Pacific Lutheran University *and* Service Employees International Union, Local 925, Petitioner. Case 19–RC–102521

December 16, 2014

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND SCHIFFER

In this case, we reexamine two significant bodies of our case law pertaining to the collective-bargaining rights under the National Labor Relations Act of faculty members at private colleges and universities. First, we reexamine the standard we apply for determining, in accordance with the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), when we should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities. Second, we reexamine our standard for determining, in accordance with *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), when faculty members are managerial employees, whose rights to engage in collective bargaining are not protected by the Act.

After careful consideration of applicable case law, as well as the positions of the parties and amici, we have decided that we will not decline to exercise jurisdiction over faculty members at a college or university that claims to be a religious institution unless the college or university first demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment. Once that threshold requirement is met, the college or university must then show that it holds out the petitioned-for faculty members as performing a religious function. This requires a showing by the college or university that it holds out those faculty as performing a specific role in creating or maintaining the university's religious educational environment. Applying that test to the facts here, we find, with respect to the petitioned-for unit of contingent (i.e., nontenure track) faculty at Pacific Lutheran University ("PLU" or "the Employer"), that although PLU has met the threshold requirement, it has failed to establish that it holds out its contingent faculty members as performing a religious function. Accordingly, we will assert jurisdiction in this case.

With respect to the managerial status of faculty members, after again taking careful consideration of our precedent and the positions of the parties and amici, we have decided to refine the standard by which we determine the managerial status of faculty pursuant to *NLRB v. Yeshiva University*. Below, we explain which factors are significant in assessing managerial status, and why, and the weight to be accorded such factors. Applying that standard here, we conclude that the University has failed to demonstrate that full-time contingent faculty members are managerial employees.

I. PROCEDURAL HISTORY

On April 11, 2013, the Service Employees International Union, Local 925 (the Union) filed a petition seeking to represent a unit of all nontenure-eligible contingent faculty members employed by Pacific Lutheran University ("PLU" or "the University"). The University challenged the Union's petition, arguing that PLU is a church-operated institution exempt from the Board's jurisdiction under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and that certain of its faculty—the full-time contingent faculty members in the proposed unit—are managerial employees who must be excluded from the unit under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Following a hearing, the Regional Director issued a Decision and Direction of Election rejecting both arguments on June 7, 2013.[1]

In accordance with Section 102.67 of the Board's Rules and Regulations, PLU filed a timely request for review of the Regional Director's decision. With respect to the Board's assertion of jurisdiction, PLU argued that, under the test articulated by the D.C. Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (2002) (hereinafter "*Great Falls*"), it is exempt from the Board's jurisdiction as a religious organization.

Second, the University argued that its full-time contingent faculty members are managerial employees excluded from coverage under the Act. It did not challenge the standard articulated by the Regional Director, but argued that the Regional Director failed to apply that standard here.

On September 23, 2013, the Board granted the University's request for review with respect to both issues.[2] The University and the Petitioner filed briefs on review.

[1] The Regional Director directed an election in the following appropriate unit:

> All full-time and regular part-time non-tenured contingent faculty employed by the Employer on campus and off campus including in the following classifications: instructor, lecturer, senior lecturer, visiting faculty, clinical faculty, leave replacement faculty, professor emeritus/retired faculty, and resident faculty; excluding all other employees, tenured faculty, administrative faculty, full-time staff who are not compensated additionally for teaching, administrators, department administrators, administrators with teaching responsibilities, counselors, coordinators, campus clergy, deans, associate deans, campus safety personnel, lab assistants, graduate assistants, teaching assistants, managers, guards and supervisors as defined in the Act.

The RD found that there are approximately 176 employees in the petitioned-for unit.

[2] The Board declined to grant review on the issues of: (1) whether there is a sufficient community of interests among the various classifications of faculty members in the petitioned-for unit; (2) whether the Regional Director's eligibility formula is appropriate; and (3) whether

On February 10, 2014, the Board issued a notice and invitation to file briefs in this case to the parties as well as the general public. The Board invited the parties and amici to address the following questions:

> (1) What is the test the Board should apply under *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), to determine whether self-identified "religiously affiliated educational institutions" are exempt from the Board's jurisdiction?
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> (2) What factors should the Board consider in determining the appropriate standard for evaluating jurisdiction under *Catholic Bishop*?
>
> (3) Applying the appropriate test, should the Board assert jurisdiction over this Employer?
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> (4) Which of the factors identified in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?
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> (5) In the areas identified as "significant," what evidence should be required to establish that faculty make or "effectively control" decisions?
>
> (6) Are the factors identified in the Board case law to date sufficient to correctly determine which faculty are managerial?
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> (7) If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?
>
> (8) Is the Board's application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context, or (b) can the Board more closely align its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?
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> (9) Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?
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> (10) Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board's analysis?
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> (11) As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty—such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty—depending on the faculty's structure and practices?
>
> (12) Did the Regional Director correctly find the faculty members involved in this case to be employees?

PLU and the Union, and a broad range of interested parties filed briefs in response to the Board's invitation.[3] We ad-

an anonymous email survey was properly admitted into evidence and given appropriate weight by the Regional Director. Member Miscimarra would have granted review on these additional issues.

The Board has also granted review on the religious jurisdiction and managerial status issues in a number of other cases. See *Manhattan College*, 02–RC–23543 (review. granted Feb. 16, 2011); *Saint Xavier University*, 13–RC–22025 (review. granted July 13, 2011); *Islamic Saudi Academy*, 05–RC–80474 (review. granted Aug. 17, 2012 on question of Board's jurisdiction over both teachers and non-teaching employees). A request for review remains pending before the Board in *Seattle University*, 19–RC–22863.

[3] The following interested parties filed briefs generally supporting the Employer: brief filed collectively by the Association of Catholic Colleges and Universities, Congregation for Mercy Higher Education, Lasallian Association of College and University Presidents, Association of Jesuit Colleges and Universities, Association of Benedictine Colleges and Universities, and Association of Franciscan Colleges and Universities (the following universities filed letters expressing support for brief filed by the Association of Catholic Colleges and Universities, et al.: Assumption College, College of Mount Saint Joseph, Duquesne University, Fairfield University, Saint Joseph's University, and Saint Leo University); Augustana College; the Beckett Fund for Religious Liberty; brief filed collectively by the Cardinal Newman Society, Benedictine College, Desales University, Holy Spirit College, John Paul the Great Catholic University, Thomas Aquinas College, Thomas More College of Liberal Arts, Aquinas College, Ignatius-Angelicum Liberal Studies Program, University of St. Thomas Houston, and Wyoming Catholic College; brief filed collectively by the General Conference of Seventh-Day Adventists, Association of Christian Schools International, California Association of Private School Organizations, Council for Christian Colleges and Universities, Azusa Pacific University, and Brigham Young University; the Islamic Saudi Academy; the Lutheran Educational Conference of North America; and the National Right to Work Legal Defense and Education Foundation, Inc. The following interested parties filed briefs generally supporting the Union: AFL–CIO; Catholic Scholars for Workers Justice; SEIU Local 925 and Service Employees International Union; and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC. Not all amici addressed both issues.

After the briefing period ended, the General Conference of Seventh-Day Adventists, Association of Christian Schools International, California Association of Private School Organizations, Council for Christian Colleges and Universities, Azusa Pacific University, and Brigham Young University (collectively) and the National Right to Work Legal Defense and Education Foundation filed letters calling the Board's attention to recently issued case authority, and the Petitioner filed a

dress first the issue of jurisdiction, and then turn to the managerial status of the full-time contingent faculty.

II. BOARD JURISDICTION OVER RELIGIOUSLY AFFILIATED UNIVERSITIES AND COLLEGES

A. Introduction

As demonstrated below, an examination of prior Board and court cases demonstrates that the Board and the courts have attempted to accommodate two competing interests when deciding whether the Board may assert jurisdiction over faculty members at religiously affiliated colleges and universities. One interest is the need to ensure that assertion of the Board's jurisdiction, and the test the Board uses when deciding whether to assert jurisdiction, do not violate the Free Exercise Clause and the Establishment Clause of the First Amendment to the Constitution ("the Religion Clauses"). This consideration requires that the Board avoid any intrusive inquiry into the character or sincerity of a university's religious views. A decision to assert jurisdiction over faculty members does not, however, involve only a consideration of concerns raised by the Religion Clauses. Also at issue is the effective implementation of Federal labor policy as embodied in the National Labor Relations Act and enforced by the Board.

Section 1 of the Act declares that it is the policy of the United States to mitigate and eliminate disruptions to the free flow of commerce by "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, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. Section 151. It is well settled that Congress vested in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause. *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). Because we are charged with protecting workers' exercise of their rights under the Act to the fullest permissible extent, we must carefully examine any claims that a group of employees is excluded from our jurisdiction and thus not afforded any of the protections of the Act, including the right to representation and collective bargaining.

B. Prior precedent

In 1975, the Board asserted jurisdiction over units of lay teachers at two groups of Catholic high schools. One group of schools was operated by the Catholic Bishop of Chicago; the other by the Diocese of Fort-Wayne South Bend. In rejecting the schools' arguments that the Religion Clauses of the First Amendment prevented the Board from asserting jurisdiction, the Board applied its then-current policy to decline jurisdiction over religiously sponsored organizations only when they were "completely religious, not just religiously associated." See *Catholic Bishop of Chicago*, 220 NLRB 359, 359 (1975) (quoting *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249, 250 (1975)). Finding that the schools did not fall within the "completely religious" exception, the Board asserted jurisdiction. Id. The Seventh Circuit denied enforcement of the Board's subsequent orders and found that the Board's distinction between "completely religious" and merely "religiously associated" provided "no workable guide to the exercise of discretion." *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1118 (7th Cir. 1977).

The Supreme Court affirmed the Seventh Circuit's decision. The Court explained that, if the Act granted the Board jurisdiction over lay teachers at church-operated schools, the Court would be required to decide whether that jurisdiction was permissible under the First Amendment. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (hereinafter "*Catholic Bishop*"). In keeping with its prudential policy of constitutional avoidance, the Court first looked to whether the Act authorized the challenged exercise of jurisdiction before deciding whether the exercise of jurisdiction in that case was constitutional. Id. at 501.

Emphasizing "the critical and unique role of the teacher in fulfilling the mission of a church-operated school," id., the Court held that the Board could not assert jurisdiction over the petitioned-for lay teachers because to do so would create a "significant risk" that First Amendment religious rights would be infringed. Id. at 502, 507. The Court feared that Board jurisdiction would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the schools' religious mission" and that "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." Id. at 502. The Court predicted that if the Act conferred jurisdiction over these teachers, the Board could not "avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining." Id. The Court concluded that "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, [the Court] decline[d] to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions aris-

letter in response. Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), we have accepted these submissions.

ing out of the guarantees of the First Amendment Religion Clauses." Id. at 507.

