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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

PACIFIC LUTHERAN UNIVERSITY, Employer
And
SEIU LOCAL 925 Petitioner.

NO. 19-RC-102521
PLU'S BRIEF IN SUPPORT OF REVIEW

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I. INTRODUCTION AND BASIS FOR REVIEW

On September 23, 2013, the Board accepted review on two grounds. First, the Board accepted review of the Regional Director’s application of the “substantial religious character test” to assert jurisdictional over PLU. PLU notes that the Board has also accepted review of this issue in three pending cases: *Saint Xavier University*, Case No. 13-RC-22025; *Manhattan College*, Case No. 2-RC-23543; and *Duquesne University of the Holy Spirit*, Case No. 6-RC-08933.

The Regional Director’s application of the “substantial religious character” test violates the Religion Clauses of the First Amendment. To avoid this serious constitutional violation, the substantial religious character test should be discarded and the three-part “bright line” test used by the D.C. Circuit in *University of Great Falls*¹ should be adopted. PLU clearly meets the *Great Falls* test and the Board therefore lacks jurisdiction over PLU.

The Board also accepted review of the Regional Director’s inclusion in the unit PLU’s full-time contingent faculty who are exempt managerial employees under the Supreme Court’s decision in *Yeshiva University*.² Here, the Regional Director stated the correct legal standard, but then refused to apply that standard to the facts of the case. PLU’s Faculty Assembly has the primary decision making authority over academic matters at PLU. This authority makes the voting members of the Faculty Assembly exempt managerial employees under *Yeshiva*. Full-time contingent faculty members have exactly the same voting rights in the Faculty Assembly as tenure line faculty. Indeed, full-time contingent faculty have the right to vote on any changes to the description and

¹ *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (2002).

² *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

1 policies applicable to contingent faculty and thus have the right to vote on the very
2 subjects the Regional decision would now require bargaining.

3 For both reasons, PLU asks that the Regional Director's Decision and Direction of
4 Election be reversed.

5 II. ARGUMENT

6 A. The Regional Director Applied an Unconstitutional Standard to Assert Jurisdiction 7 Over PLU as a Religious Institution.

8 1. PLU is a Non-Profit Corporation Owned by the Lutheran Church.

9 Pacific Lutheran University is a non-profit corporation.³ ER Exs. 2, 3; Tr. 215:19-
10 20. It is owned by the member congregations of the Northwest Region of the Evangelical
11 Lutheran Church in America. *Id.*; Tr. 216:3-11. The highest decision-making body at PLU
12 is its Board of Regents. ER Ex. 3; Tr. 217:20-21. Of the 36 Regents, three are Bishops of
13 the Lutheran Church and another 18 are elected by Lutheran congregations. ER Ex. 3, Tr.
14 218-221. Thus, a majority of PLU's Regents are either church officials or are elected by
15 member congregations. *Id.*

17 2. PLU Holds Itself Out as Providing a Religious Educational Environment.

18 a. Lutheran Theology and Traditions are Central to PLU.

19 Lutheran Theology and PLU's Lutheran heritage and tradition are central to what
20 PLU is as a university. Tr. 223-248. Several key themes of Lutheran faith are the
21 underpinnings for PLU's mission, its values and what it does.⁴ *Id.*

24 ³ References to the transcript of the proceedings are designated as "Tr. ___." References to PLU's
25 (Employer) Exhibits are designated as "ER Ex. ___," the SEIU's (Petitioner) Exhibits are designated as "PET
Ex. ___," and Board exhibits are designated as "BD Ex. ___."

26 ⁴ Even though all of this information is undisputed in the record, the Regional Director simply ignores it in
his decision. For example, the Regional Director's sole analysis of the Lutheran heritage and history of PLU
is to write that PLU's mission "makes no mention of God." In this way, the Regional Director makes himself
the arbiter of Lutheran theology to determine that PLU is "not really religious enough" to meet the *Catholic*

1 The first key premise is the Lutheran notion of "vocation." Tr. 226-229. As
2 explained by PLU's 20-year President, Dr. Loren Anderson, the concept of "vocation"
3 focuses on the sense of having a purpose in life. Tr. 228:17-24. Lutheran theology
4 understands "vocation" as a religious calling in a particular field or endeavor to be both
5 the best in that endeavor and to use the endeavor to serve others and thereby serve God.
6 *Id.* The concept of vocation includes thinking about how one lives out life with a sense of
7 meaning and purpose in a way that serves the world like a "Christian cobbler making
8 good shoes." Tr. 231:3-5.

10 A second Lutheran concept central to PLU is the Lutheran dialectic between the
11 kingdom of the right and the kingdom of the left. Tr. 231-232. In Lutheran theology, the
12 right hand involves overtly religious matters, the church and issues of faith. *Id.* The left
13 hand involves more secular pursuits including scientific knowledge and other "objective"
14 learning styles. *Id.* The Lutheran dialectic seeks to understand faith in the context of
15 scientific knowledge and scientific knowledge in the context of faith. *Id.* This debate and
16 conversation between the left and right kingdoms of God is central to both Lutheran
17 theology and the work of PLU. *Id.*

19 A third key Lutheran principle applicable to PLU is one of academic freedom.
20 Martin Luther, the founder of the Lutheran faith, was a theologian and university
21 professor. Tr. 227:1-3. When he nailed his proclamation on the door at Wittenberg
22 University, one of the key principles was that knowledge was to be acquired from free
23 discovery and not handed down through the Catholic hierarchy. Tr. 227:6-13. While this
24

26 *Bishop* test. But allowing a government agency to decide matters of theology is precisely what *Catholic*
Bishop forbids.

1 notion may be more widely accepted in secular circles today, it was a fundamental
2 principle of Lutheran faith and a very radical concept in Martin Luther's time. *Id.*

3 These three core values of Lutheran theology (among others) are central to
4 virtually every facet of PLU. These principles form the "living tradition of Lutheran higher
5 education" so frequently referred to in PLU publications such as the Faculty Handbook
6 and Course Catalog. Indeed, the proposition that Lutheran theology is central to the work
7 at PLU is clearly communicated in PLU's strategic plan written in the 1990s called "PLU
8 2000." ER Ex. 18; Tr. 252-256. Under the heading "Reaffirming the Tradition of
9 Lutheran Higher Education," PLU's strategic plan contains the following statements:
10

11 Nothing more decisively identifies Pacific Lutheran University
12 than its founding and perseverance in the tradition of
13 Lutheran learning. The University should continue to actively
14 cultivate this heritage and should articulate with its
15 constituencies the meaning of the heritage for academic
16 inquiry. The central concerns of the Lutheran faith and
17 higher education overlap where they are focused on the
18 wholeness of individuals and the well-being of society. At a
19 Lutheran university there is a functional interaction between
20 this faith perspective and the diverse perspectives that seek
21 excellence and opportunity in education. ...

22 ... the spirited University-wide deliberation on the mission
23 statement indicates that the institution is even more
24 interested in defining its educational objectives in Lutheran
25 terms than at any time since the move to University status in
26 1960. ...

27 The University is owned by the member congregations in
28 Region One of the Evangelical Lutheran Church in America,
29 but enjoys with the ELCA a relationship much more in the
30 nature of a partnership than an ownership. "On the one
31 hand, PLU is a servant of the church," according to Harvey
32 Neufeld, Vice President Emeritus for Church Relations. "It is
33 dependent on the church. It must respect the church's
34 expectations and promise to deliver on those expectations.
35 ...

