outside the scope of the duties routinely performed by similarly situated professionals.” *Id.* at 690.

In *Yeshiva*, the Court found that at least some full-time faculty in the unit met the high bar it set for determining managerial status at a university. Faculty exercised “extensive control” over academic and personnel decisions at the University and played a “crucial role . . . in determining other central policies of the institution.” *Id.* at 679 (internal quotations and citations omitted). The Court found that professors were “in effect, substantially and pervasively operating the enterprise,” *id.*, and that the faculty—not some other layer of management—“determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.” *Id.* at 686. The holding depended on a finding that the full-time faculty’s “authority in academic matters is absolute,” and to a lesser extent, the faculty played a “predominant role in faculty hiring, tenure, sabbaticals, termination and promotion”—decisions which encompass characteristics of supervisory as well as managerial functions. *Id.*

The Court also found that the “faculty’s professional interests—as applied to governance at a university like Yeshiva—*cannot be separated* from those of the institution.” *Id.* at 688 (emphasis added). The record before the Supreme Court established that the university’s administrators viewed the faculty as the school, and viewed themselves as the “executive arm of the faculty.” *Id.* at 676 n.4.
2. Changes in Administrative Structures and the Realities of Contingent Faculty Roles Mean Few Faculty Meet the High Bar for Managerial Status Set in Yeshiva.

a. The Board Must Consider the Relative Number and Role of the Institution’s Managerial Professionals to Determine the Actual Control Exercised by Professors.

Managerial professionals are hired into high-level, administrative positions by universities to oversee the development and implementation of university policies. While these functions were historically filled from the ranks of tenured professors who would temporarily rotate to serve in various administrative capacities, many managerial professionals today are being hired into career administrator paths. Assessing the role of managerial professionals and their relationship to the practicing professionals at a particular university will reveal whether the administration is “acting as the executive arm of the faculty,” as it was in Yeshiva, or acting as an administrative “buffer” that effectively reviews, mediates, and negotiates faculty recommendations into university policies. See Loretto Heights College, 264 NLRB 1107, 1121 (1982) (finding administrative program directors acted as an effective buffer between faculty and top management); St. Thomas Univ., 298 NLRB 280 (1990) (finding that university did not rely on its faculty where there existed a division chair committee that possessed the academic expertise).

In other managerial cases, the Board seeks to understand the authority of high-level managers, in order to put into context the role of allegedly managerial employees who occupy a lower place in the employer’s hierarchy. See, e.g., Scranton Tribune, 294 N.L.R.B. 692, 693 (1989) (finding that a newspaper editor’s authority was merely within the scope of professional judgment, and subservient to the operative authority held by the executive editor); Upper Great Lakes Pilot, 311 N.L.R.B. 131, 132 (1993) (finding only directors, and not lake pilots,
managerial, as the directors owned enough stock to control the course of business). The role of
the managerial professionals is especially important because the existence of an administrative
“buffer” in modern day universities is no longer the exception, but is the norm.

The vestiges of a Yeshiva-like collegiate system still exist at many non-profit universities
and colleges, usually in the form of a faculty governance body. However, the expanding ranks of
administration managerial professionals—hired to run the university with input and advice from,
but not in partnership with, the faculty—have eroded the authority that faculty exercise through
these governing bodies. As universities have become more entrepreneurial, managerial
professionals have exercised more authority over academic decisions, which can lead to
additional revenue streams. Moreover, however, they also have greater influence over
curriculum development and delivery. For example, decisions regarding distance learning or
online programs largely occur “outside the standard processes of academic governance.”

Universities often no longer rely on their faculty to shape the university’s product, the
terms and conditions on which they offer that product, and the customers to be served. These
priorities are independently determined by the increasingly large administration. From the
perspective of university management associations like the Association of Governing Boards, the
Yeshiva Court’s vision of true shared authority between the faculty and the administration is no
longer even a normative aspiration for modern university governance systems, much less a
reality.

59 Gary Rhoades, Democracy and Capitalism, Academic Style: Governance in Contemporary Higher Education 16-
60 Id. at 21-22.
61 Association of Governing Boards of Universities and Colleges, AGB Statement on Board Responsibility for
Institutional Governance 2 (2010), available at 
In this case, PLU employs a substantial number of managerial professionals, at multiple levels of authority in the administrative hierarchy, who have responsibility over an array of institutional policies that affect the university’s academic product. Employer Ex 5 (PLU Table of Organization). Four vice-presidents, in addition to the provost, make a host of university policy decisions. Under the provost are deans and directors, who have authority over each of the divisions and schools. Below them are associate deans and department chairs, who are hired into that role from among the tenured faculty members and report to the deans. Petitioner Ex 24 (PLU Academic Deans and Chairs 2012-2013), Tr. 22, 28. Directors and associate provosts also report to the provost and run other areas of academic life, such as “academic advising,” “curriculum,” and “military science.” Employer Ex 5. This extensive hierarchical administrative body is a compelling indication of an “effective buffer” that would warrant further review if this were a case about a unit of tenure-track faculty at PLU.

b. The Board Should Find that Contingent Faculty Hired Primarily to Teach are Not Managers.