After *Catholic Bishop* was decided, the Board determined on a case-by-case basis whether a self-identified religious school had a "substantial religious character" such that exercise of the Board's jurisdiction would present a significant risk of infringing on that employer's First Amendment religious rights. Compare *Jewish Day School*, 283 NLRB 757, 761–762 (1987) (declining jurisdiction where articles of incorporation stated that one of its central aims was to teach religious subjects "in accordance with the principles of the Jewish faith," students spent 40 percent of their school day in Judaic studies courses in a school-established synagogue, Judaic studies were integrated with general studies, and mandatory prayer services were held each day) with *Livingstone College*, 286 NLRB 1308, 1310 (1987) (asserting jurisdiction where property was owned by a church, the church appointed one-half of college's board of directors, and financial support was provided by the church; even though the college's purpose was primarily secular, teachers were not required to support the church, and the church was not involved in the daily administration of the college).[4]

In 1985, however, an evenly divided First Circuit declined to enforce the Board's Order asserting jurisdiction over lay teachers at a self-identified religious university. *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 399–403 (1st Cir. 1985) (en banc), denying enf. to 273 NLRB 1110 (1984). Then-Judge Breyer explained that the Board's finding that the college was not "church operated" was "legally unsupportable." Id. at 399. Although the college was a self-sufficient institution that received no financial assistance from the Dominican Order of the Catholic Church that founded it and was independent of the church, the Order continued to maintain administrative control of the college, as both the president and a majority of both the Board of Trustees and executive committee were required to be Dominican priests. Likewise, the University held itself out to students, faculty, and the community as a Catholic school, its faculty regulations allowed discipline for "offenses to the Christian morality," and students were required to take several theology courses, which were usually taught by Dominican priests. Id. at 400.

In *University of Great Falls*, 331 NLRB 1663 (2000), the Board once again found that a school did not have a substantial religious character and, therefore, that the exercise of the Board's jurisdiction would not present a significant risk of infringing on that employer's religious rights. Id. at 1665–1666. The D.C. Circuit, however, rejected both the Board's conclusion and its analysis. University of *Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). The court insisted that "[d]espite its protestations to the contrary, the nature of the Board's inquiry boils down to 'is [the university] *sufficiently* religious?'" Id. at 1343.

The court then proposed and applied a three-part test, which it drew largely from Judge Breyer's decision in *Bayamon*, under which the Board would assert jurisdiction unless a college or university: (a) holds itself out to students, faculty and the community as providing a religious educational environment; (b) is organized as a nonprofit; and (c) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.[5] Id. The court found that its proposed test "avoids the constitutional infirmities" of the Board's substantial religious character test because it "does not intrude upon the free exercise of religion nor subject the institution to questioning about its motives or beliefs." Id. at 1344. The test also "avoids asking how effective the institution is at inculcating its beliefs, an irrelevant inquiry that permeates the NLRB proceedings below." Id. The court found that the University of Great Falls satisfied this test because it "unquestionably holds itself out to students, faculty, and the broader community as providing an education that, although primarily secular, is presented in an overtly religious, Catholic environment." Id at 1345. It also found that the school was a nonprofit institution that was affiliated with the Catholic Church. Id.

Since *Great Falls*, the Board has neither adopted nor rejected the D.C. Circuit's approach. See, e.g., *Salvation Army*, 345 NLRB 550, 550 (2005) (assuming *Great Falls* test governs the exercise of the Board's jurisdiction over religiously affiliated educational institutions, but finding it unnecessary to apply because the employer did not

[4] The Supreme Court's holding in *Catholic Bishop* addressed one subset of employees at one type of employer—teachers at church-operated parochial schools. 440 U.S. at 507. The Board and the courts subsequently applied the Court's holding to faculty members at postsecondary religiously affiliated colleges and universities. See, e.g., *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 401 (1st Cir. 1985); *Trustee of St. Joseph's College*, 282 NLRB 65, 67–68 (1986).

[5] The court fully adopted the first two prongs but did not determine whether it would reach the full expanse of the third prong. Id. at 1343–1344. It was undisputed that the University of Great Falls is "affiliated with . . . a recognized religious organization," that is, the Catholic Order of the Sisters of Providence, St. Ignatius Province. Therefore, the court did not feel compelled to decide whether it would be sufficient that the school be, for example, indirectly controlled by an entity the membership of which was determined in part with reference to religion. Id. at 1343–1344, 1347 fn. 2.

provide religious education and petitioned-for employees were not teachers); *Catholic Social Services*, 355 NLRB 329, 329 (2010) (similar, except unit did include teachers providing purely secular education). See also *Carroll College, Inc.*, 345 NLRB 254, 254 fn. 8 (2005) (finding it unnecessary to pass on court's test where employer conceded that it was subject to the Board's jurisdiction under *Catholic Bishop*), enf. denied 558 F.3d 568 (D.C. Cir. 2009).[6]

C. New Standard

1. Summary

As fully explained below, we take this opportunity to articulate a new test that is faithful to the holding of *Catholic Bishop*, sensitive to the concerns raised by the parties and amici, and consistent with our statutory duty. Our consideration of prior cases, the arguments of the parties and amici, and the Act lead us to conclude that the Act permits jurisdiction over a unit of faculty members at an institution of higher learning unless the university or college demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment, and that it holds out the petitioned-for faculty member's as performing a specific role in creating or maintaining the school's religious educational environment. Applying this test, and for the reasons discussed below, we find that, although PLU holds itself out as providing a religious educational environment, it does not hold its contingent faculty out as performing a specific role in creating or maintaining that environment, in its public representations to current or potential students and faculty members, or to the community at large. In these circumstances, we will assert jurisdiction over the petitioned-for unit of contingent faculty members.

2. Positions of the parties

The University and the Petitioner, as well as all of the amicus curiae, agree that the Board should discard the "substantial religious character" test. Suggestions for a new test for the Board fall into two camps. PLU and supporting amici urge the Board to adopt some version of the D.C. Circuit's three-pronged *Great Falls* approach[7] and find that PLU is exempt from Board jurisdiction. PLU and these amici argue that the *Great Falls* test allows the Board to identify bona fide religious institutions without engaging in an intrusive inquiry forbidden by *Catholic Bishop*.

The Petitioner and supporting amici, by contrast, argue that the Board should adopt a "teacher religious function" test which focuses on whether teachers in the proposed unit perform religious functions as part of their jobs. These parties argue that the Supreme Court's focus in *Catholic Bishop* was on the nature of the employer-teacher relationship, rather than simply on the institution as a whole, and that the Court found that exercise of the Board's jurisdiction would raise serious First Amendment concerns because teachers play a "critical and unique" role in fulfilling the mission of a school designed to propagate a religious faith. They further argue that, where teachers do not play a similarly "critical and unique" role in propagating a religious faith, exercise of the Board's jurisdiction does not raise First Amendment concerns. Under this "teacher religious function" test, the Union and supporting amici argue that PLU is subject to the Board's jurisdiction.

For the reasons discussed below, we adopt neither alternative and take this opportunity to articulate a new test that is both faithful to the holding of *Catholic Bishop* and sensitive to the concerns raised by parties and amici. As discussed above, in crafting a new test for determining when to assert jurisdiction over faculty members at universities which claim to be religious institutions, we must avoid the potential for unconstitutional entanglement while, to the extent constitutionally permissible, vindicating the rights of employees to engage in collective bargaining. First, our test must not impinge on a university's religious rights and must avoid the type of intrusive inquiry forbidden by *Catholic Bishop*. Second, our decision on whether to assert jurisdiction over faculty members must give due consideration to employees' Section 7 rights to decide whether to engage in collective bargaining. As explained above, Congress granted the Board the broadest jurisdiction constitutionally permissible under the Commerce Clause and, pursuant to our responsibilities under the Act, we must ensure that we do not needlessly impair employees' rights.

As PLU and supporting amici point out, the *Great Falls* test avoids any intrusive inquiry into a university's religious beliefs or actual practices. It requires an examination only of a university's public representations of itself and of other objective, widely available evidence such as nonprofit status and formal affiliation. Although

[6] In *Carroll College v. NLRB*, the D.C. Circuit again rejected the substantial religious character test and reaffirmed its support for the *Great Falls* test. The court explained that "focusing solely on a school's public representations as to its religious educational environment—as opposed to conducting a skeptical inquiry into the actual influence exerted over the school by its affiliated religious institution—is also a more useful way for determining the school's religious bona fides." 558 F.3d at 573.

[7] Some amici argue that the Board should adopt the *Great Falls* test in full, while others argue that the third prong of the *Great Falls* test should not be adopted because it is constitutionally problematic and could lead to unconstitutional denominational preference.

this approach may avoid constitutionally problematic inquiries, it overreaches because it focuses solely on the nature of the institution, without considering whether the petitioned-for faculty members act in support of the school's religious mission. The *Great Falls* test could deny the protections of the Act to faculty members who teach in completely nonreligious educational environments if the college or university is able to point to any statement suggesting the school's—but not faculty's—connection to religion, no matter how tenuous that connection may be. This approach goes too far in subordinating Section 7 rights and ignores federal labor policy as embodied by the Act.

We also do not find the approach urged by the Petitioner and supporting amici, the "teacher religious function" test, to be entirely satisfactory. First, while we agree that faculty members' functions are key to our determination of whether the Board can assert jurisdiction, the Petitioner's proposed approach does not consider the teacher's function in connection with how the college or university holds itself out. That is, by examining only the teacher's function, there is no link between that function and any religious educational environment it arguably creates or maintains. Second, to the extent that amici argue that the Board should examine whether faculty members *actually perform* a religious function, the "teacher religious function" test could result in the type of intrusive inquiry into a university's religious beliefs and practices which was rejected by the Supreme Court in *Catholic Bishop*. We believe that the proposed test does not give sufficient consideration to the potential for infringing on a university's First Amendment religious rights.

As explained below, we find that a better approach to protecting employees' rights while being sensitive to First Amendment concerns is struck by combining elements of both the *Great Falls* test and the proposed "teacher religious function" test. Specifically, under our new test, we will not decline to exercise jurisdiction over faculty members at a college or university that claims to be a religious institution unless it first demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment. Once that threshold requirement is met, the college or university must then show that it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment.

3. Threshold requirement: University must hold itself out as providing a religious educational environment

The first step in determining whether to assert jurisdiction over a unit of faculty members at a college or university which claims to be a religious institution is to determine whether First Amendment religious rights concerns are even implicated. We agree with the D.C. Circuit that corroboration of a university's claim that it is a religious institution cannot involve an inquiry into the good faith of the university's position or an examination of how the university implements its religious mission. To avoid such an impermissible inquiry, we adopt the first part of the D.C. Circuit's *Great Falls* test as an initial threshold requirement; that is, the Board will first examine whether the university shows that it "holds itself out to students, faculty, and community as providing a religious educational environment." *Great Falls*, 278 F.3d at 1343.

Appropriate evidence of how the university holds itself out as providing a religious educational environment would include, but by no means be limited to, handbooks, mission statements, corporate documents, course catalogs, and documents published on a school's website. Press releases or other public statements by university officials could also be relevant. A university's contemporary presentation of itself is likely to be more probative than its founding documents and historical tradition.[8] Relying on an examination of these types of documents avoids intrusive inquiry into the university's beliefs or how it implements its religious mission. All of these sources involve information that the university freely provides to students, faculty, and the public, and provide an accurate, but nonintrusive, way for the Board to assess a university's assertion that it provides a religious educational environment.