1 The Martin Luther of seminal importance in shaping PLU is
2 the one who saw that being right before God depended upon
3 faith. ...

4 PLU stands within a distinctive Christian tradition that has
5 made important contributions to the founding of the modern
6 university. We take faith seriously, but we neither produce
7 nor require it. ...

8 The distinctive Lutheran concept of vocation informs our
9 understanding of our work at PLU. All persons are called to
10 understand whatever work they undertake as a calling
11 dedicated to a greater good than themselves. Luther
12 understood vocation as applying to all people, both to those
13 who interpreted it as a word from God and to those who feel
14 moved only by compelling needs of the neighbor.

15 ER Ex. 18.

16 Following that strategic plan, PLU Professor Philip Nordquist developed a summary
17 of PLU entitled "A Lutheran University." ER Ex. 19. That document explained PLU's
18 Lutheran heritage and tradition as follows.

19 ... PLU is part of an educational tradition that stretches back
20 to and was profoundly influenced by Martin Luther and the
21 Reformation.

22 Fundamental here is Luther's dialectical or paradoxical
23 theology which distinguishes between the "right hand" and
24 the "left hand" of God. The "right" hand is the spiritual realm
25 of God's activity, which Luther says is the "proper" work of
26 God and is expressed most powerfully in Jesus Christ, then in
the proclamation of the Gospel and the administration of the
sacraments. Salvation is the work of the "right" hand. The
"left" hand, where God is hidden, is the secular realm and it
includes all human work including government, family, art,
intellectual life and much more. The realm of the "left" hand
does not contribute to salvation but it is to be taken with the
utmost seriousness. It is part of God's creation.

PLU groups other terms in this dynamic -- and singularly
Lutheran -- dialectical fashion and puts them at the center
of its educational mission: ...

1 A second over-arching theme initiated by Luther and present
2 from the Reformation onward and fundamental to the
modern university is intellectual freedom. ...

3 Lutherans establish and maintain colleges and universities
4 for that kind of contemplation, ...

5 ER Ex. 19.

6 The document "A Lutheran University" was used to explain PLU's connection to
7 the Lutheran Church and its theology, heritage and history primarily for incoming faculty
8 but also for other members of the campus community. Tr. 257-259. In its new faculty
9 orientation, PLU devotes nearly an hour and a half on the first day of orientation to
10 explaining this connection to the Lutheran Church, to the Lutheran tradition and to the
11 mission of PLU. Tr. 273-274.

12 The document "A Lutheran University" was updated in 2012 in the "Core Elements
13 in Lutheran Higher Education." ER Ex. 17. That document identifies seven specific
14 elements of Lutheran theology and tradition that underscore the mission and work of
15 PLU. *Id.* In introducing these seven elements, PLU Professor Samuel Torvend explained:

17 Yet this cluster of elements sets forth, in our experience and
18 reflection, the genetic encoding of Lutheran education, an
19 education committed to the advancement of knowledge,
20 thoughtful inquiry and questioning, the preparation of
citizens in service to the world, ...

21 *Id.*

22 This express connection between Lutheran theology and tradition and the mission
23 and operation of PLU, is also consistent with the Evangelical Lutheran Church in
24 America's expectations for the universities affiliated with the ELCA. ER Ex. 16. There are
25 26 colleges and universities in the United States affiliated with the ELCA. Tr. 223:2-4. In
26 2007, the ELCA adopted a statement entitled "Our Calling in Education" which identified

1 the Church's expectations for the colleges and universities it owns. ER Ex. 16; Tr. 224:9-

2 11. Specifically, the ELCA listed the following expectations of its universities.

- 3 - Reaffirm their commitment to maintain a living
4 connection with the Christian faith;
- 5 - Offer excellent, broad education in service to Church and
6 society in a setting of academic freedom;
- 7 - Educate in the faith with courses in Bible, Lutheran
8 theology, church history, and ethics;
- 9 - Serve as incubators for the discovery of knowledge,
10 preserve it in scholarly collections, and communicate it
11 through scholarly publications;
- 12 - Nurture an ongoing dialogue between the claims of the
13 Christian faith and the claims of the many academic
14 disciplines as well as explore issues at the crossroads of
15 life;
- 16 - Feature prominently the Lutheran teaching on vocation;
- 17 - Embody important elements – worship, music and the
18 arts, service, personal moral standards, international
19 education – as part of the ongoing Lutheran ethos;
- 20 - Maintain programs that serve as a liaison between the
21 college or university and the various expressions of this
22 church; ...

23 ER Ex. 16. PLU consciously meets each of these expectations.

24 **b. PLU Communicates this Religious Heritage and History to Students.**

25 PLU informs prospective and enrolled students of its connection to the Lutheran
26 Church and what it means to attend a Lutheran University. Central to this task is the
document "What's in a Middle Name?" prepared by PLU University Pastor Dennis Sepper
in 2001. ER Ex. 21. That document is written for prospective or enrolled students to
explain Lutheran theology and tradition and how those play out at PLU. Tr. 265-66. This
document is widely available on the PLU campus for current or prospective students.

1 Additionally, PLU's 20-year President, Dr. Anderson, always explained PLU's
2 "Lutheranism" to current and prospective students in a number of different ways. First,
3 in his speeches opening each University term for the last 20 years, he has explained to
4 newly admitted students and their families what a Lutheran university is, that the
5 Lutheran concept of "vocation" is central to PLU's educational program and educational
6 mission and that students at PLU would be challenged to explore how faith intersected
7 with the secular world in the tradition of Luther's right hand/left hand dialectic. Tr. 234-
8 235.
9

10 This explanation of PLU's "Lutheranism" continues through convocation and
11 commencement ceremonies. *Id.* Each such ceremony opens and closes with a prayer by
12 PLU's university Lutheran pastor. *Id.* A variety of banners and other religious symbols are
13 used in convocations and commencements and each such symbol is explained in the
14 convocation and commencement program. *Id.* For the last 20 years, Dr. Anderson spoke
15 at convocations and commencements, always again talking about Lutheran notions of
16 vocation, service and the inquiry between faith and the secular world. Tr. 234-235. No
17 person attending convocation or commencement could miss the substantial connections
18 between Lutheran theology and tradition and the educational operations and mission of
19 Pacific Lutheran University. Tr. 234-236.
20

21 PLU's "Lutheranism" is also underscored in mailings to students. For example,
22 exhibit 22 is a postcard mailed to prospective students featuring a student who is a
23 daughter of a Lutheran minister. ER Ex. 22. Under the heading "Lutheran," Ms. Goulson
24 explains that "I like the community that comes from a Lutheran university." *Id.* The
25 publication entitled, "The PLU Experience," tells prospective students about PLU's
26

1 Lutheran heritage beginning “At PLU we are proud of our Lutheran heritage” and ending,
2 “That’s the Lutheran tradition.” PLU’s course catalog contains statements regarding
3 PLU’s Lutheran heritage and Lutheran traditions. ER Ex. 28; Tr. 282-283. PLU offers
4 specific recruiting programs designed to recruit Lutheran students including the
5 “Lutheran Summer Music Academy.” Tr. 272:4-19. In each of these ways, PLU
6 communicates to prospective and enrolled students its Lutheran heritage and direct
7 connection to Lutheran theology⁵.

