UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PACIFIC LUTHERAN UNIVERSITY, Employer, and SEIU LOCAL 925, Petitioner.	Case 19-RC-102521

RESPONSIVE BRIEF ON BEHALF OF PETITIONER SEIU LOCAL 925

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

SUMMARY OF ARGUMENT

The "teacher religious function" test that Petitioner SEIU Local 925, along with *amici* the Service Employees International Union (SEIU), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC (USW), propose the Board adopt in place of the "substantial religious character" test is consistent with Supreme Court caselaw, is narrow and workable, and serves as an effective "market check." By contrast, the tests urged by the employer-side *amici* – variously, the D.C. Circuit's *Great Falls* test or some subset thereof – are overly broad and would exempt huge numbers of employees from the protection of the National Labor Relations Act, despite their clear inclusion in the language of the Act and the absence of any risk of constitutional entanglement posed by their exercise of their rights under the Act.

Contrary to PLU's protestations, the Board is well within its authority to update the framework it uses in applying *Yeshiva* through this case. Rather than accept PLU's attempt to reframe the issue in this case as simply whether there is any distinction between PLU's contingent and tenure-line faculty, the Board should use this occasion to modernize its *Yeshiva* analysis to account for structural changes in higher education.

ARGUMENT

I. The "Teacher Religious Function" Test is the Most Appropriate Application of *Catholic Bishop.*

As we set forth in our opening brief, the Board should abandon its "substantial religious character" test in favor of a "teacher religious function" test. That test would ask whether, according to the school's own public statements, its teachers perform religious functions as part

of their jobs. Specifically, it would inquire whether teachers are required to promulgate religious beliefs, and whether they are hired or can be disciplined or fired based on religious criteria.

A. The "Teacher Religious Function" Test Is Constitutional, Narrow, Workable, and Serves as an Effective Market Check.

1. The "teacher religious function" test is similar to the inquiry the Supreme Court performed in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 132 S. Ct. 694 (2012), demonstrating that it passes constitutional muster. The arguments by *amici* that the D.C. Circuit's "religious educational environment" test is the "only" test that implements the Supreme Court's decision in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), in a constitutional manner, *see, e.g.*, PLU's Brief in Response to Notice and Invitation to File Briefs ("PLU *Amicus* Br.") at 3, ignore this recent Supreme Court endorsement of an alternative approach.

In *Hosanna-Tabor*, the Supreme Court faced the very issue the Board is grappling with now: what type of inquiry it should conduct to determine whether the application of labor and employment laws to employees of a religiously affiliated institution would pose a risk of entanglement between government and religion. There, in order to determine whether the "ministerial exception" to the Americans with Disabilities Act applied to a "called teacher" at a church-operated elementary school, the Court first had to decide what degree of examination of the teacher's job functions was constitutionally appropriate.

Justice Thomas wrote a separate concurrence, not signed by any of the other Justices, in which he asserted that the Constitution required the Court simply to take the employer at its word when it asserted that the teacher was a "minister." 132 S. Ct. at 710. "A religious organization's right to choose its ministers would be hollow," he wrote, "if secular courts could second-guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets." *Id.*

This position is remarkably similar to that taken by *amici* here. For instance, *amici* the Association of Catholic Colleges and Universities *et al* (ACCU) argue that "*Catholic Bishop* expressly forecloses any inquiry into the religious function of faculty at a religious-affiliated school." Brief for *Amicus Curiae* Association of Catholic Colleges and Universities *et al.* ("ACCU *Amicus* Br.") at 21. *See also* Brief of *Amicus Curiae* National Right to Work Legal Defense and Education Foundation, Inc. ("NRTW *Amicus* Br.") at 12 (urging the Board to use as its test just the question "whether the University holds itself out … as providing a religious educational environment."). But the *Hosanna-Tabor* Court rejected that extraordinarily deferential approach. Instead, it performed a targeted but substantive inquiry into the teacher's job functions, focusing on how the employer had held the teacher out to the public, and on documents reflecting her job description and job duties. 132 S.Ct. at 708. For the Board to conduct a similar inquiry into the job functions of teachers at schools that seek the *Catholic Bishop* exception is thus entirely appropriate.