This initial threshold requirement does not require any particular showing of religious character and does not impose a heavy burden on colleges and universities claiming to be religious institutions. It is appropriate to

[8] Some universities may have been founded by churches or religious orders and had a strongly religious conception of their mission, but, over time, become so secularized, either formally or informally, that they no longer maintain any religious character. See generally James Tunstead Burtchaell, *The Dying of the Light: The Disengagement of Colleges and Universities from their Christian Churches* (1998); George M. Marsden, *The Soul of the American University* 263–428 (1994). For example, in 1881, 80 percent of the colleges in the United States were church related and private. In 2001, only 20 percent had a connection to a religious tradition. See "Colleges and Universities with Religious Affiliations" article in Education Encyclopedia – StateUniversity.com. http://education.stateuniversity.com/pages/1860/Colleges-Universities-with-Religious-Affiliations.html (last visited December 12, 2014). Other formally religious colleges have severed any relationship with the religious community and continued as independent institutions, while others may have evolved so far from their religious roots that they can arguably be considered only "nominally" religious. See, e.g., Marsden, supra at 276–296 (chronicling Vanderbilt University's disassociation from the Methodist Episcopal Church, South); see also Burtchael, supra at 819–851.

require a minimal showing at this stage, when the Board is determining not whether it has the authority to assert jurisdiction, but whether First Amendment concerns are even potentially implicated with respect to the petitioned-for unit. In determining whether constitutional issues are in play, we err on the side of being overinclusive and not excluding universities because they are not "religious enough." *Great Falls*, 278 F.3d at 1343.

This threshold requirement will, however, allow the Board to dismiss claims from universities that assert they are religious organizations solely in an attempt to avoid the Board's jurisdiction. If a university does not even present itself as providing a religious educational environment, it would appear to be highly unlikely that exertion of the Board's jurisdiction would give rise to any risk of entanglement, and no First Amendment concerns are implicated.

The *Great Falls* test also requires that, in order to be exempt from the Board's jurisdiction, the university be organized as a non-profit. We agree with the D.C. Circuit that non-profit status provides an objective way of differentiating between a church or religion's profit-making ventures and its endeavors to carry out its religious mission. 278 F.2d at 1344. As such, proof of such status or lack thereof, may be relevant in an examination of how a university holds itself out.[9]

Finally, we do not adopt the third requirement of the *Great Falls* test, which, as discussed above, the court did not fully endorse. See 278 F.3d at 1343–1344. We believe that the inquiry described above is sufficient to determine whether First Amendment concerns are raised, and we do not believe that the analysis will be improved by imposing an additional requirement that the university be "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion." Further, such a requirement might exclude from exemption a university that holds itself out as providing a religious educational environment but is interdenominational or nondenominational. As some amici argue, such an outcome might amount to denominational preference, again in contravention of the First Amendment. See *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another"). To the extent that an employer wishes to argue that its affiliation with a particular organization demonstrates its religious nature, it is free to do so. We shall not, however, require such a showing.

[9] A for-profit university claiming religious status might be analyzed under the Board's line of cases asserting jurisdiction over the operations of churches and other religious organizations that are "commercial in nature." See fn. 19.

4. University must hold petitioned-for faculty members out as performing a religious function in furtherance of its religious mission

Once the university meets the threshold requirement of showing that it holds itself out as providing a religious educational environment, thus raising concerns under the Religion Clauses of the First Amendment, we will then examine whether the university holds out its petitioned-for faculty members as performing a specific role in creating and maintaining that environment. We find that the focus of our inquiry into whether there is a "significant risk" of infringement under *Catholic Bishop*, 440 U.S. at 502, must be on the faculty members themselves, rather than on the nature of the university as a whole. Our statutory duty requires that we engage in an examination of the specific employees in the petitioned-for unit to determine if they are employees eligible for coverage under the Act in order to ensure that the petitioned-for employees are not improperly denied the opportunity to vote on representation. As the Court stated in *Catholic Bishop*, "[t]he key role played by teachers in such a school system has been the predicate" for its concern about "creat[ing] an impermissible risk of excessive governmental entanglement."[10] 440 U.S. at 501. According to the court, if teachers play a "critical and unique role" in creating and sustaining a religious environment, the Board's assertion of jurisdiction over them could result in interference in management prerogatives and "open the door to conflicts between clergy-administrators and

[10] The religious function of teachers has been recognized as the central focus of the jurisdictional test: *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 822, 823 (2d Cir. 1980) ("[t]he entire focus of Catholic Bishop was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith"); *NLRB v. St. Louis Christian Home*, 663 F.2d at 64 (noting the Catholic Bishop Court's emphasis on the religious function of the petitioned-for teachers). Many of the Board's post-Catholic Bishop cases have also relied heavily on the function of petitioned-for teachers, and not simply on whether the institution had a "substantial religious character" in deciding whether to assert jurisdiction. See, e.g., *Livingstone College*, 286 NLRB 1308, 1309 (1987) (Board asserted jurisdiction over college and explained that evidence showing faculty members were not required to conform to Church doctrine, were not prohibited from knowingly inculcating ideas contrary to the position of the Church, and could not be dismissed for engaging in conduct not in harmony with the teachings of the Church was more important than the secular nature of the college's mission and purpose); *Trustee of St. Joseph's College*, 282 NLRB at 68 (Board declined to assert jurisdiction, relying "*particularly* [on] . . . the College's requirement that faculty members conform to Catholic doctrine and agree on hire 'to promote the objectives and goals . . . of the Sisters of Mercy of Maine,' not merely the objectives and goals of the College itself.") (Emphasis added.)

the Board." Id. at 503. By contrast, where faculty members are not expected to play such a role in effectuating the university's religious mission and are not under religious control or discipline, the same sensitive First Amendment concerns of excessive entanglement raised by the Court are not implicated. In these circumstances, it is appropriate for the Board to assert jurisdiction for the same reasons that it is appropriate to assert jurisdiction over employees at other types of religious organizations, that is, because assertion of the Board's jurisdiction does not raise concerns under either the Free Exercise Clause or the Establishment Clause of the First Amendment. See, e.g., *Catholic Social Services*, 355 NLRB 929, 929–930 (2010) (asserting jurisdiction over facility providing childcare services where an "ancillary" part of social services provided included "wholly secular education" to a small number of children); *Salvation Army*, 345 NLRB 550, 552 (2005) (asserting jurisdiction over resident advisors at facility providing prerelease services to prisoners and probationers).[11]

Faculty members who are not expected to perform a specific role in creating or maintaining the school's religious educational environment are indistinguishable from faculty at colleges and universities which do not identify themselves as religious institutions and which are indisputably subject to the Board's jurisdiction. Both faculty provide nonreligious instruction and are hired, fired, and assessed under criteria that do not implicate religious considerations. For the Board to assert jurisdiction over such employees does no harm to the university's religious mission and does not impermissibly entangle the Board in any of the university's religious beliefs or practices. On the other hand, excluding such faculty members based solely on the nature of the institution erases the Section 7 rights of an entire group of employees who are indistinguishable from their counterparts at universities that do not claim any religious affiliations or connections.

We recognize that our examination of the actual functions performed by employees could raise the same First Amendment concerns as an examination of the university's actual beliefs, and we are again faced with the need to avoid "trolling" through a university's operation to determine whether and how it is fulfilling its religious mission. To avoid this risk, we extend the "holding out" principle to our analysis of faculty members' roles; that is, we shall decline jurisdiction if the university "holds out" its faculty members, in communications to current or potential students and faculty members, and the community at large, as performing a specific role in creating or maintaining the university's religious purpose or mission. As the D.C. Circuit explained in *Great Falls*, the "holding out" requirement eliminates the need for a university to explain its beliefs, avoids asking how effective the university is at inculcating its beliefs, and does not "coerce[] an educational institution into altering its religious mission to meet regulatory demands." 278 F.3d at 1344–1345.

The focus is on whether faculty members are held out as having such an obligation as part of their faculty responsibilities. Although we will not examine faculty members' actual performance of their duties, we shall require that they be held out as performing a *specific religious function*. Generalized statements that faculty members are expected to, for example, support the goals or mission of the university are not alone sufficient. These types of representations do not communicate the message that the religious nature of the university affects faculty members' job duties or requirements. They give no indication that faculty members are expected to incorporate religion into their teaching or research, that faculty members will have any religious requirements imposed on them, or that the religious nature of the university will have any impact at all on their employment. This is especially true when the university also asserts a commitment to diversity and academic freedom, further putting forth the message that religion has no bearing on faculty members' job duties or responsibilities. Without a showing that faculty members are held out as performing a specific religious function, there is no basis on which to distinguish these employees from faculty members at nonreligious universities or to exclude them from coverage under the Act.

Member Johnson argues that a university's commitment to diversity and academic freedom can be consonant with and part of a religious belief system, and specifically the beliefs of Lutherans. This may be true, but requiring faculty members to comply with norms shared

[11] As these and other cases show, the Board has long asserted jurisdiction over secular employees of nonprofit religious organizations other than schools, as well as over nonteaching employees at religious institutions that have an educational component as part of their mission. See id. See also, e.g., *Ecclesiastical Maintenance Services*, 325 NLRB 629, 630-631 (1998) (unit of cleaning and maintenance employees of nonprofit contractor formed to assist the Roman Catholic Archdiocese of New York); *Hanna Boys Center*, 284 NLRB 1080 (1987), enfd. 940 F.2d 1295 (9th Cir. 1991), cert. denied 504 U.S. 985 (1992) (unit of clerical employees, recreation assistants, cooks, and child-care workers at non-profit institution founded by Catholic priests); *St. Elizabeth Community Hospital*, 259 NLRB 1135 (1982) (unit of service and maintenance employees at religiously affiliated nonprofit hospital), enfd. 708 F.2d 1436 (9th Cir. 1983); *NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981), enfg. 251 NLRB 1477 (1980). Our decision today is limited to addressing the requirements for units of faculty members at colleges and universities.

by both a religion and by wider society does not support a finding that faculty members are held out as performing any specific religious role. Although we are not examining an institution's beliefs or practices, or questioning a university's religious identity, our examination of a university's public representations must show that it holds its faculty out as performing a specifically religious role, not a role that they would be expected to fill at virtually all universities.[12]

Appropriate evidence to assess this requirement could include, but would not be limited to, job descriptions, employment contracts, faculty handbooks, statements to accrediting bodies, and statements to prospective and current faculty and students. We will not seek to look behind these documents to determine what specific role petitioned-for faculty actually play in fulfilling the religious mission of a school or to inspect the university's actual practice with respect to faculty members. Nor will we examine the specific actions of any individual teacher.[13] Rather, we rely on the institution's own statements about whether its teachers are obligated to perform a religious function, without questioning the institution's good faith or otherwise second-guessing those statements. If the evidence shows that faculty members are required to serve a religious function, such as integrating the institution's religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training, we will decline jurisdiction. Likewise, if the college or university holds itself out as requiring its faculty to conform to its religious doctrine or to particular religious tenets or beliefs in a manner that is specifically linked to their duties as a faculty member, we will decline jurisdiction.[14] However, general or aspirational statements, without specificity as to how the requirement affects actual job functions, will not suffice.

Part of the D.C. Circuit's rationale for adopting a "holding out" requirement was that such a requirement would serve as an effective "market check" and discourage wholly secular universities from falsely claiming to be religious institutions. See *Great Falls*, 278 F.3d at 1344. While holding itself out as creating a religious educational environment may attract some students, the same religious educational environment may dissuade other potential students from attending. Thus, the university's public representations can come at a cost. This cost, it is presumed, will dissuade institutions from falsely claiming that it is religious merely to avoid the jurisdiction of the Board. See id.