8
9 c. **PLU Communicates Its Religious Educational Environment to
Faculty.**

10 In addition, PLU communicates to its faculty that they are teaching at a Lutheran
11 school guided by Lutheran theology and Lutheran tradition. ER Ex. 25; Tr. 275. As noted
12 above, the first hour and a half of faculty orientation was spent reviewing the material in
13 “A Lutheran University” and then more recently in “Core Elements of Lutheran Higher
14 Education.” ER Ex. 17; ER Ex. 19. The purpose of that orientation is to ensure that all
15 new faculty members understand PLU’s Lutheran heritage and traditions and the
16 expectation that new faculty will act in a manner consistent with that heritage and
17 tradition.
18

19 Additionally, PLU’s Lutheran heritage and connection with the ELCA is explained
20 on the first substantive page of text in the Faculty Handbook, starting with PLU’s mission
21 statement. ER Ex. 1. As Dr. Anderson testified, PLU’s mission statement is written in
22 profoundly Lutheran language and can only be understood if one understands the
23 Lutheran theology and tradition that underpins the language used. Tr. 252:1-17. Thus,
24

25
26 ⁵ The Regional Director simply ignored these undisputed facts or lumped them into his opinion that PLU was “not sufficiently religious” because its mission statement did not mention God and it does not indoctrinate students.

1 while the text may be similar to other college mission statements, the words used in the
2 PLU mission statement mean something unique and distinctive to Lutherans because of
3 the Lutheran heritage and theology. *Id.* The first substantive page of the Faculty
4 Handbook then goes on to explain PLU's Lutheran history and its connection to the ELCA.

5 Every Faculty Assembly meeting is opened with a prayer. Tr. 289. At every
6 convocation and commencement ceremony, all faculty process behind banners conveying
7 various aspects of Lutheran theology and Lutheran tradition. Tr. 277-278; Tr. 280:21-25.
8 As noted above, convocation and commencement are opened and closed with prayer. Tr.
9 235:14-16. No faculty member who attends orientation, reads the Faculty Handbook,
10 attends Faculty Assembly or attends convocation or commencement could not know that
11 he or she is teaching in a Lutheran university.⁶

12
13 **d. PLU Communicates Its Lutheran Heritage and Tradition to the**
14 **Community.**

15 PLU also publicly communicates its Lutheran heritage and Lutheran theology. The
16 University does so most explicitly in two strategic plans, PLU 2000 and PLU 2010. ER Ex.
17 18; ER Ex. 20. Those documents are used for many community purposes, including
18 communications with donors and alumni. Those documents make explicit PLU's
19 connection with the ELCA, Lutheran theology and Lutheran tradition. *Id.*

20
21 In addition, for the last 20 years, Dr. Anderson regularly spoke with donors, alumni
22 and the public. Tr. 291-294. In many of those conversations, Dr. Anderson would
23 discuss PLU's mission and educational philosophy in expressly Lutheran terms –
24 “vocation,” “faith – secular dialectic,” “academic freedom,” and the like. *Id.* PLU's logo
25 publicly communicates its affiliation with the ELCA.

26

⁶ The Regional Director similarly ignored these undisputed facts.

1 e. **PLU Maintains Substantial Connections to the Lutheran Church.**

2 PLU also maintains substantial and ongoing connections to the Lutheran Church.
3 As noted above, a majority of PLU's Regents are either church officials (the three Bishop
4 Regents) or are elected by ELCA congregations. Tr. 217-222. Trinity Lutheran Church, an
5 active Lutheran congregation, is adjacent to campus only approximately 75 yards from
6 the President's office. Tr. 244:9-22. The ELCA Bishop for the Northwest Region
7 maintains an office in Trinity Lutheran Church. *Id.* On campus, PLU has a chapel and
8 holds chapel services three days a week and maintains an active Lutheran congregation
9 of students fully recognized as a congregation by the ELCA. Tr. 288:11-15. The tallest
10 building at PLU has a cross on top and has a "rose window," a specific symbol within the
11 Lutheran religion. Tr. 363; Tr. 364. There is a bust of Martin Luther on campus. Tr.
12 291:6-7.
13

14 PLU also employs individuals specifically tasked with maintaining relations with
15 the ELCA. PLU has an office of congregation relations to manage University-Church
16 affairs. Tr. 285:19-22. PLU is also the official repository of all records of the ELCA in the
17 Pacific Northwest, having church records that date back to the 1800s. Tr. 288:16-22.
18 These records are maintained in PLU's main library on campus. *Id.*⁷
19

20 In each of these ways, Pacific Lutheran University regularly, actively and expressly
21 communicates to students, faculty and community that it is a Lutheran university - it
22 provides an educational environment in the tradition and heritage of a Lutheran
23 university.
24

25 _____
26 ⁷ The Regional Director acknowledged these facts on page 16 of his decision, but then concluded that PLU was not "really religious" because it was not substantially funded by the church and it does not require administrators to be Lutheran.

1 3. The Board's Substantial Religious Character Test is Inconsistent with
2 Constitutional Requirements.

3 Following the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*,
4 440 U.S. 490 (1979), the Board began applying the "substantial religious character test"
5 to determine whether jurisdiction exists over a religiously affiliated university such as
6 PLU. Under this test, the Board considers "all aspects of a religious school's organization
7 and function that may be relevant to 'the inquiry whether the exercise of the Board's
8 jurisdiction presents a significant risk that the First Amendment will be infringed.'"

9 *Trustees of St. Joseph Coll.*, 282 NLRB 65, 68 n. 10 (1986). The Board also looks at the
10 extent of the affiliated religious group's involvement in the daily operation of the school,
11 the degree to which the school has a religious mission and curriculum, and whether the
12 school uses religious criteria when appointing or evaluating faculty. *Id.* The Regional
13 Director relied on this line of authority to assert jurisdiction over PLU.
14

15 Several federal appellate courts have recognized that the Board's "substantial
16 religious character" test is inconsistent with the Supreme Court's decision in *Catholic*
17 *Bishop* and have therefore held that the Board's test is unconstitutional under the
18 Religion Clauses of the First Amendment. *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 572
19 (D.C. Cir. 2009); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341-1342 (D.C. 2002);
20 *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 399-403 (1st Circ. 1986) (en
21 banc, 3-3 decision) (then-Judge Breyer writing for the court and rejecting the Board's
22 test). See also *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1263-1264 (10th Cir.
23 2008). These cases flow from the Supreme Court's holding in *Catholic Bishop* that the
24 Board is prohibited from trolling through the religious beliefs of religiously affiliated
25 schools because such an inquiry in and of itself violates the Religion Clauses of the First
26

1 Amendment. Accordingly, PLU requests that the substantial religious character test be
2 abandoned as a violation of the First Amendment and that it be replaced by the bright-
3 line three factor test used by the federal courts. Under the only constitutionally
4 permissible standard, there is no jurisdiction over PLU.

5 **a. The Supreme Court's Holding in *Catholic Bishop*.**

6 The Board began exercising jurisdiction over all private, nonprofit, educational
7 institutions in the 1970's. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 497
8 (1979). Several church-operated schools challenged the Board's jurisdiction under the
9 First Amendment, but the Board rejected their arguments. *Id.* The Board concluded that
10 it had jurisdiction over all religious schools, although as a policy matter, it decided not to
11 exercise jurisdiction over schools that were "completely religious." *Id.* at 496, 498.