Indeed, it is also worth noting that then-Judge Breyer's opinion in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1985), which the D.C. Circuit cited as the inspiration for its *Great Falls* test, *see Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002), also went beyond considering just the University's nonprofit status, religious affiliation, and self-identification as a religious educational institution. Judge Breyer's opinion discussed the faculty's religious functions, noting that "[t]he Dominicans … teach Christian ethics" and "claim the right to dismiss teachers for 'offenses to the Christian morality.'" 793 F.2d at 401. The opinion thus cannot be said to stand for the proposition that a test that asks about faculty religious functions constitutes improper entanglement.

2. Additionally, the "teacher religious function" test is non-intrusive. Contrary to the assertions of *amici* ACCU, the test is certainly *not* more intrusive than the Board's current approach. *See* ACCU *Amicus* Br. at 24. The institution's "mission" and overall "character" are *not* relevant under the "teacher religious function" test. Nor are such matters as the religious affiliations of the student body, chapel attendance requirements, or whether classrooms have crosses or other religious iconography.

3. The test we propose is eminently workable. Attempts by *amici* to describe the proposed test as an "administrative nightmare," *Amicus* Brief of General Conference of Seventh Day Adventists *et al*. ("GCSDA *Amicus* Br.") at 21, or to suggest that it would require an individual inquiry into each course offered, *id.* at 20, or into the jobs of each bargaining unit member, *id.* at 22, ignore the fact that the Board has extensive experience in assessing the job functions of a proposed bargaining unit as a whole. Indeed, the "nature of the employee skills and functions" is one of the factors the Board routinely considers in determining whether a group of employees constitutes an appropriate bargaining unit. *See* NLRB Outline of Law and Procedure in Representation Cases, § 12-210, *available at* http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/representation_case_outline_of_law_4-16-13.pdf (listing "community of interest" factors).

Our proposed test is made even simpler by the fact that it permits the Board to rely on the school's own public representations about the nature of its teachers' jobs. *Amici* endorse just such an approach when they call the D.C. Circuit test's reliance on the school's public statements a "key virtue." GCSDA *Amicus* Br. at 22. On this point, we agree. A test that relies on a university's public representations cannot be said to be overly intrusive.

4. The "teacher religious function" test parallels well-accepted higher education accreditation standards by permitting schools to decide for themselves whether to make the inculcation of religious belief a job function of their teachers – but also by creating a meaningful built-in "market check" by insisting that schools inform potential students, employees, and the public if they do so.

This "market check" dynamic is well demonstrated by *amici* ACCU's discussion of the diversity of Catholic schools that self-identify as religiously-affiliated. ACCU's point out that some religiously-affiliated institutions "prefer to promote religious beliefs 'with a velvet glove rather than an iron fist,' as they are privileged to do under the First Amendment." ACCU *Amicus* Br. at 15. Similarly, they note, a "religious school might hire a nonbelieving math teacher, but it is not likely to permit him to flaunt his nonbelief, to denigrate the church that runs the school, or to set a bad example." *Id.* at 16.

The "teacher religious function" test would *not* affect a school's First Amendment right to make these decisions. It would instead require that, if such a school seeks to exempt its teachers from the coverage of the NLRA under *Catholic Bishop*, it publicly hold itself out to potential teachers, students, and the public as a school that, for instance, "promotes religious beliefs" or bars teachers from "flaunt[ing] [their] nonbelief" or "denigrat[ing] the church that runs the school." *Id.* The school would retain its choice in the matter, and the public notice to potential students and employees would serve as a "market check."

The pertinence of precisely that type of information to potential students and the public, and the reasonableness of a request that schools disclose it, is demonstrated by the test's parallels to higher education accreditation standards. Schools whose teachers perform religious functions certainly can be and often are accredited – but accrediting bodies require those schools to openly

disclose as much. For instance, as mentioned in our opening brief, the Northwest Commission on Colleges and Universities ("NWCCU"), which accredits PLU, requires a school to "give[] clear prior notice" if it "requires its constituencies to conform to specific codes of conduct or seeks to instill specific beliefs or world views." NWCCU, Standards for Accreditation (Revised 2010), criteria 2.A.23, available at http://www.nwccu.org/Pubs%20Forms%20and%20Updates/Publications/Standards%20for%20Accreditation.pdf. Those same standards require schools to "apprise[]" employees of their "conditions of employment, work assignments, rights and responsibilities, and criteria and procedures for evaluation, retention, promotion, and termination," *Id.* criteria 2.A.19, which would include whether they are hired or can be fired or disciplined based on religious criteria. NWCCU-accredited schools must also generally "represent[] [themselves] clearly, accurately, and consistently through [their] announcements, statements, and publications." *Id.* criteria 2.A.21. If colleges and universities are complying with these standards, the Board need only take them at their word to determine whether their teachers qualify for the *Catholic Bishop* exception.