Our "holding out faculty members" requirement serves as a similar market check, as representations that faculty members perform a religious function will come at a cost to the university. Analogous to students' decision-making process, the representation that faculty members must carry out a religious function might attract some potential applicants for faculty positions but dissuade others from even applying. *Great Falls*, 278 F.2d at 1344. Hence, relevant to our inquiry of how the university presents the role of its teachers in creating or maintaining its religious educational environment are documents concerning the recruitment of future staff.[15] Our inquiry in this regard focuses on whether a reasonable prospective applicant would conclude that performance of their faculty responsibilities would require furtherance of the college or university's religious mission.[16]

This limited "holding out" inquiry will not entangle the Board, or reviewing courts, into the institution's religious beliefs and practices. The Board will not "troll" through the beliefs of the school or examine the religious beliefs or practices of faculty members, students, administrators, or the institution itself. Instead, we will view

[12] Compare *NLRB v. St. Louis Christian Home*, 663 F.2d at 64 (church "may perceive its religious mission to include caring for unfortunate children, but the actual business of the Home and its employees does not involve a religious enterprise comparable to a church-operated school").

As examples of the extent to which commitments to diversity in education and to academic freedom are indicative of broadly shared values, see *Bob Jones University v. U.S. Goldsboro Christian School*, 461 U.S. 574, 593 (1983) (Burger, C.J.) ("racial discrimination in education violates a most fundamental national public policy, as well as the rights of individuals."); and *Keyishian v. Bd. of Regents of the Univ. of the State of NY*, 87 S.Ct. 675, 683 (1967) (Brennan, J.) ("[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned").

[13] Our minimal requirements do not, of course, preclude a party from presenting additional evidence that it believes is relevant to demonstrating that faculty members do or do not perform a religious function.

[14] This inquiry is not focused on the personally held beliefs or values of faculty that are unrelated to the performance of their obligations as faculty members. Also, by citing these examples, we do not mean to suggest that showing that faculty members are held out as being required to proselytize or to indoctrinate students will be necessary to establish that faculty members are held out as performing a specific religious function. These examples are intended only to demonstrate that there must be a *connection* between the performance of a religious role and faculty members' employment requirements.

[15] We note that a relevant inquiry will be the extent to which the college or university holds itself out as respecting or promoting faculty independence and academic freedom, versus focusing on religious identification and sectarian influence.

[16] We are again not convinced that requiring faculty members to support widely shared university values, such as a commitment to diversity and academic freedom, provides prospective applicants with any indication that they would be expected to perform any specific religious function that would differ from their functions at virtually any university, or that the evaluation of their success in fulfilling these goals would be any different.

the school's own statements.[17] As the D.C. Circuit explained in *Great Falls*, the "holding out" requirement eliminates the need for a university to explain its beliefs, avoids asking how effective the university is at inculcating its beliefs, and does not "coerce[] an educational institution into altering its religious mission to meet regulatory demands."[18] 278 F.3d at 1344–1345.

The concern with respect to the Board's assertion of jurisdiction over faculty members at religious universities is that it entails excessive state interference through regulation. See *Universidad Central de Bayamon v. NLRB*, 793 F.2d at 403. In *Catholic Bishop*, the Supreme Court agreed with the court of appeals that assertion of the Board's jurisdiction could "impinge on the freedom of church authorities to shape and direct teaching." 440 U.S. at 496. If our examination shows that faculty members are not held out as performing a religious function in support of the college or university's religious mission, however, the concern about impinging on the ability to shape and direct teaching is no longer present. As discussed above, the Board's assertion of jurisdiction in those circumstances does not affect the university's religious rights or give rise to any potential First Amendment concerns of entanglement.[19]

Our new standard also addresses the concern that the substantial religious character test "limit[ed] the *Catholic Bishop* exemption to religious institutions with hard-nosed proselytizing." *Great Falls*, 278 F.3d at 1346. We recognize that an institution that does not require faculty members to attend religious services or be a member of any particular faith may still hold out its faculty members as performing a religious function in the performance of their academic responsibilities. Accordingly, to the extent that the substantial religious character test resulted in an impermissible denominational preference, the same cannot be said of our new standard.

Moreover, we believe that the Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694 (2012), is instructive in determining whether an examination of employees' roles is permitted when the question presented is whether employees of a religious organization are exempt from Federal law. There, in finding that a teacher's discrimination suit was barred by Title VII's ministerial exception, the Court did not simply accept the school's assertion that the teacher was a minister, but instead explored the teacher's job functions and training. In doing so, it noted that the school publicly held out the plaintiff as a minister, the school periodically reviewed her "skills of ministry" and "ministerial responsibilities," and her

[17] As discussed above, by this we mean not only oral statements to prospective and current students and faculty and to the public, but also statements contained on the school's website and, for example, contained in its handbooks, employment contracts, job descriptions, handbooks, and other documents.

[18] Requiring organizations claiming religious status to make some showing beyond that bare assertion is neither impermissible nor particularly uncommon. For example, in order to qualify as a religious nonprofit organization and thus eligible for an exemption from taxation pursuant to 26 U.S.C. Section 501 (c)(3), the Internal Revenue Service (IRS) requires fairly detailed information with respect to an organization's mission, goals, and organizational structure. Specifically, the IRS reviews an organization's articles of incorporation, financial books and records, and the minutes of the Board of directors, as well as other brochures and publications, in order to determine if the organization qualifies for the religious exemption. See Internal Revenue Manual Part 4 Chapter 76 Section 6. Available at http://www.irs.gov/irm/part4/index.html (last visited December 12, 2014). And to receive an exemption under Title VII, courts conduct a factual inquiry and weigh "[a]ll significant religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious." *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988). See also *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980). These inquiries are not impermissible examinations of the sincerity of religious beliefs; they simply put an organization claiming religious status "to the proof of its bona fides as a religious organization." *Larson v. Valente*, 456 U.S. 228, 255 fn. 30 (1982) (discussing application of state law to organizations claiming exemption on religious grounds).

[19] Our test will not require or permit the Board decide any issues of religious doctrine. We will decline jurisdiction so long as the university's public representations make it clear that faculty members are subject to employment-related decisions that are based on religious considerations. For example, if faculty members are subject to dismissal for teaching a doctrine at odds with the religious faith of the institution, our new test would lead the Board to decline jurisdiction over disputes about those dismissals so long as the university's public representations indicated that faculty members were expected to comply with (or at least not openly contravene) certain tenets of a religion as a term and condition of employment. Similarly, where a university's public representations indicate that faculty members accept ecclesiastical sources of dispute resolution, and/or waive their right to dispute resolution in any other forum, as a condition of employment, our test would again lead the Board to decline jurisdiction.

Many religiously affiliated universities are not owned or operated directly by a church or by any other religious organization. As a result, any First Amendment concerns implicated do not concern interference with a church's operations. See *Catholic Bishop*, 440 U.S. at 503 (expressing concern that assertion of the Board's jurisdiction would lead to conflicts between "clergy-administrators" and the Board).

The Board has typically declined to assert jurisdiction where petitioned-for employees are employed directly by a church unless the church is engaging in operations that are, "in the generally accepted sense, commercial in nature." *The First Church of Christ*, 194 NLRB 1006 (1972) (asserting jurisdiction over unit of electricians and carpenters because Church was engaged in commercial publishing enterprises). See also *St. Edmund's High School*, 337 NLRB 1260, 1261 (2002) (declining jurisdiction over unit of custodial employees where Church directly employed all petitioned-for employees); *Riverside Church*, 309 NLRB 806, 807 (1992) (declining jurisdiction over unit of service and maintenance employees of a church). Several Board Members have questioned whether *Riverside* was decided correctly, but the case has not been overruled. See *Ecclesiastical Maintenance*, 325 NLRB at 629 fn.1; *St. Edmund's*, 337 NLRB at 1261 fn. 2. In any event, the analysis used by the Board in these cases is not affected by our decision today.

"job duties reflected a role in conveying the Church's message and carrying out its mission." Id. at 707–708. In short, the Court found it appropriate, for the purposes of applying Title VII's ministerial exception, to evaluate the teacher's functions to determine whether the exception applied.

5. Conclusion

In conclusion, we find that, when a college or university argues that the Board cannot exercise jurisdiction over a petitioned-for unit of faculty members because the university is a religious one, the university must first demonstrate, as a threshold requirement, that First Amendment concerns are implicated by showing that it holds itself out as providing a religious educational environment. Once that threshold requirement is met, the university must then show that it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by its representations to current or potential students and faculty members, and the community at large.

We will apply this new standard in this case and retroactively in all other pending cases, except those in which an election was held and the ballots have been opened and counted, consistent with the Board's established approach in representation proceedings.[20] We also overrule prior Board decisions such as *Jewish Day School*, 283 NLRB 757 (1987), and *Nazareth Regional High School*, 283 NLRB 763 (1987), to the extent that they are inconsistent with this decision or suggest that an analysis of the nature of faculty members' roles is not necessary in deciding whether the Board should assert jurisdiction.

D. Standard Applied to Pacific Lutheran University

1. Facts

PLU was founded in 1890 by Lutherans from the Puget Sound area to help immigrants adjust and find jobs and to serve the church and community. It is one of 26 colleges and universities affiliated with the Evangelical Lutheran Church in America (ECLA). PLU is organized as a not-for-profit corporation for education purposes, and it is exempt from Federal taxation pursuant to Section 501(c)(3) of the Internal Revenue Code.

PLU offers undergraduate and graduate degrees at its campus in Tacoma, Washington. It consists of one college and four schools: the College of Arts and Sciences, the School of Arts and Communication, the School of Business, the School of Education and Movement Studies, and the School of Nursing. During the 2012–2013 academic year, PLU had a total enrollment of 3,473 students and employed about 180 tenured or tenure-track faculty and 176 contingent faculty.

The current bylaws and articles of incorporation provide that PLU shall be managed by an independent board of regents. Of the 37 regents on the Board, 16 must be ELCA congregants and 6 ministers of ELCA. The remaining 15 regents can be of any religious affiliation or none. PLU's president must be a member of a Christian denomination with which the ELCA "has a relationship of full communion." The bylaws and articles of incorporation do not impose religious requirements on any other administrative, staff, or faculty positions (with the exception of campus pastors).

According to PLU's bylaws, its mission is "to educate students for lives of thoughtful inquiry, service, leadership, and care for other persons, for their communities and for the earth."[21] PLU's purpose includes "establishing and maintaining within the State of Washington an institution of learning of university rank in the tradition of Lutheran higher education . . . ." The faculty handbook states, "[t]he university values as its highest priority excellence in teaching." It describes PLU as "[s]teeped in the Lutheran commitment to freedom of thought."

PLU's religion department web page states that its "religion courses ask students to engage in the academic study of religion, not in religious indoctrination." According to PLU's course catalog, "the study of religion at PLU builds on the historic strengths of the Lutheran higher education and enhances global perspectives that reflect our commitment to human communities and the world. This discipline engages students in the scholarly study of sacred texts and practices, histories, theologies, and ethics."

Through its website, PLU advises prospective students that "[t]here are also plenty of on-campus opportunities for students to grow their faith—including voluntary chapel, a vibrant campus ministries office and numerous organizations [religious groups and faith clubs] to help nurture your spiritual life." Neither students nor faculty are required to attend religious services or participate in any of these activities; there is no evidence that faculty

[20] In representation cases, the Board has recognized a presumption in favor of applying new rules retroactively, which is "overcome . . . where retroactivity will have ill effects that outweigh 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *Crown Bolt, Inc.*, 343 NLRB 776, 779 (2004), quoting *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001). No grounds exist to warrant only a prospective application of our new test.