12 The Supreme Court rejected the Board's approach in *NLRB v. Catholic Bishop*.
13 The Court held that the Board does not have jurisdiction over religious educational
14 institutions⁸ because exercising jurisdiction would result in excessive entanglement, in
15 violation of the First Amendment. *Id.* at 507; *see also id.* at 504 ("We see no escape
16 from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-
17 operated schools and the consequent serious First Amendment questions that would
18 follow."). Specifically, the Court found that by exercising jurisdiction in such cases, the
19 Board would necessarily have to "inquire into the good faith of the position asserted by
20 the clergy-administrators and its relationship to the school's religious mission." *Id.* at
21 502. This inquiry, in and of itself, violates the First Amendment: "It is not only the
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26 ⁸ Although the schools in *Catholic Bishop* were parochial schools, the Board has since recognized that the ruling applies to educational institutions at every level. *Trustees of St. Joseph's Coll.*, 282 NLRB 65, 68 (1986).

1 conclusions that may be reached by the Board which may impinge on rights guaranteed
2 by the Religion Clauses, but also the very process of inquiry leading to findings and
3 conclusions." *Id.*

4 Understanding how such an inquiry violates the First Amendment is paramount to
5 understanding the reasons why the Board's substantial religious character test is
6 unconstitutional.

7
8 First, the Board violates the First Amendment and United States Supreme Court
9 precedent when it trolls through an institution's beliefs to determine if it is "religious
10 enough" to be deemed a religious institution. *See Mitchell v. Helms*, 530 U.S. 793, 828
11 (2000) ("[T]he inquiry into the recipient's religious views required by a focus on whether a
12 school is pervasively sectarian is not only unnecessary but also offensive. It is well
13 established ... that courts should refrain from trolling through a person's or institution's
14 religious beliefs."); see also *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir.
15 2002) (finding the Board's test unconstitutional because the nature of the inquiry boils
16 down to whether the institution is sufficiently religious); *Ams. United for Separation of*
17 *Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 414 n.2 (8th Cir.
18 2007) ("An inquiry into an organization's religious views to determine if it is pervasively
19 sectarian 'is not only unnecessary but also offensive. It is well established, in numerous
20 other contexts, that courts should refrain from trolling through a person's or institution's
21 religious beliefs.'") (quoting *Mitchell v. Helms*).

22
23 Second, the Board further violates the First Amendment and United States
24 Supreme Court precedent by delving into a religious institution's practices and parsing
25 out which practices are "secular" or "religious," because this very process results in
26

1 excessive entanglement. See *Hernandez v. Commissioner of Internal Revenue Services*,
2 490 U.S. 680, 694 (1989) (noting the inherent problem in having IRS agents distinguish
3 between secular and religious activities and noting “that pervasive monitoring for the
4 subtle or overt presence of religious matter is a central danger against which we have
5 held the Establishment Clause guards”) (internal quotations omitted); *Corp. of the*
6 *Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S.
7 327, 343 (1987) (Brennan, J., concurring) (“What makes the application of a religious-
8 secular distinction difficult is that the character of an activity is not self-evident. As a
9 result, determining whether an activity is religious or secular requires a searching case-
10 by-case analysis. This results in considerable ongoing, government entanglement in
11 religious affairs.”); *New York v. Cathedral Academy*, 434 U.S. 125, 132-133 (1977) (“The
12 prospect of church and state litigating in court about what does or does not have religious
13 meaning touches the very core of the constitutional guarantee against religious
14 establishment.”); *Cantwell v. State of Connecticut*, 310 U.S. 296, 307 (1940) (finding a
15 state statute unconstitutional because it conditioned the receipt of solicitation licenses
16 based on the state authority’s determination of what constituted a religious cause);
17 *Espinosa v. Rusk*, 634 F.2d 477, 480-481 (10th Cir. 1980) (finding a statute
18 unconstitutional where it required the state secretary to appraise the facts, exercise
19 judgment, and form an opinion as to whether a religious institution’s activities such as
20 feeding the poor and hungry, were for a secular or religious purpose); see also *Espinosa*,
21 634 F.2d at 482 (Barrett, J., dissenting) (“The particular problem relates to the definition
22 of ‘religious’ and ‘secular’ activities and the interrelationship one to another. This in turn
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1 is bound up in one of the most trying and vexing tasks found in constitutional law – that
2 of defining ‘religion’ for the purposes of the First Amendment rights.”).

3 The Board’s substantial religious character test considering “all aspects of a
4 religious school’s organization and function that may be relevant to ‘the inquiry whether
5 the exercise of the Board’s jurisdiction presents a significant risk that the First
6 Amendment will be infringed.” *Trustees of St. Joseph’s Coll.*, 282 NLRB 64, 68 n. 10
7 (1986). Under this test, the Board analyzes the purpose of the employer’s operations,
8 the role of the unit employees in effectuating the purpose, and the potential effects of
9 exercising jurisdiction. *Univ. of Great Falls*, 331 NLRB 1663, 1664 (2000). The Board
10 also looks at the extent of the affiliated religious group’s involvement in the daily
11 operation of the school, the degree to which the school has a religious mission and
12 curriculum, and whether the school uses religious criteria when appointing or evaluating
13 the faculty. *Id.* at 1664-1665; *see also Ecclesiastical Maintenance Serv.*, 325 NLRB 629,
14 630 (1998). As recognized by several federal appellate courts, this inquiry, which is what
15 the Regional Director did here, is clearly inconsistent with the Supreme Court’s holding in
16 *Catholic Bishop* and is unconstitutional.
17
18

19 **b. Federal Courts Have Rejected the Board’s Substantial Religious**
20 **Character Test.**

21 Courts have repeatedly rejected the Board’s substantial religious test because it
22 “involve[s] just ‘the sort of intrusive inquiry that [the Supreme Court’s ruling in] *Catholic*
23 *Bishop* sought to avoid,’ with the [Board] trolling through the beliefs of schools, making
24 determinations about their religious mission, and that mission’s centrality to the primary
25 purpose of the school.” *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009);
26 *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341-1342 (D.C. 2002); *Colorado Christian*

1 *Univ. v. Weaver*, 534 F.3d 1245, 1263-1264 (10th Cir. 2008) (citing with approval the
2 D.C. Circuit's rejection of the Board's substantial religious character test); *Universidad*
3 *Central de Bayamon v. NLRB*, 793 F.2d 383, 399-403 (1st Circ. 1986) (en banc, 3-3
4 decision). In essence, "[d]espite its protestations to the contrary, the nature of the
5 Board's inquiry boils down to 'is it *sufficiently* religious?'" *Univ. of Great Falls*, 278 F.3d at
6 1343 (emphasis in original). This inquiry is plainly unconstitutional. *Id.*

7
8 In *University of Great Falls*, the university's president was questioned about the
9 nature of the University's religious beliefs, and how its religious mission was
10 implemented. *Id.* The president was "required to justify the method in which the
11 [u]niversity [taught] gospel values, and to respond to doubts that it was legitimately
12 'Catholic.'" *Id.* The president was asked, "What good is a Catholic institution unless [it]
13 espouse[s] the values and the teachings and the traditions of the Catholic Church?" *Id.*
14 Such an inquiry is "the *exact* kind of questioning into religious matters which *Catholic*
15 *Bishop* specifically sought to avoid." *Id.* (emphasis in original).
16

17 **4. The Regional Director's Decision Regarding PLU's Religious Character**
18 **Violates the First Amendment.**

19 In his Decision and Direction of Election, the Regional Director applies the
20 unconstitutional "substantial religious character test" and makes himself the arbiter of
21 PLU's Lutheran history and heritage. The Regional Director concludes that PLU is "not
22 sufficiently religious" based apparently on his personal beliefs as to what is "secular" as
23 opposed to "religious." The Regional Director decides what is necessary to be
24 "sufficiently religious;" for example the apparent rule that a mission statement must
25 mention God. In essence, the Regional Director concludes that PLU is "not really
26

1 Lutheran” as he “defines” Lutheran theology. But this analysis in the Decision and
2 Direction of Election is precisely what the federal cases cited above directly prohibit.