B. The Tests Proposed by Several *Amici* Are Overbroad, Unjustifiably Exclude Many Employees from the Coverage of the Act, and Promote Discriminatory Application of the Act

Several employer-side *amici* advocate for overbroad tests that would exclude many covered employees from coverage under the Act, and promote rather than prevent its discriminatory application.

1. Employer-side *amici* propose tests much broader than what is required to address the entanglement concerns identified in *Catholic Bishop*, a case that involved teachers at primary and secondary parochial schools whose jobs involved "the propagation of a religious faith." 440

U.S. at 503. These tests would, in fact, sweep even more broadly than the D.C. Circuit's highly deferential *Great Falls* test.

Amici ACCU erroneously collapse the *Great Falls* test into one that would exempt from coverage any non-profit school with a religious affiliation. The ACCU brief cites *Great Falls* to support a proposed test limiting the inquiry to whether a school "(1) holds itself out as a *religious institution*, (2) is non-profit, and (3) is religious-affiliated," ACCU *Amicus* Br. at 5, 19. This formulation effectively collapses the first and third prongs of the D.C. Circuit's test and eliminates the requirement that the school "holds itself out to students, faculty, and the community as providing a religious educational environment." *Great Falls*, 278 F.3d at 1343. This test would permit the 876 colleges and universities across the country with some affiliation, however tenuous, to a church or other religious institution to exempt themselves from the NLRA, regardless of whether those schools would even claim to provide a religious education, and would deny the protections of federal labor law to those schools' hundreds of thousands of employees.[1] *Amici* ACCU *et al.* also explicitly advocate exempting *all* employees of "religious-affiliated" schools, not just teachers, from Board jurisdiction. ACCU *Amicus* Br. at 20 n. 16.

Amicus National Right to Work Legal Defense and Education Foundation would also broaden the D.C. Circuit's already expansive test, albeit in a different way – it would eliminate the second and third prongs and require only that the school hold itself out as providing a "religious educational environment." NRTW *Amicus* Br. at 12.

Thus, the tests advocated by *amici* would extend *Catholic Bishop* and deny NLRA rights to *all* employees at religiously-affiliated schools, and even to employees at other religiously

[1] Federal IPEDS data, which aggregates self-reported data from institutions of higher education in the United States, list 876 religiously-affiliated colleges and universities employing 396,667 employees and 156,305 faculty members. Data from the Integrated Postsecondary Education Data System, National Center for Education Statistics, http://nces.ed.gov/ipeds/.

affiliated institutions that are not schools. *See, e.g.*, ACCU *Amicus* Br. at 20 n.16 ("all employees of religious-affiliated schools, whether teaching or non-teaching, are exempt from Board jurisdiction under *Catholic Bishop*"); GCSDA *Amicus* Br. at 21 (*Hanna Boys Center* "incorrectly" holds that *Catholic Bishop* does not apply to non-faculty, "blue-collar" employees); NRTW *Amicus* Br. at 5-7 (arguing that Board jurisdiction over any institution that claims a religious objection to abortion would present a constitutional problem).

This reasoning flies in the face of the holding of *Catholic Bishop*. As the Ninth Circuit explained in its carefully reasoned decision in *Hanna Boys Center*.:

> The facts of *Catholic Bishop* are confined to Board jurisdiction over teachers … The difficult constitutional question that the Court sought to avoid was that which would flow from the Board's exercise of jurisdiction over teachers in church-operated schools. That point was reiterated throughout the Court's opinion, and it was clearly founded on the unique role of teachers in accomplishing the religious goals of the school.

NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1301 (9th Cir. 1991) (internal citations and quotations omitted). Nothing in *Catholic Bishop* supports a Board doctrine that would exclude from coverage all religiously-affiliated institutions, and deny rights under the Act to all employees of those institutions.

2. Contrary to the employer-side *amici*, the narrow "teacher religious function" test would alleviate, not promote, discriminatory application of the Act.

The claim by *amici* that it is discriminatory to exempt from the Act schools, like those in *Catholic Bishop*, whose teachers perform religious functions while requiring other schools to comply with a law whose language clearly covers them, *see, e.g.*, Seventh-Day Adventist *Amicus* Br. at 21, must fail. The application of the Act to all religiously-affiliated institutions covered by its language *except* those for whom there is an actual risk of entanglement is not discriminatory.

Rather, it accomplishes the goals of the Act and displays the very respect for religion required by the First Amendment.

Our proposed "teacher religious function" test, which faithfully implements the holding of *Catholic Bishop*, would correct any tendency in the existing "substantial religious character" test to exempt schools with a highly religious atmosphere from Board jurisdiction while requiring those of a more secular "feel" to comply with the Act without regard to the specific risks of entanglement presented. The "teacher religious function" test obviates the need to probe the religiosity of the school, including its physical and moral environment.

The various tests urged by the employer-side *amici*, by contrast, would result in irrational and harmful discrimination against the employees of religiously-affiliated institutions. *See* Br. on Behalf of Petitioner SEIU Local 925 and SEIU as *Amicus Curiae* (SEIU *Amicus* Br.) at 11 (noting that employees' NLRA rights could depend on whether the university where they work decided to contract out functions like cleaning and food preparation). The Board must remain true to the text of the Act and the policies animating it, which include "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, and for the purpose of negotiating the terms and conditions of their employment[.]" 29 U.S.C. § 151. Here, the employer's overbroad application of *Catholic Bishop* would arbitrarily exclude tens of thousands of employees from the protections of the Act, and the opportunity to bargain for better working conditions for themselves and their fellow employees.

II. Although PLU's Contingent Faculty are not Managerial Employees Under any Application of *Yeshiva*, this Case Highlights the Need for the Board to Modernize the *Yeshiva* Doctrine to Reflect Structural Changes in Higher Education that have Significantly Reduced the Proportion of University Faculty Subject to the Managerial Exclusion.

In *NLRB v. Yeshiva*, the Supreme Court established a flexible approach, explicitly disavowing "an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." 444 U.S. 672, 690 (1980). Yet, by arguing that PLU's contingent faculty members are managerial employees, PLU and its employer-side *amici* advocate for precisely the type of one-size-fits-all application that would convert a limited managerial exclusion into a general rule.

A. The Board's consideration of issues presented in the Notice and Invitation to File Briefs falls squarely within its authority to refine and establish case-dispositive legal principles through adjudication.

Although PLU's contingent faculty members are not managerial employees under any application of *Yeshiva*, the Board should exercise its adjudicatory power to resolve the issue presented in this case by modernizing its analytical framework. PLU misapprehends the scope of the Board's authority due to its mischaracterization of the issue as whether "PLU's full-time contingent faculty should be analytically the same as or different from PLU's tenure line faculty who all parties presume are exempt under any application of *Yeshiva*."[2] PLU *Amicus* Br. at 25. In reality, the Board granted review to consider whether the Regional Director correctly concluded that certain PLU faculty members are not managerial employees—a determination guided, in the first instance, by *Yeshiva* and its progeny. This case, like other agency adjudications, provides

[2] We do not and cannot speculate as to whether PLU's tenure line faculty are exempt managerial employees because SEIU Local 925 did not seek to represent those employees and, accordingly neither the parties nor the hearing officer developed the record to resolve this issue. PLU *Amicus* Br. at 22 n.13 (confirming that the record is insufficient to make such a determination). Nonetheless, the Board does not need such a record to resolve the issue presented in this case or to answer the questions posed in the Notice and Invitation to File Briefs. The Board need only apply and, to the extent appropriate, refine the approach established in *Yeshiva* and developed in subsequent Board cases.

the Board with a much-needed, and long overdue, "vehicle[] for the formulation of agency polic[y]" that recalibrate the *Yeshiva* doctrine to capture the realities of today's educational institutions and eliminate inconsistencies in Board caselaw. *See NLRB v. Wyman-Gordon*, 394 U.S. 759, 765 (1969).