[21] The Union introduced into the record the mission statements, which are each similar to PLU's, of the University of Washington, Central Washington University, and Western Washington University, all public, secular institutions.

are required to perform any functions in connection with any of these activities. Mailings to prospective students mention the school's Lutheran heritage, describing it as calling for a commitment to academic excellence and freedom. These materials emphasize that students from all backgrounds and religious traditions attend PLU.

Although not referencing Lutheranism specifically, nor religion in general, PLU's website, on a page directed at admitted students, describes it as "a special place" and "close-knit community." A specific reference to Lutheranism on PLU's website, appearing in a "Frequently Asked Questions" section for prospective students, downplays the religious character of the school:

> Q: Do you have to be a Lutheran to attend PLU?
>
> A: Not at all. Students of all faiths-or of no faith-attend PLU . . . .
>
> Q: What exactly is a Lute?
>
> A: Originally, I think a Lute was a nickname for Lutheran. But that doesn't mean you can't be a Lute if you aren't Lutheran. I'm a Lute, you're a Lute, were [sic] all Lutes. . . .
>
> Q: Do I have to attend chapel?
>
> A: No. . . . PLU was founded by Scandinavian immigrants, so Lutheran heritage is very important to our school, but that doesn't mean it will be forced on you... There are many religious opportunities that are offered on and off-campus-for people of all faiths.

PLU's faculty handbook begins by laying out its mission and history, with a discussion of its Lutheran origins and affiliation. There is no provision in the University's policies for disciplining or firing faculty if they do not hold to Lutheran values, and no hiring preference is given to Lutherans for faculty positions. No adherence to Lutheran doctrine or membership in a Lutheran congregation is required for hiring, promotion, or tenure; nor does it play any role in faculty evaluations or promotions.[22]

PLU's part-time teaching contracts and faculty job postings do not mention religion in general (excepting the religion department) or Lutheranism in particular. Glen Guhr, a lecturer in the music department who testified at the preelection hearing, indicated that when he was hired there was no discussion or requirement that he subscribe to any particular statement of religious beliefs, and no requirement that his course material should contain any religious component. Likewise, Michael Ng, a lecturer in PLU's Department of Languages and Literature, testified that when he was hired he was not advised of any religious requirement. He was told that his personal beliefs were not relevant to whether he is an excellent teacher.[23]

2. Analysis

We find, for the following reasons, that although PLU meets the threshold requirement of holding itself out as creating a religious educational environment, it does not hold out the petitioned-for contingent faculty members as performing a religious function in support of that environment. Accordingly, we will assert jurisdiction over the petitioned-for faculty members.

PLU's public representations generally emphasize a commitment to academic freedom, its acceptance of other faiths and its explicit deemphasis of any specific Lutheran dogma, criteria, or symbolism. Neither Lutheranism specifically, nor religion in general, are featured prominently on PLU's website, and communications to potential and admitted students emphasize that students of all faiths, or no faith at all, are welcome at PLU. Nevertheless, PLU holds itself out as a providing a religious educational environment in statements to prospective students on PLU's website , articles of incorporation, bylaws, faculty handbook, course catalog, and other publications. These discuss its Lutheran heritage, and its stated purpose, in its bylaws, to "establish[] and maintain[] within the State of Washington an institution of learning of university rank in the tradition of Lutheran higher education . . . , affiliated with the Evangelical Lutheran Church in America . . . ." The faculty handbook discusses PLU's history and concludes by stating, "the faculty of Pacific Lutheran University enjoy the support of a religious community committed to liberal learning at the service of a just, peaceful, and humane future." PLU also discusses its heritage in materials provided to prospective students, including a flyer entitled, "What's In A Middle Name," which "explain[s] what it means to attend a Lutheran University and explains how Lutheran theology underscores what a Lutheran University

[22] The Faculty Constitution, in a section on individual rights and duties, says that an appointed faculty member "becomes a member of a community of scholars who respect and uphold the principles of Lutheran Higher Education with certain rights and obligations. Preeminent among these is the obligation to uphold the objectives of the university and the right of academic freedom in order that the obligation of examining and interpreting special areas of instruction and may be freely and thoroughly exercised." In our view, this general and aspirational statement emphasizes the religious history and identity of the school, but does not indicate that faculty members are expected to perform any specific religious role. Nothing in the statement indicates that faculty members' job responsibilities include any religious component.

[23] We include this testimony in our consideration as evidence of communications PLU made to prospective faculty members.

does."[24] On its website, PLU describes for students how they can "grow their faith," by listing various opportunities it makes available for students, including religious services and religious activities.

As discussed above, this threshold requirement does not require a rigorous showing of PLU's religious character. Accordingly, based on the above-cited evidence, we find that PLU has met the initial threshold of showing that it holds itself out as providing a religious educational environment. As a result, First Amendment concerns surrounding assertion of the Board's jurisdiction are raised, and we next determine whether PLU holds its faculty members out as performing a religious function.

An examination of the evidence concerning faculty members shows that PLU does not, in fact, hold them out as performing any religious function in creating or maintaining its religious educational environment. Although PLU proclaims its Lutheran heritage in its bylaws, for example, the section of the bylaws governing the faculty is silent with respect to their role in fostering that heritage. The same is true with respect to PLU's articles of incorporation. And although the faculty handbook broadly covers issues such as the obligation of faculty members to engage in academic advising and evaluate administrators, and sets forth instructional responsibilities and course procedures, it does not require or encourage contingent faculty members to perform any religious function. Likewise, the Division of Humanities' Statement of Principles and Best Practices Relating to Contingent Faculty is silent regarding any religious function served by contingent faculty members.

Moreover, throughout its substantial website, PLU does not indicate that its contingent faculty members play a role in advancing the Lutheran religion. And PLU makes clear that it welcomes the diversity of its faculty and the various perspectives they bring to its community without referencing any religious function that they perform. This is encapsulated in PLU's "What's In A Middle Name" flyer:

> We don't fear those who are not like us because we know that others have a perspective we might need to hear. We embrace diversity with great joy. On our campus we have professors, staff, and students of every race, many nationalities, different Christian traditions, different faiths, or no faith. We do not see this as a weakness but as a great strength for it is in the interchange of differing perspectives and ideas that most often truth is found. At a Lutheran university you will find a great variety of people from many cultures and from all walks of life. We embrace this diversity as a gift from God to be treasured.

PLU does not take into account a contingent faculty member's adherence to Lutheranism, membership in a Lutheran congregation, or knowledge of Lutheranism in making hiring, promotion, tenure, or evaluation decisions. PLU's contingent faculty job postings do not list the need to serve any religious function or be or become knowledgeable about the Lutheran religion. For instance, a posting for a full-time contingent faculty position—visiting assistant professor/instructor of computer engineering—for the 2013–2014 academic year, stated that the applicant must be able to teach computer engineering courses, and that "[a] demonstrated commitment to excellence in teaching, especially courses involving group projects and labs is essential. Preference will be given to candidates specializing in electronics (both analog and digital). Applicants with expertise in control systems, robotics, or general signals/systems will also receive strong consideration." The same is true with respect to the other job postings in the record for sssistant professor positions in chemistry, biology, marriage and family therapy, and sociology.

PLU's contingent faculty contracts likewise do not mention religion in general (excepting the religion department) or Lutheranism in particular, though the contracts do state that PLU requires the individual "to be committed to the mission and objectives of the University."[25] Further, contingent faculty members testified at the preelection hearing, without any rebuttal by PLU, that there was no discussion about religion, in any context, during their interviews, no requirement that course material requires a religious component and no requirement that they perform any function in support of a religious educational environment.[26]

In short, there is nothing in PLU's governing documents, faculty handbook, website pages, or other material, that would suggest to faculty (either existing or prospective), students, or the community, that its contingent faculty members perform any religious function. Ac-

[24] PLU is also organized as an educational nonprofit and so is not commercial in nature.

[25] As discussed above, this type of representation does not communicate the message that employees are expected to perform a specific religious function and is not specifically linked to any job duties to be performed by the faculty. Indeed, the mission of the University as stated in its bylaws as "educating students for lives of thoughtful inquiry, service, leadership, and care for others persons, for their communities and for the earth" describes values that are emphasized by nonreligious institutions as well. Similarly, the faculty handbook describes PLU "as steeped in the Lutheran commitment to freedom of thought"—a core commitment shared by secular academic institutions.

[26] The personnel policy in the faculty handbook assures faculty members that they enjoy all rights of their individual contracts as well as of "the law of the land."

cordingly, although we find that PLU holds itself out as providing a religious educational environment, we find that we may assert jurisdiction because PLU does not hold its petitioned-for faculty members out as performing any religious function.

III. MANAGERIAL STATUS OF FULL-TIME CONTINGENT FACULTY MEMBERS

A. Introduction

The Petitioner seeks to represent a unit consisting of all contingent (nontenure eligible) faculty employed by PLU who teach a minimum of three credits during an academic term.[27] Currently, their number stands at approximately 176. PLU claims that approximately 39 of these contingent faculty—those who are employed full time—are managerial employees and therefore excluded from the Act's protections.[28] The Regional Director found that PLU did not prove that claim and therefore included them in the proposed unit.[29] As stated, PLU requested review, which the Board granted. The Board subsequently issued a notice and invitation to file briefs to assist the Board in reviewing its application of the Supreme Court's decision in *Yeshiva*.

Upon full consideration of the record, the briefs by the parties and amici, the Supreme Court's decision in *Yeshiva*, and the Board's 30-plus years applying *Yeshiva*, we have decided to revise our analytical framework for determining the managerial status of university faculty. Ultimately, our analysis is designed to answer the question whether faculty in a university setting actually or effectively exercise control over decision making pertaining to central policies of the university such that they are aligned with management. In making this determination, we will examine the faculty's participation in the following areas of decisionmaking: academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions, giving greater weight to the first three areas than the last two. This examination will be considered in the context of the university's decision making structure and administrative hierarchy, as well as the nature of the employment relationship of the faculty in issue. Applying this framework here, we conclude that the approximately 39 full-time contingent faculty do not exercise managerial authority on behalf of PLU. They are therefore properly included in the proposed unit.

B. Yeshiva and Its Progeny

1. The *Yeshiva* decision

More than 30 years ago, the Supreme Court found that the faculty of Yeshiva University were managerial employees, who are "excluded from the categories of employees entitled to the benefits of collective bargaining under the National Labor Relations Act." 444 U.S. at 674. In reaching this conclusion, the Court recognized that the "authority structure of a university does not fit neatly within the statutory scheme we are asked to interpret." Id. at 680. In contrast to the model of management-employee relations that developed in the hierarchical companies of industry, the Court explained that "authority in the typical 'mature' private university is divided between a central administration and one or more collegial bodies." Id. As a result, the Court agreed with the Board that "principles developed for use in the industrial setting cannot be imposed blindly on the academic world." Id. at 681.