3 First, the Regional Director refuses to discuss or acknowledge that the Lutheran
4 values of vocation, left-hand/right-hand dialectic and academic freedom guide everything
5 PLU does. Instead, the Regional Director dismisses this Lutheran theology out of hand
6 concluding that PLU is “not sufficiently religious.” The Regional Director concludes, for
7 example, that the references to vocation and other expressly Lutheran concepts in PLU’s
8 mission statement are not really “religious” because the mission statement “makes no
9 mention of God, religion or Lutheranism.”
10

11 The Regional Director’s analysis should be contrasted with Martin Luther’s
12 explanation of a Lutheran cobbler. Luther explained that the task of a Lutheran cobbler
13 is to make good shoes, not poor shoes with little crosses on them. ER Ex. 16, p. 40. In
14 the same way, the task of a Lutheran University is to provide the best possible education,
15 not an education with a cross on it. See, Tr. 229-31. But, the Regional Director finds PLU
16 to be “not sufficiently religious” because it does not provide an education with a cross on
17 it, even though doing so would be directly contrary to Lutheran theology.
18

19 Similarly, the Regional Director concludes that because the language in PLU’s
20 mission statement is similar to that of state universities, the theological and historical
21 underpinning of PLU’s mission – the reliance on Lutheran values of vocation, dialectic
22 and academic freedom – is not really “religious,” because secular universities use
23 similar words in a very different context. But “vocation” “dialectic” and “academic
24 freedom” are concepts with specific meanings and history in Lutheran theology. See Tr.
25
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1 226-34. The fact that other universities may use similar words does not make these
2 concepts in a Lutheran university any less “Lutheran.”

3 The Regional Director similarly finds PLU to be “not sufficiently religious” in his
4 discussion of the Faculty Handbook. He acknowledges that PLU’s “faculty handbook
5 begins by laying out the mission and history of the University, with a discussion of its
6 Lutheran origins and affiliation, but then dismisses this writing that “God is not
7 mentioned in the Handbook.” Decision at 5. In this passage, the Regional Director
8 apparently decides that for a University to be “sufficiently religious” it must mention God
9 in the Faculty Handbook. This is precisely the “trolling through religious beliefs” that the
10 First Amendment prohibits. It is not up to the federal government to create a litmus test
11 that “PLU must mention God” in the Faculty Handbook to provide a religious educational
12 environment.
13

14 The Regional Director further “trolls through religious beliefs” in arguing that
15 because PLU does not seek to indoctrinate students, faculty or others into the Lutheran
16 faith, this means that PLU is not ‘sufficiently religious.’ For example, the Regional
17 Director concludes that the statement in a publication for prospective students that PLU’s
18 “Lutheran heritage is very important to our school, but that doesn’t mean it will be forced
19 on you,” means that PLU “downplays” its religious nature. Decision p. 4. The Regional
20 Director argues that because PLU does not require its administrators or faculty to be
21 Lutheran, it is “not sufficiently religious.” The Regional Director writes that because PLU
22 does not require its students to take Lutheran courses it is “not sufficiently religious.”
23 But, he misses the critical point that Lutheran theology provides that a Lutheran
24 university is not in the business of indoctrination. Instead, as the record undisputedly
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1 reflects, a fundamental principle of a Lutheran education is the free exchange of ideas.
2 The dialectic between the spiritual (right-hand) and secular (left-hand) worlds is central to
3 Lutheran theology. This was a key point of Martin Luther's departure from the Catholic
4 Church. See Tr. 227-248. The Regional Director concludes that PLU is not "sufficiently
5 religious" simply because it follows Lutheran theology; a theology that does not include
6 indoctrinating its students or requiring faculty to subscribe to any particular belief. The
7 conclusion that PLU is "not sufficiently religious" because it follows the fundamental
8 theological principles of a Lutheran education is the type of decision the First Amendment
9 prohibits.⁹

11 The fundamental thrust of the Regional Director's decision is that unless an
12 institution actively mentions God in its mission statement, requires its faculty to subscribe
13 to a particular religion and seeks to indoctrinate its students into that religion, the
14 University is "not really religious" and therefore subject to NLRB jurisdiction. This analysis
15 has three fatal flaws. First, it establishes the Regional Director (a government official) as
16 the arbiter of whether an institution is "sufficiently religious." The First Amendment
17 forbids the government from deciding what qualifies as "sufficiently religious."

19 Second, the Regional Director concludes that PLU is not "sufficiently religious" for
20 following the fundamental tenants of its own faith. For a Lutheran university to require
21 faculty and students be practicing Lutherans would be directly contrary to the principles
22 Martin Luther established in the 1500s when he nailed his proclamation on the door of
23 Wittenberg College. See Tr. 226-27. But according to the Regional Director, a Lutheran
24

25 ⁹ Continuing this theme, the Regional Director notes that a majority of PLU's Regents are either church
26 officials or appointed by Lutheran congregations, but then concludes that PLU is not "sufficiently religious"
because its President and administrators are not Lutheran. Once again, however, a requirement that
administrators or faculty all subscribe to the Lutheran faith would itself be inconsistent with the tenants of
the Lutheran church.

1 university can be “sufficiently religious” only if it abandons its faith and subscribes to
2 what the Regional Director believes makes an institution “religious.” How can the
3 government conclude that an institution is not “religious” simply by following the very
4 tenants of its faith?

5 Third, the decision follows an incorrect and unconstitutional standard. That
6 standard should be abandoned.

7
8 **5. The Board Should Adopt the Bright-Line Three-Part Test Used by the D.C.
Circuit.**

9 To avoid the unconstitutional “entanglement” the Regional Director’s decision
10 inevitably creates, the Board should adopt the D.C. Circuit’s *University of Great Falls* test.
11 That test sets forth a simple, three-part rule as a bright-line rule for determining whether
12 the Board has jurisdiction “without delving into matters of religious doctrine or motive.”
13 *Carroll Coll., Inc.*, 558 F.3d at 572; *Univ. of Great Falls*, 278 F.3d at 1344-1345. Under
14 this test, a school is exempt from the Board’s jurisdiction if it:
15

- 16 (1) holds itself out to students, faculty and the community as
17 providing a religious educational environment;
- 18 (2) is organized as a nonprofit; and
- 19 (3) is affiliated with, or owned, operated, or controlled,
20 directly or indirectly, by a recognized religious
21 organization, or with an entity, membership of which is
22 determined, at least in part, with reference to religion.

23 *Carroll Coll., Inc.*, 558 F.3d at 572; *Univ. of Great Falls*, 278 F.3d at 1344-1345.