As PLU acknowledges, it is well-established that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). "[T]he nature of adjudication is that similarly situated non-parties may be affected by the policy or precedent applied, or even merely announced in dicta." *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999); *see also Bell Aerospace Co.*, 416 U.S. at 292. Therefore, the Supreme Court has consistently held that an administrative agency may announce new legal principles through adjudication. *Id.* at 294; *Wyman-Gordon*, 394 U.S. at 765 ("Adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein."). In other words, "[t]he fact that an order rendered in an adjudication may affect agency policy and have general prospective application, does not make it rulemaking subject to APA section 553 notice and comment." *Conference Grp., LLC v. FCC*, 720 F.3d 957, 966 (D.C. Cir. 2013) (internal quotation marks and citation omitted). Indeed, the Supreme Court has repeatedly upheld the Board's preference "to promulgate virtually all of the legal rules in its field through adjudication rather than rulemaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *accord Bell Aerospace Co.*, 416 U.S. at 290-94.

Here, PLU discounts the Board's authority by attempting to bypass a critical step in the *Yeshiva* analysis. Yet, a workable, coherent approach is a necessary prerequisite to the Board's determination of whether a rational dividing line can be drawn within PLU's faculty. *Yeshiva*, 444 U.S. at 690 (acknowledging the likelihood "that a rational line could be drawn between

tenured and untenured faculty members, *depending upon how a faculty is structured and operates*.") (emphasis added).

Resolving the issue of whether contingent faculty are protected by the NLRA requires the application of a harmonious analytical framework that reflects the current higher education context. Given the inconsistencies in the Board's caselaw, the Board must address the antecedent matter of how to modernize the *Yeshiva* framework before determining the managerial status of PLU contingent faculty. Therefore, the Board is well within its authority to seek guidance on and address the case-dispositive questions presented in the Notice and Invitation to File Briefs, which inform the Board's determination as to the appropriate contours of the *Yeshiva* doctrine.

B. The Board should reject PLU's approach because it conflicts with the Supreme Court's holding in *Bell Aerospace* and its reasoning in *Yeshiva*.

As explained above, PLU pays lip service to *Yeshiva* but then invites the Board to sidestep the requisite analysis by framing the issue as "whether there was any legally sufficient distinction between PLU's full-time contingent faculty, who have the same voice and vote in the Faculty Assembly, and PLU's tenure line faculty whom all parties presumed were exempt under *Yeshiva*." PLU *Amicus* Br. at 2. Under *Yeshiva*, however, the Board must examine whether the employees in the proposed bargaining unit formulate and effectuate policies such that they are substantially and pervasively operating the enterprise, and whether their interests are so aligned with management's that they must lose the protections of the NLRA. 444 U.S. at 679, 682-83, 688. PLU does not satisfy its burden on either front, asserting instead that *any* faculty member with the right to voice and vote in the Faculty Assembly should be deemed a managerial employee.

The job responsibilities, authority, and relationship to management of full-time contingent faculty clearly point toward a non-managerial employment relationship. As a general

matter, faculty have a professional interest in providing the best educational experience for their students and furthering scholarship in their chosen disciplines. However, this certainly does not mean that all faculty members' interests are aligned with those of the academic managers of their respective academic institutions. This is particularly true for contingent faculty, who are hired primarily to fulfill a specific instructional need in a department, who do not have the attendant rights of full academic freedom that tenure allows, and who do not have expectations of reappointment at that institution.

Contrary to PLU's contention, the right to voice and vote in the Faculty Assembly, in and of itself, neither establishes that contingent faculty substantially and pervasively operate PLU's academic enterprise, nor that their "activities fall outside the scope of the duties routinely performed by similarly situated professionals" such that their interests are aligned with management. Contingent faculty members' precarious job status and limited professional rights and responsibilities evidence a significant divergence of interests with university management on myriad issues, including salary, tenure stream options, and academic freedom, to name a few.