Nonetheless, the Court observed that the "business" of the university is education. Id. at 688. Drawing from its precedent, the Court defined managerial employees in a university setting as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." Id. at 682, citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The Court explained, managerial employees "must exercise discretion within, or even independently of, established employer policy and must be aligned with management." Id. at 683. To determine whether an employee is "aligned with management," the Court held that an employee must "represent[] management interests by taking or recommending discretionary actions that effectively control or implement employer policy." Id. (citations omitted). The Court further observed that "the relevant consideration is effective recommendation or control rather than final authority." Id. at 683 fn. 17 The Court emphasized, "the fact that the administration holds a rarely exercised veto power does not diminish the faculty effective power in policymaking and implementation." Id.

Agreeing with the court of appeals, the Supreme Court found that the Yeshiva faculty "substantially and pervasively operate the enterprise." Id. at 691 (quotations omitted):

> They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively

[27] Although the University maintains that all parties assumed that the regular faculty are managerial employees, in fact their status was neither placed in issue nor discussed by either party.

[28] By challenging the status of full-time contingent faculty only, the University effectively concedes that the part-time contingent faculty are not managerial.

[29] The Petitioner stated at the hearing that it would proceed to election on any unit found appropriate.

> decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school.

Id. at 686. Analogizing to the industrial model, the Court summarized the circumstances at Yeshiva: "the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served." Id. Given the "business" of the university, the Court stated that "it is difficult to imagine decisions more managerial than these." Id.

In reaching its conclusion, the Court observed that Yeshiva did not contest that the faculty were professionals under Section 2(12) of the Act. Id. at 681. And it recognized that "[t]here may be some tension between the Act's exclusion of managerial employees and its inclusion of professionals, given that most professionals in managerial positions continue to draw on their special skills and training." Id. at 686. But the Court found that the interests of the faculty and their university often closely align. Such an alignment is particularly true for "a university like Yeshiva, which . . . requires faculty participation in governance because professional expertise is indispensible to the formulation and implementation of academic policy." Id. at 689. To allow the faculty at Yeshiva to unionize, the Court concluded, would serve to divide the loyalties of the faculty. Id. at 688–690.

The Court recognized the limit of its holding, however, acknowledging that its decision was only a starting point. It observed that "employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably involved some divided loyalty." Id. at 690. In the university setting, for instance, "professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research." Id. at 690 fn. 31.

2. Post-*Yeshiva*

Since the Court's *Yeshiva* decision, the Board has issued nearly two dozen published decisions addressing the managerial status of faculty at colleges and universities.[30] In those cases, the Board examined various areas of university decision-making in which the faculty participated. The breadth of this examination has been sweeping. *See, e.g., University of Dubuque*, 289 NLRB 349, 353 (1988) (taking into account "the many different combinations and permutations of influence that render each academic body unique"). The Board has examined faculty participation in decisions affecting, among other things, curriculum, certificate/program/degree offerings, university/academic structure, graduation requirements/lists, honors, university catalogues, admissions, enrollment, matriculation, student retention, tuition, finances, hiring/firing, promotions, tenure, salary, evaluations, sabbaticals, teaching methods, teaching assignments, grading policy, syllabi, course size, course load, course content, textbooks, academic calendar, and course schedules. The Board never specifically addressed the relative significance of particular areas of decision-making, although it tended to give more weight to those decisions deemed "academic" rather than "non-academic" because, as the Supreme Court said, "academic" decisions affect the "business" of the university.[31] The Board also examined whether faculty participation in a particular area of decision-making amounted to effective control over that area, "whether individually, by department consensus, through . . . committees, or in meetings of the whole." *Lewis & Clark College*, supra at 161.

Because innumerable permutations can result when examining more than two dozen areas over which faculty may control or make effective recommendations, the Board's decisions have been criticized as failing to provide sufficient guidance regarding the importance and relative weight of the factors examined. For instance, in *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (2004), denying enf. 338 NLRB No. 92 (2003) (not reported in Board volumes), the United States Court of Appeals for

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[30] *LeMoyne-Owen College*, 345 NLRB 1123 (2005); *University of Great Falls*, 325 NLRB 83 (1997), affd. 331 NLRB 1663 (2000), reversed on other grounds 278 F.3d 1335 (D.C. Cir. 2002; *Elmira College*, 309 NLRB 842 (1992); *Lewis & Clark College*, 300 NLRB 155 (1990); *St. Thomas University*, 298 NLRB 280 (1990); *University of Dubuque*, 289 NLRB 349 (1988); *Livingstone College*, 286 NLRB 1308 (1987); *American International College*, 282 NLRB 189 (1987); *Boston University*, 281 NLRB 798 (1986), affd. sub nom. *Boston University Chapter, AAUP v. NLRB*, 835 F.2d 399 (1st Cir. 1987); *Marymount College*, 280 NLRB 486 (1986); *Kendall School of Design*, 279 NLRB 281 (1986), enfd. 866 F.2d 157 (6th Cir. 1989); *Cooper Union of Science & Art*, 273 NLRB 1768 (1985), enfd. 783 F.2d 29 (2d Cir. 1986); *University of New Haven*, 267 NLRB 939 (1983); *Lewis University*,265 NLRB 1239 (1982), enf. denied 765 F.2d 616 (7th Cir. 1985);*College of Osteopathic Medicine*, 265 NLRB 295 (1982); *Puerto Rico Junior College*, 265 NLRB 72 (1982); *Loretto Heights College*, 264 NLRB 1107 (1982), enfd.742 F.2d 1245 (10th Cir. 1984); *Florida Memorial College*, 263 NLRB 1248 (1982), enfd. 820 F.2d1182 (11th Cir. 1987); *New York Medical College*, 263 NLRB 903 (1982); *Duquesne University*, 261 NLRB 587 (1982); *Thiel College*, 261 NLRB 580 (1982); *Montefiore Hospital*, 261 NLRB 569 (1982); *Bradford College*, 261 NLRB 565 (1982); and *Ithaca College*, 261 NLRB 577 (1982).

[31] See, e.g., *Lemoyne-Owen College*, supra, 345 NLRB at 1130–1131; *Livingstone College*, supra, 286 NLRB at 1314.

the District of Columbia Circuit faulted the Board for failing to explain adequately how its disposition of the case was consistent with its precedent. Writing for the court, then-Judge Roberts observed,

> The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication. The open-ended rough-and-tumble of factors on which *Yeshiva* launched the Board and higher education can lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why. . . . In the absence of an explanation, the totality of the circumstances can become simply a cloak for agency whim—or worse.

Id. at 61 (internal citations and quotations omitted). In *Point Park University v. NLRB*, 457 F.3d 42 (2006), denying enf. 344 NLRB 275 (2005), the D.C. Circuit again criticized the Board: "The Regional Director . . . produced a 108-page decision with 59 pages of factual findings, and 16 pages of legal analysis . . . . Yet nowhere in his lengthy decision did the Regional Director state, as we held in *LeMoyne-Owen* that he must, which factors were 'significant and which less so, and why.'"

C. Analytical Framework for Determining Managerial Status of University Faculty

The *Yeshiva* Court established some basic markers—faculty who determine the product to be produced, on what terms, and for whom are likely to be managerial, whereas faculty whose purview is limited to their own academic affairs likely are not. But of course, most cases fall somewhere along the spectrum between these two poles. Because the Court did not prescribe an analytical framework to determine the status of faculty, it has been left to the Board to devise such a framework, and that process continues today. We have thus undertaken to develop a more workable, more predictable analytical framework to guide employers, unions, and employees alike. See, e.g., *Gitano Distribution Center*, 308 NLRB 1172, 1176 (1992).[32]

In defining this new approach, we are guided by *Yeshiva*. The Court's overarching determination was that the faculty in question "substantially and pervasively" operated the university by exercising extensive control over decision-making and playing a "crucial role … in determining . . . central policies of the institution." *Yeshiva University*, supra, 444 U.S. at 679 (internal quotations omitted). This language clearly contemplates that managerial employees will have a significant breadth and depth of decision-making authority, which was borne out in *Yeshiva* itself.

For instance, in analyzing the breadth and depth of the Yeshiva faculty's decision making, the Court observed, "Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *Yeshiva*, supra, 444 U.S. at 690. In the university context, professional faculty typically teach and research. As a result, "[i]t is plain . . . that professors may not be excluded merely because they determine the content of *their own* courses, evaluate *their own* students, and supervise *their own* research." Id. at 690 fn. 31 (emphasis added). While some areas of faculty decision-making involve policies largely limited to their own classrooms and labs, others involve policies that have a greater effect on the university as a whole. It is when faculty exercise actual or effective decision making authority over policies for the university as a whole that their interests begin to align with management, thereby creating the problem of divided loyalty that the managerial employee exception seeks to avoid. Id. at 690. Ultimately, the Court characterized as "[t]he controlling consideration in this case . . . that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial." Id. at 686. It found they did. "To the extent the industrial analogy applies," the Court concluded, "the faculty determine the product to be produced, the terms upon which it will be offered, and the customers who will be served." Id.

Accordingly, as detailed below, we too shall examine both the breadth and depth of the faculty's authority at the university. In examining the breadth of the faculty's authority, we will give more weight to those areas of policy making that affect the university as a whole, such as the product produced, the terms on which it is offered, and the customers served. In examining the depth of their authority, we seek to determine whether the faculty actually exercise control or make effective recommendations over those areas of policy; this inquiry will necessarily be informed by the administrative structure of the particular university, as well as the nature of the faculty's employment with that university.[33]

[32] Our dissenting colleagues criticize our framework for being too narrow in identifying managerial employees. In revisiting this issue, we are mindful of the fundamental principle that "exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996); see also *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985), affd. in relevant part 794 F.2d 527 (9th Cir. 1986)(supervisory status).

[33] The Board has long held that the party seeking to exclude employees as managers bears the burden of proving their managerial status.

1. Areas of university decision making

With an eye toward "the product to be produced, the terms upon which it will be offered, and the customers who will be served," we organize our review of faculty decision-making into five general areas, which we further denote as either primary, i.e., more important as they affect the University as a whole, or secondary, i.e., less important.[34]

a. Primary areas of decision making

Academic Programs: This decision making area covers topics such as the university's curricular, research, major, minor, and certificate offerings and the requirements to complete successfully those offerings. These topic areas affect the very nature of an academic institution, reflect its goals and its aspirations, and clearly fall outside the routine discharge of a professor's duties. They effectively determine the university's "product" and the terms upon which that "product" is offered to its students. Like any business, changes to this area may be made to provide new products appealing to greater numbers of customers, to eliminate old products that are no longer appealing, or for other reasons. See, e.g., *St. Thomas University*, supra, 298 NLRB 280 (creation of law school). Changes in any of these areas will often affect and necessitate a change to the university's organization and structure, such as the creation or elimination of a new division or department. Thus, this decision-making area will necessarily involve consideration of organizational and structural changes.

Enrollment Management: This decision-making area dictates the size, scope, and make-up of the university's student body.[35] The targeted student body is a fundamental choice for any university, and the ability to attract and retain those students affects polices throughout the university. In keeping with the industrial analogy, enrollment decisions are managerial when they directly affect the customers who will be served by the university—i.e., its students, without which the university cannot sustain itself.