24 This three-prong test meets the constitutional standards because it uses a limited,
25 restrained line of inquiry. Under this test, the Board does not troll through the religious
26 institution’s practices, questioning the institution’s motives or beliefs. *Univ. of Great
Falls*, 278 F.3d at 1344. Under it, the Board does not sit as arbiter of religious doctrine,

1 determining whether a given belief action or mission statement is secular or religious.
2 Nor does the Board analyze whether (in its own view), the religious institution is
3 “sufficiently religious” to be exempt. *Id.* As *Carroll College* notes, the first element is
4 measured based on the college’s public statements and not by delving in to the inner
5 workings of the school. Because this test is the only analysis that avoids such improper
6 “trolling,” it is the only constitutionally permissible test.
7

8 This test also provides the Board with assurance that the institutions availing
9 themselves of the *Catholic Bishop* exemption are *bona fide*¹⁰ religious institutions,
10 thereby providing all of the information necessary to determine whether the institution
11 lies within the Board’s jurisdiction. *See id.*

12 **6. The Board Does Not Have Jurisdiction Over PLU Under the D.C. Circuit’s**
13 **Three-Part Test.**

14 PLU easily meets the three-part test used by the D.C. Circuit based on the
15 University’s public communications.¹¹ First, PLU’s strategic plans, Faculty Handbook,
16 Course Catalog, and other publications clearly show that PLU holds itself out as a
17 Lutheran university providing a religious educational environment. ER Exs. 1, 18-21, 28.
18 *See Univ. of Great Falls*, 278 F.3d at 1345 (finding that the university’s mission
19

20
21 ¹⁰ Religious beliefs need not be acceptable, logical, consistent or comprehensible to others to merit
22 protection under the First Amendment. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). The First
23 Amendment protects all sincerely held ethical or moral beliefs that play the role of a religion or function as
24 a religion to the individual, or impose a duty of conscience upon the individual. *Welsh v. United States*, 398
25 U.S. 333, 339-340 (1972); *McGinnis v. U.S. Postal Services*, 512 F. Supp. 517, 518 (N.D. Cal. 1980).

26 ¹¹ In dicta, the Regional Director opines that under the *Great Falls* test, PLU would “likely” still be subject to
Board jurisdiction because “it is far from clear” that PLU holds itself out as providing a religious educational
environment. This dicta about what is “likely” or “far from clear” is no finding at all. Moreover, to support
this dicta, the Regional Director again moves directly to “decide” how religious PLU is. The Regional
Director concedes that PLU is “inspired” by Lutheranism but in the next clause claims that PLU is not
“really” Lutheran because it allegedly “de-emphasizes any specific Lutheran dogma, criteria or symbolism.”
Not only is this assertion complexly inconsistent with the record, but it again is the Regional Director
deciding that PLU is “not sufficiently religious.” Thus, while purporting to consider what is “likely” under the
Great Falls test, the Regional Director immediately reverts back to [impermissibly] deciding “how Lutheran”
PLU is.

1 statement that it offered students a foundation for implementing the teachings of Jesus
2 within the Catholic tradition, the presence of Catholic icons in the classroom, and being
3 listed in the Catholic directory satisfied the first prong of the test); *Carroll College*, 558 F.
4 2d at 572 (finding that statements in the Articles of Incorporation, from the Board of
5 Trustees and in documents with the Presbyterian Church met the first prong of the test.).
6 Similarly, PLU's pamphlets and information available on campus and on the website
7 regarding its history, its mission, the heritage and involvement, provide abundant proof
8 that PLU holds itself out as a Lutheran University that provide a religious educational
9 environment in that context.¹² ER Exs. 21-24, 28-29; Tr. 264-72; 282-89.

11 Second, it is undisputed that PLU is organized as a nonprofit 501(c)(3)
12 corporation. ER Ex. 2; Tr. 215.

13 Third, PLU is "owned" by the Lutheran Church (*Id.*; Tr. 216) in that membership in
14 the University corporation is limited to congregations of the ELCA. Those ELCA
15 congregations alone possess the power to elect the Regents who oversee the University's
16 operations. Moreover, a majority of PLU's Regents are either church officials or elected
17 by the church. ER Ex. 3; Tr. 217. These facts easily meet the third element of the *Great*
18 *Falls* test. *See Univ. of Great Falls*, 278 F.3d at 1345 (holding that a university met this
19 element where reserve powers were held by the Sisters of Providence). Accordingly, since
20 the three elements of the *University of Great Falls* test are satisfied, the Board does not
21 have jurisdiction In over PLU and the SEIU's representation petition must be dismissed.
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¹² Further facts to support this conclusion are set forth in Section III(A)(2).

1 B. The Regional Director Erred in Including Managerial Employees in the Bargaining
2 Unit.

3 PLU's full-time contingent faculty (the "F8" category in the record) are managerial
4 employees under the Supreme Court's decision in *NLRB v. Yeshiva*, 444 U.S. 672 (1990).
5 PLU shows three steps to reach this conclusion. First, PLU explains the *Yeshiva* test and
6 discusses subsequent Board decisions applying that test. Second, PLU explains its
7 unique system of shared governance in which tenured track and full-time contingent
8 faculty are all given the same right to vote in the Faculty Assembly on matters of
9 university governance and academic policy. Third, PLU shows that when the *Yeshiva* test
10 is properly applied to PLU's unique faculty governance system, all voting members of the
11 Faculty Assembly, including the full-time contingent faculty, are exempt managerial
12 employees.
13

14 1. The *Yeshiva* Decision

15 In *Yeshiva*, the Supreme Court held that the university's full-time faculty members
16 were "managerial employees" excluded from the coverage of the NLRA. *Id.* at 691. The
17 Court noted that managerial employees are defined under the NLRA as those who
18 "formulate and effectuate management policies by expressing and making operative the
19 decisions of their employer." *Id.* at 683. The Court explained:
20

21 Managerial employees must exercise discretion within, or
22 even independently of, established employer policy and must
23 be aligned with management. Although the Board has
24 established no firm criteria for determining when an
25 employee is so aligned, normally an employee may be
26 excluded as managerial only if he represents management
interests by taking or recommending discretionary actions
that effectively control or implement employer policy.

Id. at 684.

1 Applying this test in an academic setting, the Supreme Court held that full-time
2 faculty members at Yeshiva University were exempt managerial employees:

3 The controlling consideration in this case is that the faculty
4 at Yeshiva University exercise authority which in any other
5 context unquestionably would be managerial. Their authority
6 in academic matters is absolute. They decide what courses
7 will be offered, when they will be scheduled, and to whom
8 they will be taught. They debate and determine teaching
9 methods, grading policies, and matriculation standards.
10 They effectively decide which students will be admitted,
11 retained and graduated. On occasion their views have
12 determined the size of the student body, the tuition to be
13 charged, and the location of a school. When one considers a
14 function of a university, it is difficult to imagine decisions
15 more managerial than these. To the extent the industrial
16 analogy applies, the faculty determines within each school
17 the product to be produced, the terms upon which it will be
18 offered, and the customers who will be served.

19 *Id.* at 686.

20 The Supreme Court's test in *Yeshiva* is based on the faculty's right as a whole to
21 vote on and decide academic matters. As the Court wrote, "the controlling consideration
22 ... is that the faculty ... [may] exercise authority." *Yeshiva*, 444 U.S. at 686. The Court did
23 not look at whether any individual faculty member initiated an academic change or the
24 number of faculty members who vote on a given issue. Rather, it was the right to
25 exercise authority by the faculty as a whole that made the faculty as a whole managerial.
26 Central to this authority, of course, is the right of an individual faculty member to vote on
academic matters.

Moreover, in *Yeshiva*, the Supreme Court made it clear that in order to be
considered managerial the faculty did not need to be the final authority with respect to
academic matters. "[T]he fact that the administration holds a rarely exercised veto power
does not diminish the faculty's effective power in policy making and implementation ...