Moreover, the Supreme Court's own pronouncements in *Yeshiva* belie PLU's contention that "it was the right to exercise authority by the *faculty as a whole* that made the *faculty as a whole* managerial." PLU *Amicus* Br. at 28 (emphasis in original). The Court plainly recognized that "[t]here may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit."[3] *Yeshiva*, 444 U.S. at 690. The Court also acknowledged that there "may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial," a clear signal that the Board must consider the petitioned-for faculty unit and *not* the faculty as a whole. *Id.*

[3] The reason the Supreme Court declined to express an opinion as to whether some segment of the Yeshiva University faculty were entitled to NLRA protection was because it was "clear that the unit approved by the Board was far too broad." 444 U.S. at 690.

C. The mere existence of a faculty governance system does not mean that PLU operates within a "system of shared authority," particularly with respect to contingent faculty members.

"The idea of 'shared authority' invoked by the Supreme Court in *Yeshiva* refers to a conception that at the time was encouraged as an aspiration but that very often was not realized in the practice of 'joint effort' in college and university government, and that is even less realized in the decades since" the case was decided. Brief *Amicus Curiae* of Sociology of Higher Education Restructuring Scholar (Rhoades *Amicus* Br.) at 17, 24-34. PLU's singular focus on voting in the Faculty Assembly typifies the shortcomings of a managerial analysis that equates the mere presence of a faculty governance system with the actual existence of shared authority between administrators and faculty.[4]

First, an analysis of the faculty governance system will almost always be an inadequate proxy for assessing whether *contingent* faculty, in particular, exercise managerial authority.[5] The contingent faculty model is purposefully structured to consign non-tenure-track educators to a second-tier faculty status in which they have less authority and less academic protection than their tenured and tenure-track colleagues. *See* SEIU *Amicus* Br. at 26-29. Because they are hired primarily to teach, contingent faculty's sphere of influence is circumscribed by the universities that employ them. For instance, the majority of respondents in an one study reported that full-time contingent faculty members were excluded from certain governance processes, a pattern that is reflected in PLU's administrative policies. *Id.* at 25. Even when contingent faculty are nominally granted some subset of faculty governance rights, such as the right to vote in the

[4] Indeed, a 2003 study revealed that nearly half of faculty did not believe that faculty senates were highly valued in their educational institutions. Willis A. Jones, *Faculty Involvement in Institutional Governance: A Literature Review*, 6 J. Professoriate 117, 122 (2011). Researchers have also "found that faculty influence in institutional governance was perceived as higher among academic administrators than among faculty." *Id.*

[5] Notably, the Employment Law Alliance proposes that the Board adopt a rebuttable presumption of managerial status for tenure line faculty based solely on governance documents; however, it does not take the position that such a presumption should extend to contingent faculty. *Amicus* Brief by the Higher Education Council of the Employment Law Alliance at 10-11.

faculty assembly, their tenuous, short-term appointments preclude them from meaningfully exercising this authority. By PLU's own admission, "Contingent Faculty may not feel able to speak freely about work-place issues." Recommendations of Ad Hoc Task Force on Contingent Faculty at 2; *see also* Rhoades *Amicus* Br. at 12 (citing a study in which a non-tenure-track faculty member explained that "[w]e have a vote, but I would say not a voice in the department . . . I would even hesitate to express my opinion at a faculty meeting").[6]

Second, the presence of a governance system through which faculty provide advice and input regarding certain academic matters does not transform any and all faculty participants into managerial employees. Despite the Employment Law Alliance's assertions, far fewer faculty members are "involved in formulating and implementing policies regarding the 'business of education' that reach beyond the faculty member's own classroom and/or professional scholarship ." *Amicus* Brief by the Higher Education Council of the Employment Law Alliance (ELA *Amicus* Br.) at 3. In today's higher education context, it is the "business of education," in which knowledge is a source of revenue for universities and decisions are influenced by external market factors, that has eroded faculty authority. Unlike *Yeshiva*, where the faculty wielded near absolute authority over academic matters, high-level administrators, not faculty members, primarily control "the product to be produced, the terms upon which it will be offered and the customers who will be served" in modern educational institutions. 444 U.S. at 686. Thus, the inverse of ELA's proposition is true: *fewer* faculty members' sphere of influence extends much beyond their classrooms whereas *more* non-faculty academic managers possess authority that extends into faculty members' classrooms and/or professional scholarship because research,

[6] The marginalization of contingent faculty members is further corroborated by research indicating that faculty at schools without tenure have substantially less power and overall influence than faculty at institutions with tenure-line systems. Jones, *Faculty Involvement in Institutional Governance*, 6 J. Professoriate at 126.

educational materials, and even assessment tools can be transformed into revenue-generating commodities. SEIU *Amicus* Br. at 20-21.