Contingent professors have a different employment relationship with their employer institutions than traditional tenured or tenure-track faculty. They are hired to perform a specialized subset of professional duties for a limited contractual period and are paid substantially less than their tenure-track colleagues. While some full-time contingent professors are able to remain employed with one university for an extended period of time, this does not change the fact that they are in a tenuous and subordinate position at that institution. That distinction eliminates any possibility that they have the power to “formulate and effectuate management policies” or that their professional interests are “aligned with” the management that consigns them to this low-wage, insecure status. Yeshiva, 444 U.S. at 682-83.
When a party asserts that contingent faculty are managerial, the Board must examine the “actual job responsibilities, authority, and relationship to management” of such faculty in order to determine whether, despite their temporary status and limited responsibilities, they participate in formulating or implementing management policies and whether they are aligned with management. *Bell Aerospace,* 416 U.S. 267, 290 n.19 (1974). The appropriate inquiry is *not* whether contingent faculty members have any participatory rights in a faculty governance system.62 That a university may decide to “rebundle” the duties of contingent faculty by permitting them to participate in select aspects of university faculty life does not change the fact that their functions and interests fundamentally diverge from those of management.

Here, PLU did not proffer evidence that full-time contingent faculty formulate and effectuate management policies of the university. Rather, full-time contingent faculty members are hired by PLU on one-year contracts that specify fulfillment of temporary needs. These include filling in for regular faculty who are on sabbatical or other leave, providing expertise needed for a particular type of program that the school’s management has decided to launch, and meeting teaching needs in courses with high enrollment. *See* Tr. 98-105; ER Request for Review 36-37. While PLU has offered a myriad of reasons for hiring full-time contingent faculty, it does not assert that one of those reasons is because they are needed to formulate and effectuate PLU management policies.

The Board must deny PLU’s argument that the right of full-time contingent faculty to vote in the Faculty Assembly transforms contingent faculty into managerial employees who are

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62 We do not consider, given the facts of this case, whether the tenure-line faculty at PLU are managerial employees, but if that question were before the Board, their participation in faculty governance structures should be just one among the factors considered in that analysis. *See supra,* at 33.
so closely aligned to management that they lose their statutory rights under the NLRA. There is no basis for reaching this conclusion. PLU relies on contingent faculty because it needs the flexibility to draw from a pool of qualified practicing professionals. Indeed, PLU itself notes: “The university has lower expectations for scholarly work and university service for contingent faculty than we do for tenure-line faculty, and some of our contingent faculty prefer to teach exclusively without the requirement to be productive scholars or active in committees and other service work of the university.”

CONCLUSION

For the foregoing reasons, the Regional Director’s decision should be affirmed.

Respectfully submitted,

Judith A. Scott
Maryann Parker
Jennifer Hunter
Elena Medina
Saerom Park
Service Employees International Union
1800 Massachusetts Avenue, NW
Washington, D.C. 20036
(202) 730-7466
Attorneys for Amicus Curiae

Paul Drachler
Martha Barron
Douglas Drachler McKee & Gilbrough LLP
1904 Third Ave, Suite 1030
Seattle, WA 98101
(206) 623-0900
Attorneys for Petitioner

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63 PLU erroneously characterizes the full-time contingent faculty as having “exactly the same vote as tenure line faculty.” Employer’s Request for Review, 28. The record clearly indicates that full-time contingent faculty, unlike tenure-line faculty, do not have the same rights as they cannot vote on personnel matters in the Faculty Assembly. Faculty Handbook, 32; Tr. 56-57.

64 Pacific Lutheran University, Summary for the ASPLU [Associated Students of Pacific Lutheran University], 1 (Sept. 2013), available at http://www.plu.edu/provost/Contingent%20Faculty%20Information/home.php.
CERTIFICATE OF SERVICE

I certify that on the 28th day of March, 2014, a copy of this document is being served upon the following persons by electronic mail as follows:

Ronald K. Hooks, Regional Director
NLRB, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174
Email: Ronald.hooks@nlrb.gov

Warren E. Martin
Gordon Thomas Honeywell LLP
1201 Pacific Avenue, Suite 2100
PO Box 1157
Tacoma, WA 98401-1157
Email: wmartin@gth-law.com

Dated this 28th day of March, 2014.

s/ Paul Drachler
Paul Drachler, WSBA 8416
DOUGLAS DRACHLER MCKEE & GILBROUGH, LLP
1904 Third Ave, Suite 1030
Seattle, WA 98101
206-623-0900
206-623-1432 (facsimile)
Email: pdrachler@qwestoffice.net