Finances: The power to control or make effective recommendations regarding financial decisions—both income and expenditure—is one of the hallmarks of managerial control across all industries. See, e.g., *General Dynamics Corp.*, 213 NLRB 851, 860 (1974). Financial decisions have broad effects across a university, and are not localized in a professor's classroom or lab. What the school charges for its services—net tuition (tuition less financial assistance)—also sets the price point for its student-customers, and as any student (or parent) knows, net tuition plays a significant role in determining which university a student will attend.

b. Secondary areas of decision making

Academic Policy: This decision-making area covers topics such as teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy. They are areas addressed in *Yeshiva*, but are not as central to the institution's offerings as the primary decision making area of academic programs. While determinations of academic policy apply more broadly than the faculty's classroom or research project, they tend to be crafted more generally, giving the faculty latitude within their individual classrooms or research projects. As such, this decision making area does not demonstrate the same alignment with management interests as do the primary decision-making areas. Likewise, these policies do not have the same impact on the product delivered as does control over academic programs.

Personnel Policy and Decisions: The Court in *Yeshiva* relied on control of personnel policy and decisions in making its managerial finding, albeit not "primarily." 444 U.S. at 686 fn.23. Faculty control over personnel policy, including hiring, promotion, tenure, leave, and dismissal, goes beyond an individual faculty member's classroom or research project in that it affects the make-up of the academy. To that extent, it potentially implicates the divided loyalty concern that underlies the managerial exception. But this decision-making often only indirectly implicates the product to be produced, the terms in which it is offered, and the customers sought.

See *Montefiore Hospital & Medical Center*, 261 NLRB 569, 572 fn. 17 (1982) ("we do not believe the Court intended to preclude the Board from requiring the party seeking to exclude either a whole class of employees or particular individuals as managerial to come forward with the evidence necessary to establish such exclusion"); cf. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712 (2001) (burden of proving supervisory status is on the party alleging such status). We have consistently applied this principle in faculty cases, see, e.g., *University of Great Falls*, above, 325 NLRB at 93, and we adhere to it today.

[34] In accordance with the D.C. Circuit's instruction that we develop a standard that will lead to increased "predictability and intelligibility," *LeMoyne-Owen*, 357 F.3d at 61, we have consolidated the numerous areas of decisionmaking into a much more manageable five. We understand that faculty may not control or effectively recommend all aspects of a particular decision-making area. Nonetheless in keeping with the framework discussed in this decision, we will assess their actual involvement in university decisionmaking when determining whether the faculty at issue are managerial employees as defined in *Yeshiva*.

[35] Board and court decisions have variously used the terms "admissions," "enrollment," and "matriculation." We perceive no significant difference in these terms as they relate to the considerations at issue here.

2. Actual control or effective recommendation

In order for decisions in a particular policy area to be attributed to the faculty, the party asserting managerial status must demonstrate that faculty actually exercise control or make effective recommendations.[36] *Yeshiva*, 444 U.S. at 683 fn. 17 ("the relevant concern is effective recommendation or control"); *American International College*, supra, 282 NLRB at 202 ("the faculty of the American International College exercises effective control"); *Point Park University*, supra.

First, the party asserting managerial status must prove actual—rather than mere paper—authority. See *Point Park University*, 457 F.3d at 48 (emphasizing that the Board must "look beyond self-serving descriptions of the role of faculty or the administration of a university" to the "actual role of the faculty"). A faculty handbook may state that the faculty has authority over or responsibility for a particular decision-making area, but it must be demonstrated that the faculty exercises such authority *in fact*. We emphasize the need for specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision-making area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed.[37]

Second, to be "effective," recommendations must almost always be followed by the administration. See *Ithaca College*, supra, 261 NLRB at 577, 578 (observing that recommendations "invariably . . . followed" and noting that the dean of one school approved every one of 500 faculty curriculum recommendations); *College of Osteopathic Medicine*, supra, 265 NLRB at 297 (finding that faculty recommendations are "almost always followed by the administration"); *Livingstone College*, supra, 286 NLRB at 1310, 1313 (finding faculty recommendations generally approved by the administration and no evidence of faculty decisions countermanded); *St. Thomas University*, supra, 298 NLRB at 286 (finding faculty committee recommendations not effective because recommendations usually ignored or reversed by the administration); *Elmira College*, supra, 309 NLRB at 845, 850 (finding that all curriculum recommendations were approved, and that the creation of core curriculum without faculty vote several years earlier was isolated, remote, and under different administrators); *University of Great Falls*, supra, 325 NLRB at 83 (finding *Elmira College* distinguishable because "unlike here, there was clear evidence that faculty recommendations were generally followed").[38] Further, faculty recommendations are "effective" if they routinely become operative without independent review by the administration. See *Lewis and Clark College*, supra, 300 NLRB at 163 (1990)(finding faculty are managerial despite administrative hierarchy where recommendations are routinely approved by administration; to negate managerial status, there must be evidence that the administrators are relied on for their independent review and recommendation); *University of Great Falls*, 325 NLRB at 95–96 (finding that faculty are not managerial where record is replete with evidence of committee recommendations but vague or silent as to whether recommendations generally and routinely were approved by the administration or whether those recommendations were independently reviewed and evaluated by higher-ranking administrators).[39]

Finally, an evaluation of whether faculty actually exercise control or make effective recommendations requires our inquiry into both the structure of university decision-making and where the faculty at issue fit within that structure, including the nature of the employment rela-

[36] In those instances where a committee controls or effectively recommends action in a particular decision-making area, the party asserting that the faculty are managers must prove that a majority of the committee or assembly is faculty. If faculty members do not exert majority control, we will not attribute the committee's conduct to the faculty. See, e.g., *University of Great* Falls, supra, 325 NLRB at 95.

[37] Member Miscimarra contends that we "disregard" faculty handbooks and job descriptions as "mere paper authority." That is not the case. Such evidence is, of course, relevant. But, for purposes of determining managerial status, the actual practice of the faculty is much more probative. Conclusory statements, such as those appearing in handbooks and job descriptions, give the Board little upon which to make a sound judgment as to the faculty's managerial status. As a result, the Board has often looked at the actual practice at the university, and not merely the faculty's paper authority. See, e.g., *Bradford College*, 261 NLRB 565, 566 (1982); *Thiel College*, 261 NLRB 580, 586 (1982); *St. Thomas University*, 298 NLRB 280, 286 fn. 48 (1990). Cf. *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 290 fn. 19 (1974) ("Of course, the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are 'managerial' must be answered in terms of the employees' *actual* job responsibilities, authority, and relationship to management.") (Emphasis added.) A party seeking to exclude employees from the protection of the Act should be able to provide examples of purported managerial authority.

[38] Our dissenting colleagues take issue with this "onerous" standard. But, as seen in the cases cited, the Board has regularly required a substantial level of acquiescence in faculty recommendations in order to find those recommendations "effective."

[39] Member Johnson argues that our inclusion of independent review is "serious error," creating false dichotomies and making it effectively impossible for faculties at universities—places rich in dialogue—to be managerial employees. We have no such fears. The Board has extensive experience applying this well-established standard. See, e.g., *Yeshiva*, supra, 444 U.S. at 683 fn. 17; *DirectTV*, 357 NLRB 1747, 1747–1748 (2011).

tionship held by such faculty (e.g., tenured vs. tenure eligible vs. nontenure eligible; regular vs. contingent).[40]

The Court in *Yeshiva* examined the authority structure of the university to determine the faculty's authority. It described the nature of university decision-making, as it observed it in 1980:

> The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry. In contrast, authority in a typical "mature" private university is divided between a central administration and one or more collegial bodies. This system of "shared authority" evolved from the medieval model of collegial decisionmaking in which guilds of scholars were responsible only to themselves.

Id. at 680 (citations omitted). This system of collegial decisionmaking arose because universities required the professional expertise of the faculty in the formulation and implementation of academic policy. Id. Nonetheless, the Court recognized that not all universities were so organized, noting that its decision was only a "starting point" and acknowledging that there "may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominately nonmanagerial." 444 U.S. at 866 fn. 31.

Time appears to have confirmed the wisdom of the Court's decision to address only the case then before it. Over the 30-plus years since *Yeshiva* was decided, the university model of delivering higher education has evolved considerably. As one commentator has explained:

> The rise of consumerism, a growing push for accountability and declining public support for education are contributing to what many call the 'corporatization' of higher education. Nonprofit colleges and universities are adopting corporate models, cutting costs and seeking profit-making opportunities.[41]

Indeed, our experience applying *Yeshiva* has generally shown that colleges and universities are increasingly run by administrators, which has the effect of concentrating and centering authority away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself.[42] Such considerations are relevant to our assessment of whether the faculty constitute managerial employees.

A common manifestation of this "corporatization" of higher education that is specifically relevant to the faculty in issue here is the use of "contingent faculty," that is, faculty who, unlike traditional faculty, have been appointed with no prospect of tenure and often no guarantee of employment beyond the academic year.[43]

There are many important ways, besides their tenuous employment relationship, in which contingent faculty differ from their tenured and tenure-eligible colleagues. Contingent faculty are often employed in teaching- or research-only positions, with little to no support for faculty development or scholarship, providing them with a very different relationship to the university and its functions. This relationship is reflected in the different man-

[40] In *Yeshiva*, the Court acknowledged the possibility "that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates." 444 U.S. at 866 fn. 31. We do not draw such a line in this case. However, as the Court's observation recognizes, the structure of the university administration and the nature of the faculty's employment relationship may well bear on whether the faculty in issue control or make effective recommendations for specific areas of university decision-making. To that extent, both the structure of the university administration and the nature of the faculty's employment relationship will be relevant to our analysis.

[41] Rebecca Clay, The Corporatization of Higher Education: The Intermingling of Business and Academic Cultures Brings Both Concerns and Potential Benefits to Psychology, 39 MONITOR ON PSYCHOLOGY 50 (2008).

[42] See *Puerto Rican Junior College*, 265 NLRB 72 (1982) (effective faculty influence declines as promotion evaluations ascend the administrative hierarchy); *Cooper Union of Science & Art*, 273 NLRB 1768 (1985) (faculty authority, although considerable, frequently made ineffective by administration decisions that exclude faculty or are made over faculty opposition); *St. Thomas University*, 298 NLRB 280 (1990) (Division Chairperson Committee comprising dean of faculty and five division chairpersons is "effective buffer" between the faculty and top management and obviates the need to rely on the faculty's provisional judgment). See also, Benjamin Ginsberg, *The Fall of the Faculty: The Rise of the All-Administrator University and Why it Matters*, 28 (Oxford University Press, 2011); Jeffrey Brainard, Paul Fain & Kathryn Masterson, "Support-Staff Jobs Double in 20 Years, Outpacing Enrollment," *The Chronicle of Higher Education* (April 24, 2009).