In contrast, the employer-side *amici* offer variations of the argument that some ambiguous but minimal level of input into just two narrow areas of decision-making – curriculum and course offerings – satisfies the *Yeshiva* standard. *See* Brief of *Amici Curiae* American Council on Education *et al.* at 7 (emphasizing effective recommendation over "curriculum and course offerings" as the critical inquiry); ELA *Amicus* Br. at 10-11 (concluding that Board cases have found managerial status where faculty "at least 'effectively recommend' policies with respect to curriculum and course offerings"); NRTW *Amicus* Br. at 14 (identifying "effective, university-wide faculty control of curricula and course offerings as primary manifestations of academic control"). By elevating the importance of curriculum and course offerings to the exclusion of a whole host of other academic matters, employer-side *amici* take the position that faculty input in these matters alone confers managerial status on faculty members.[7]

The employer-side *amici's* low threshold for managerial authority reflects the reality that collective faculty authority has been fractured and eroded since *Yeshiva*. As PLU demonstrates, contingent faculty now comprise a significant percentage (or in some cases a majority) of instructional employees at private, nonprofit universities. These faculty have no long-term expectations of employment at the institution. Even for the tenure-line faculty who are able to participate in some form of faculty governance or have some level of input into curriculum and course offerings, they can no longer be characterized as jointly operating the university enterprise with the central administration.

[7] Employer-side *amici* classify other fundamental academic matters—such as course scheduling, grading, graduation policies, scholarships, matriculation standards, academic calendar, teaching methods, hiring, tenure, promotions, terminations—as "peripheral" or "less critical" indicia of authority.

D. In light of significant structural changes in higher education, the Board should focus on the size and role of the university's academic managers and the degree of specialization of the contingent faculty members.

The Supreme Court established an approach – not a rigid set of factors – because it recognized that "other facts not present [in *Yeshiva*] may enter into the analysis in other contexts." 444 U.S. at 691 n.31. There is substantial evidence in our and supporting *amici* briefs that the modern educational context has shifted dramatically since *Yeshiva*, due in large part to the corporatization of higher education, the unbundling of faculty duties, and the ensuing re-conceptualization of the role of shared governance. SEIU *Amicus* Br. at 18; AAUP *Amicus* Br. at 8-9. The appropriate response to changes in the university administrative structure is not to lower the *Yeshiva* standard in order to reach the conclusion that faculty who participate in faculty governance systems or advise the development of curriculum and course offerings are managers.[8] Rather, it is to consider carefully the size and nature of the growing administrative apparatus at the university and assess who actually exercises power and authority to develop and implement the institutional policies governing academic affairs. SEIU *Amicus* Br. at 33-34; Br. of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* at 15-18; *see generally Amicus* Brief of the National Education Association at 22-31. This approach ensures that faculty members are not excluded from NLRA coverage simply because they are professional employees, an outcome the Supreme Court cautioned against in *Yeshiva*. 444 U.S. at 690.

[8] For this reason, the Board should reject any suggestion of a "rebuttable presumption" of managerial status where faculty governance documents exist. *See* ELA *Amicus* Brief at 10-11 (arguing that such a presumption should apply to tenure line faculty, where the faculty governance system provides for various levels of faculty responsibility or involvement in enumerated areas). While ELA does not suggest that such a presumption should apply to contingent faculty, it nonetheless highlights how easily the party asserting managerial status could discharge its evidentiary burden without being required to produce any evidence of actual managerial authority.

Although PLU's contingent faculty are not managerial employees under any application of *Yeshiva*, the Board should incorporate these considerations into its Yeshiva approach and uphold the Regional Director's ultimate determination that contingent faculty are entitled to the Act's protections.

CONCLUSION

For the foregoing reasons, as well as those set forth in our earlier briefing, the Regional Director's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 11th day of April, 2014, a copy of this document is being served upon the following persons by electronic mail as follows:

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