1 the relevant consideration is effective recommendation or control rather than final
2 authority.” *Id.* at 683 fn. 17. *See also, University of Dubuque*, 289 NLRB 349 (1988)
3 (“under *Yeshiva*, it is a faculty member’s *participation* in the formulation of academic
4 policy that aligns their interests with that of management.”) (emphasis added).

5 Since the Supreme Court’s decision in *Yeshiva*, the NLRB has determined the
6 managerial status of faculty in a wide variety of factual settings. In *Lemoyne Owen*
7 *College*, 345 NLRB 1123 (2005), the Board held that the faculty at Lemoyne Owen
8 College were managerial employees because they participated in faculty governance and
9 made recommendations on a wide variety of academic matters through a Faculty
10 Assembly. In holding that the managerial exception applied, the Board noted that the
11 “Faculty Assembly conducts the academic business of the faculty and deliberates and
12 makes recommendations on areas of faculty responsibility.” *Id.* at 1124.

13 Similarly, in *Livingstone College*, 286 NLRB 1308 (1987), the Board found faculty
14 members to be managerial employees because they exercised substantial authority with
15 respect to academic matters and by virtue of a faculty wide vote. *Id.* at 1313. “[T]he
16 faculty here exercise almost plenary control over curriculum and academic policy,
17 particularly by virtue of a faculty-wide vote over proposals and recommendations made by
18 various standing committees.” *Id.* In finding managerial status, the Board placed only
19 limited significance on the fact that the faculty had virtually no impact on nonacademic
20 matters such as budget process, selection of administrators and the hiring and firing of
21 faculty. *Id.* at 1314.

22 In many other cases the Board has reached the same result, holding that when
23 the faculty had a central and/or voting role in formulating academic policies, the
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1 managerial exemption applied. *See e.g., University of Dubuque*, 289 NLRB 349 (1988)
2 (the Board held that the faculty members were managerially employees on the basis that
3 the faculty set student grading and classroom conduct standards, set degree
4 requirements, and developed, recommended and approved curriculum content and
5 course offerings); *Boston University*, 281 NLRB 798 (1986) (finding full-time faculty were
6 managerial employees as they exercised effective control over matriculation
7 requirements, curriculum, academic calendars and course schedules); *College of*
8 *Osteopathic Medicine and Surgery*, 265 NLRB 295 (1982) (holding that the college's
9 medical faculty were managerial employees because the faculty had authority in
10 academic matters and were governed by a faculty drafted constitution and bylaws which
11 established faculty committees which determined issues related to admission policies,
12 academic standards, and hiring and promotion); *Duquesne University*, 261 NLRB 587
13 (1982) (holding that the university's law school faculty were managerial employees given
14 their authority over academic matters such as determining class requirements, changes
15 in curriculum, admission requirements, and the number of credits necessary for
16 graduation).
17
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19 These decisions demonstrate that the managerial exemption applies to various
20 faculty governance models so long as one controlling factor is met: that the faculty at
21 issue exercise discretion in deciding academic policies of the institution. PLU's system of
22 shared governance provides both full-time contingent and tenure line faculty with a vote
23 in the Faculty Assembly. The Faculty Assembly votes on the Faculty handbook which
24 *governs nearly all academic matters and policies of the university*. Under the *Yeshiva*
25 test, the managerial exception clearly applies.
26

1 2. The PLU Governance System.

2 As noted above, PLU has a unique faculty governance system.¹³ Prior to 1977,
3 PLU had a “top down” system of faculty governance with its President effectively running
4 the University. TR. 64.4. But in 1977, in what at PLU is known as the “Schackenberg
5 Revolution,” PLU created a new system of shared governance in a general assembly
6 legislative model. TR. 30:9-16; 23: 14.

7 A central feature of this shared governance model is a Faculty Handbook which
8 sets most of the academic principles of the institution. ER Ex. 1. That Handbook covers
9 matters such as curriculum, degree requirements, academic integrity principles and
10 instructional responsibilities. *Id.* The Faculty Handbook includes personnel policies
11 applicable to faculty, including expectations for teaching, scholarship and service. *Id.* It
12 sets the criteria for receiving tenure. *Id.* The entire range of academic activities,
13 including the rights and definitions of the contingent faculty at issue in this proceeding, is
14 set forth in the Faculty Handbook. *Id.*

15 A vote of the faculty is required to amend or change the Faculty Handbook. Tr. 32
16 – 36. At PLU, this vote occurs at the Faculty Assembly. In a process defined in the
17 Handbook, the Faculty Assembly considers and votes on any proposed change to the
18 Faculty Handbook and thus votes on nearly all academic functions of the University. *Id.*;
19 Tr. 38 – 41. A full-time contingent faculty member has exactly the same voice and vote
20 any as tenured or tenure line faculty at PLU.
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26 ¹³ While the Board of Regents has authority to approve or disapprove any faculty action, in practice it does not do so. PLU administration has no ability to approve or disapprove a decision of the Faculty Assembly. Therefore, in practice, the Faculty Assembly is where academic policy decisions are made.

1 Any three members of the faculty (including full-time contingent faculty as they are
2 “members” of the faculty) may place any matter relating to the Faculty Handbook on the
3 Faculty Assembly agenda. Any ten members of the faculty (including full-time contingent
4 faculty as they are “members” of the faculty) may place any proposed change to the
5 Faculty By-Laws on the Faculty Assembly agenda. Other issues may arise through PLU’s
6 committee system. But the point is that any three (or 10 for bylaw changes) faculty
7 members may place any issue before the Faculty Assembly for a vote.
8

9 For example, PLU recently added a Master of Science in Finance program to its
10 Business School. Tr. 85-88. The decision to add that program started with business
11 school faculty. The decision whether to have such a program, as well as the
12 requirements and course content of that program were reviewed, voted on and approved
13 by the Faculty Assembly, including the full-time contingent faculty members. *Id.* If PLU
14 wished to change the requirements for a given degree or its general education
15 requirements or even the requirement to have a senior “capstone” project, all of those
16 decisions would have to be voted on and approved by the Faculty Assembly. *Id.*; Tr. 39 –
17 41.
18

19 Many other academic decisions are made by faculty below the Faculty Assembly
20 level. Thus, the decisions of what courses to offer, who will teach what courses and the
21 scheduling of courses are made by faculty in each department at PLU. *Id.*; Tr. 46; Tr. 72.
22 The decision of how to grade a particular course or course work is left with each
23 individual faculty member. Tr. 73. Fundamentally, however, the PLU Faculty Assembly
24 votes on the academic program of the University. ER. Ex. 1; Tr. 38 – 41. A full-time
25 contingent faculty member has full voice and vote in the Faculty Assembly.
26

1 **3. PLU’s Contingent Faculty Are Managerial Employees Under *Yeshiva***

2 The record is clear that every voting member of the Faculty Assembly (including
3 contingent full-time faculty members) is a managerial employee under *Yeshiva*. At PLU,
4 the Faculty Handbook governs the faculty organization (Section 2), academic policies,
5 procedures and services (Section 3), personnel policies and employee benefits (Section
6 4), and special institutional policies and procedures (Section 5). Any decision to change
7 the Faculty Handbook starts with and requires a vote of the Faculty Assembly.
8

9 In *Yeshiva*, the ability of a faculty member to exercise authority over the same set
10 of subjects governed at PLU in the Faculty Handbook made the entire *Yeshiva* faculty
11 managerial. (“[T]he controlling consideration ... is that the faculty ... [may] exercise
12 authority.” *Yeshiva*, 444 U.S. at 686). At PLU, every voting member of the Faculty
13 Assembly has an identical ability to exercise authority over each item set forth in the
14 Faculty Handbook. At PLU, a full-time contingent faculty member has exactly the same
15 authority in the Faculty Assembly as the most senior tenured faculty member. The
16 tenure-line faculty at PLU are unquestionably managerial under *Yeshiva*. Because full-
17 time contingent faculty have exactly the same ability to “exercise authority” through the
18 Faculty Assembly, the full-time contingent faculty are also managerial.
19

20 **4. The Regional Director Failed to Apply *Yeshiva* to the Facts of this Case**

21 In the Decision and Direction of Election, the Regional Director works hard to avoid
22 the conclusion that full-time contingent faculty are managerial. First, although the Faculty
23 Assembly is how PLU faculty “exercise authority,” the Regional Director instead focuses
24 on the committee structure leading up to a vote in the Faculty Assembly. *Decision and*
25 *Direction of Election* at 18. This focus is improper for several reasons.
26

1 First, the *Yeshiva* test is based on the right of the faculty as a whole to vote on and
2 thereby decide academic matters. Under the *Yeshiva* analysis, it does not matter in what
3 context the faculty decision making process occurs. Put another way, the faculty votes on
4 academic matters through a Faculty Assembly. Faculty votes cast during a committee
5 meeting simply bring an item to the Faculty Assembly. Although both contexts involve the
6 exercise of faculty discretion in formulating university academic policy, the authority rests
7 with the Faculty Assembly. The fact that contingent faculty votes at PLU occurs at the
8 Faculty Assembly, rather than committee level, does not change the managerial analysis.
9 Under *Yeshiva*, managerial status exists because full-time contingent faculty vote on the
10 academic policies of the university at the Faculty Assembly level. The fact that full-time
11 contingent faculty do not serve on faculty committees¹⁴ is irrelevant. It is the right to vote
12 and to thereby “exercise authority” in the Faculty Assembly that is “controlling” under
13 *Yeshiva*.
14

15 Second, the Regional Director improperly transformed the fact that university and
16 faculty committees make recommendations to the Faculty Assembly into a wholly
17 unsupported assertion that decisions by the Faculty Assembly are mere
18 “recommendations” subject to review and reversal by PLU administration. This is
19 unsupported by the record and these two processes are not the same. It is true that
20 university and faculty committees are advisory. Those committees make
21 recommendations to the Faculty Assembly. The Faculty Assembly (including full-time
22 contingent faculty) then votes on those recommendations. However, there is no evidence
23
24

25 ¹⁴ At PLU, service on a faculty committee is a very different analysis from voting in the Faculty Assembly.
26 Service on faculty committees falls under the “service” obligation for tenure line faculty. Tenure line faculty
are expected to meet teaching, service and scholarship obligations. Full-time contingent faculty are
required to meet only teaching and a minimal service requirement. Thus, service on faculty committees
reflects different work (and pay) expectations not a different level of authority to decide academic matters.

1 in the record that the vote by the Faculty Assembly is merely a “recommendation” or that
2 the PLU administration has ever independently reviewed or rejected any Faculty Assembly
3 votes.

4 Significantly, even if there was evidence in the record that PLU’s Faculty
5 Assembly’s vote on academic policy is only advisory (which there is not), this does not
6 impact a finding of managerial status. In *Yeshiva*, the Court was clear that faculty do not
7 need to have “ultimate” authority over academic matters for a finding of managerial
8 status. *Id.* The controlling consideration in *Yeshiva* was that the faculty had the ability to
9 effectively *participate* in the determination of appropriate curriculum, grading systems,
10 admission and matriculation standards and other academic matters. *Id.* at 676. This is
11 clearly the case at PLU where contingent full-time faculty have a voice and vote in the
12 Faculty Assembly, which is the legislative body at PLU governing academic affairs at the
13 university.
14

15 Furthermore, the Regional Director’s reliance on *Lewis and Clark College*, 300
16 NLRB 155 (1990) is misplaced. The Regional Director incorrectly applied the burden of
17 proof as to any hypothetical (and factually unsupported) “recommendation” by the
18 Faculty Assembly. In *Lewis and Clark*, the Board (reversing the Regional Director) held
19 that there must be affirmative “evidence that the administrators are relied on for their
20 independent review and recommendation regarding academic matters” to avoid a
21 managerial finding under *Yeshiva*. *Id.* at 163. Notably, in *Lewis and Clark*, the Board
22 found that the managerial exception applied in circumstances where the faculty had *less*
23 *authority* than the faculty at PLU. The governance system at Lewis and Clark expressly
24 allowed University administrators to independently review the academic
25
26

1 recommendations made by faculty. The Regional Director found that the Lewis and Clark
2 faculty were not “managerial,” in large part because he viewed the administration review
3 as “a substantial buffer” between the faculty and the board of trustees. *Id.* The Board
4 reversed this finding, holding that “[t]he evidence is insufficient to show the kind of
5 buffer.” *Id.*

6
7 At PLU, there is no evidence of PLU administration making an “independent
8 review” of a Faculty Assembly vote or serving as a “buffer” between the Faculty Assembly
9 and the Board of Regents. Moreover, the Regional Director switched the burden to force
10 PLU to prove a negative that does not exist. *Lewis and Clark* required affirmative
11 evidence that “administration” reviewed or overruled faculty votes – there is absolutely
12 no such evidence in this record.

13
14 Finally, the Regional Director next misrepresents the record when he writes that
15 “no contingent faculty may vote in the assembly ... on personnel matters.” *Decision* at
16 19. In fact, the Faculty Assembly votes on the criteria for tenure and promotion, all
17 faculty personnel policies, including things like the level of compensation during
18 sabbatical and the rules and guidelines to discipline or discharge faculty. All full-time
19 contingent faculty may vote on each of these subjects. It is the right to vote on these
20 subjects that makes faculty managerial under *Yeshiva*. It is only individual tenure
21 decisions or individual personnel decisions that are made by “administration.” But these
22 individual decisions are separate from the “controlling” ability to “exercise authority” over
23 academic policy matters that make faculty managerial under *Yeshiva*.

24
25 In conclusion, all voting members of the Faculty Assembly at PLU are managerial
26 under *Yeshiva*. At PLU, an F8 contingent faculty member has exactly the same voice and

1 vote in faculty governance as the holder of an endowed chair. Tr. 42. Because F8 faculty
2 members have such vote, they are managerial, just like PLU's tenure line faculty.
3 Therefore, the full-time, F8 faculty must be excluded from any unit.

4 III. CONCLUSION

5 For the reasons set forth above, the Board should decline jurisdiction over PLU. In
6 the alternative, full-time contingent faculty should be excluded as managerial employees.
7

8 RESPECTFULLY SUBMITTED this 23rd day of October, 2013.

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I hereby certify that on the 23rd day of October, 2013, I electronically filed with the NLRB PLU's Brief in Support of Review in NLRB No. 19-RC-102521 and I emailed and mailed the same to the following:

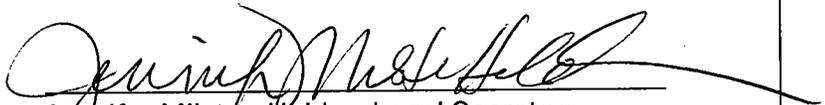
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