[43] "[T]he increasing use of contingent faculty, to the point where the faculty itself can be described as contingent, clearly comprises a major component of a fundamental change in the nature of higher education institutions and their role in a democratic society." John W. Curtis & Monica F. Jacobe, *Consequences: An Increasingly Contingent Faculty*, AAUP CONTINGENT FACULTY INDEX 15 (2006). The university professorate, once dominated by tenured or tenure-track faculty, now counts ever more nontenure eligible faculty among its members. See, e.g., Adrianna Kezar & Daniel Maxey, THE CHANGING FACULTY AND STUDENT SUCCESS 1 (2012) ("In 1969, tenured and tenure-track positions made up approximately 78.3% of the faculty and non-tenured track positions comprised about 21.7%. Forty years later, in 2009 these proportions had nearly flipped; tenured and tenure-track faculty had declined to 33.5% and 66.5% of faculty were ineligible for tenure." (citations omitted)); Michael Klein, *Declaring an End to "Financial Exigency"?: Changes in Higher Education Law, Labor, and Finance, 1971-2011*, 38 J.C. & U.L. 221, 271 (2011–2012) ("Between 1995 and 2007, contingent faculty came to outnumber tenured faculty."). Universities are increasingly turning to this contingent workforce in part because they are often paid less, helping to reduce costs, and because they also give the institutions flexibility to respond to fluctuations in university and course enrollment. See, e.g., Klein, supra, at 272.

ner of their employment by the university.[44] Their appointment and/or reappointment often depends on the discretion of a single administrator, "producing the kind of hesitancy regarding controversy or offense in teaching and research that limits academic freedom."[45] As a result, contingent faculty "tend not to be involved in shared governance" because of the precarious nature of their appointment.[46] Given all of this, the net result of their unique, temporary relationship frequently is "[a] diminution of the faculty voice."[47] Our inquiry, therefore, must include an examination of whether the nature of the employment in issue prevents those affected from helping shape the academy as a whole at their individual institutions.

In sum, where a party asserts that university faculty are managerial employees, we will examine the faculty's participation in the following areas of decisionmaking: academic programs, enrollment management, finances, academic policy, and personnel policies and decisions, giving greater weight to the first three areas than the last two areas. We will then determine, in the context of the university's decision making structure and the nature of the faculty's employment relationship with the university, whether the faculty actually control or make effective recommendation over those areas. If they do, we will find that they are managerial employees and, therefore, excluded from the Act's protections. We turn now to the present case.

D. Full-Time Contingent Faculty at PLU

1. Nature of contingent faculty employment relationship

The use of full-time contingent faculty at PLU is consistent with the national pattern described above.[48] PLU employs over 350 faculty, approximately 50 percent of whom are contingent. Contingent faculty are hired on yearly contracts. Although these are yearly appointments, a number of contingent faculty have been teaching at PLU for decades. According to a spring 2011 survey of contingent faculty by the PLU chapter of the American Association of University Professors ("Spring 2011 survey"), contingent faculty of PLU (who responded to the survey) "represent 576+ total years of teaching, 512+ of those at [PLU]. A range of 1-40 years at [PLU] was reported, with many of the respondents being long-term affiliates." Despite these, at time, lengthy tenures, nearly 30 percent of respondents said that they have never been told of the actual duration of their appointment. As a result, PLU has created a sizeable cadre of faculty, who, despite their longevity, can be terminated at the end of any given academic period.

Typically, PLU hires contingent faculty to replace regular faculty who are on sabbaticals, in response to increased enrollment demands, or while PLU seeks a replacement for a tenured faculty member. PLU does not accord all contingent faculty the same benefits as their tenure-track faculty colleagues and does not accord them support for their professional development or research activities. According to the Spring 2011 survey, 56 percent of respondents said that PLU does not support their travel to professional meetings, 30 percent said they did not have access to University-sponsored professional development, 77 percent said they were not able to submit external research grant proposals with institutional support, and 45 percent said they were not regularly evaluated. Additionally, 29 percent had never had a discussion with their supervisor regarding expectations for teaching, 52 percent had never had a discussion regarding expectations for university service, and 67 percent had never had a discussion about expectations for scholarship.

2. Authority of full-time contingent faculty in University Governance

Consistent with the national trend, the voice of full-time contingent faculty in university governance is limited both by their uncertain position within the university community as well as by restrictions specifically imposed on them by PLU.

The faculty constitution states that that the "governing body" of the faculty is the faculty assembly. The constitution also creates the faculty committee system, which, according to the faculty bylaws, consists of university committees and faculty standing committees that make recommendations to the faculty assembly.[49] Faculty governance is generally organized in accordance with PLU's three divisions and four schools and their constituent departments.[50]

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[44] Curtis & Jacobe, suprafn. 43, at 7.

[45] Id.

[46] Clay, supra fn. 41.

[47] Curtis & Jacobe, supra fn. 43, at 16.

[48] As we have indicated, in addition to full-time and part-time contingent faculty, the University's faculty consists of "regular" tenure-eligible faculty, administrative faculty, and emeriti faculty.

"Administrative" faculty status is given to the occupants of the following positions: the president, the provost/dean of graduate studies, the vice president for development and university relations, the vice president for finance and operations, the vice president for admission and enrollment services, the vice president of student life/dean of students, and the academic deans.

[49] Under the bylaws, both faculty and university committees are "standing" committees; for purposes of clarity, we will use "faculty standing committee" and "university committee" to distinguish between the two. The faculty committee system also includes ad hoc committees.

[50] PLU is composed of the division of humanities, the division of natural sciences, the division of social sciences, the school of arts and

Divisions, Schools, and Departments: The record reflects that these organizational units, among other things, originate curriculum revisions and revisions to academic policies, establish graduation standards, determine student scholarship standards and recipients, and participate in the selection of new faculty. Additionally, proposals for new majors, minors, departments, divisions, and schools frequently originate here. These changes typically proceed through the faculty standing committee on educational policies and, if necessary, the faculty assembly. Three divisions also elect their deans, and departments elect their respective department chair.[51]

Full-time contingent faculty may participate at the department level on various curriculum matters, but the extent of any actual participation was not explained by PLU. Further, PLU failed to establish that full-time contingent faculty have a vote on any of these matters within their department or division or school. In the division of humanities, regular and contingent faculty recently voted on a "Statement of Principles and Best Practices" for the division, which appears to recommend giving full-time contingent faculty voting privileges on all matters except personnel. The record does not indicate, however, that the recommendation was ever implemented. And the record does not demonstrate that the full-time contingent faculty have actually voted on any divisional matters. Further, the record contains no evidence that full-time contingent faculty in other divisions or schools have any right to vote within their respective divisions, schools, or constituent departments.

University Committees: University committees must be authorized by the faculty assembly, the president, and the appropriate representative authority for non-faculty members of the proposed committee. According to the handbook, the membership of each current university committees include a mix of faculty, administrators and students, but the faculty are not a majority on any committee. The duration of a faculty appointment to a university committee is 3 years. Full-time contingent faculty were barred from serving on university committees until 2013, when the faculty assembly voted to remove that prohibition. There is no evidence, however, of full-time contingent faculty currently serving on a university committee. And practically speaking, it is uncertain how many full-time contingent faculty, who serve only 1-year appointments, are even eligible to serve on university committees given that committee appointments last for 3 years.[52]

Currently, the university committees cover topics such as: long-range planning, diversity, budget,[53] retirement fund, strategic enrollment management, university media, institutional animal care and use, and campus ministry. Recommendations from university committees go to the president's council, which consists of the president, provost, and vice presidents.[54] These recommendations from the university committees appear to be purely advisory. For instance, the University provost testified as follows regarding the university budget committee: "The word, advisory, is key. They don't decide, but they offer an avenue for input to the administration." In any event, according to the provost's testimony, none of the faculty has a vote on the size of the student body, admissions standards, retention standards, tuition and fees, or distribution of financial aid.

Faculty Standing Committees: Faculty standing committees are created by the faculty assembly. Membership on faculty standing committees is limited to regular faculty; contingent faculty are expressly barred from serving.

The eight faculty standing committees cover faculty governance, educational policies, admission and retention, rank and tenure, faculty affairs,[55] campus life,[56] global education,[57] and instructional resources.[58] The

communication, the school of business, the school of education, and the school of nursing. Divisions and schools may be further divided into departments by subject matter. Deans head the three divisions and four schools; regular faculty serve as department chairs.

[51] The deans of the four schools are hired by PLU.

[52] Additionally, as seen for the university budget committee, faculty membership on university committees is often drawn from faculty standing committees. As such, full-time contingent faculty would not be able to fill those seats.

[53] The provost testified that the university budget committee makes recommendations on tuition, among other things.

The Regional Director found that the university budget committee also counts faculty as a majority of its membership. This appears to be incorrect. Per the faculty handbook, its membership is: the president; the provost; the vice president for finance and operations (chair); one member each from the educational policies faculty standing committee, faculty affairs faculty standing committee, and the instructional resources faculty standing committee; two budget heads selected by the president, one from the college of arts and sciences, one from the professional schools; two students; and two administrative staff.

[54] There is no evidence that university committee recommendations are forwarded to the faculty assembly for consideration.

[55] This committee recommends policy regarding faculty welfare, including scholarships and grants, faculty leaves, fringe benefits, retirement, and salaries and advises the administration regarding faculty concerns regarding allocation of budgetary funds.

[56] This committee "consider[s] in a coordinated fashion matters pertaining to the academic and social aspect of campus life," including the academic integrity policy.

[57] This committee "review[s] and oversee[s] off-campus curricular matters related to global education programs and initiatives, to advise the Executive Director of the Wang Center for International Programs on policies and procedures related to global education, and to advocate with the Wang Center for global education across the campus."

admission and retention committee "stud[ies] problems, recommend[s] policy, and, in general, represent[s] the faculty in matters dealing with admission, retention, student academic status and policy recommendation and formulation related to enrollment." But as stated above, the faculty does not vote on admission and retention matters. The educational policies committee has jurisdiction over, among other things: the academic calendar; changes to degree requirements; design of courses, degrees, majors, and minors; and the establishment of departments and divisions/schools.[59] The tenure and rank committee may recommend procedures for granting tenure, the requirements for promotion and rank, faculty evaluations, and salary. And the governance committee has purview over changes to the faculty constitution and bylaws,[60] faculty handbook,[61] and the faculty governance system as a whole. Although the faculty handbook provides that the faculty shall recommended many procedures governing an array of subjects, some of these procedures provide only a limited role for the faculty and others prohibit their participation. Even further removed are all contingent faculty because they cannot participate in the development of these recommendations at the faculty standing committee level.

At the hearing, the provost emphasized that although the "vast majority" of committee determinations go to the faculty assembly, others do not. Curriculum and course changes are automatically approved after going through the educational policies committee, unless there is an objection; only then would the matter potentially have to go through the faculty assembly.[62] Any matter concerning money, particularly compensation, goes directly to the administration without first going to the faculty assembly.

Faculty Assembly: Faculty assembly meetings are held once a month during the academic year. Regular, administrative, and contingent faculty may attend. Attendance is typically over 100. The provost estimated that 80 percent of the faculty attendees are tenure eligible and 20 percent are contingent, and possibly 10 to 11 administrative faculty attend as well. The provost did not estimate how many of the contingent faculty attendees are full time. He acknowledged that there may be faculty assembly meetings where very few contingent faculty are present. Of the contingent faculty members, only full-time contingents have the right to vote in the assembly, and PLU has limited their right by excluding them from all personnel decisions.[63] The record contains no evidence, however, that full-time contingent faculty have actually ever voted or spoken in the faculty assembly.

The provost testified it is unusual for the faculty assembly to reject recommendations from faculty standing committees. He cited only one example—the 2013–2014 academic calendar guidelines. The guidelines originated with the educational policies committee and were returned to the committee after rejection by the assembly. Afterward, the provost *worked with the committee* on revisions. The revised guidelines were later approved by the assembly.

E. The Regional Director's Decision

Applying *Yeshiva* and its progeny, the Regional Director found that the Employer failed to carry its burden of demonstrating the managerial status of the full-time contingent faculty. The Regional Director emphasized that the full-time contingent faculty cannot serve on the faculty standing committees, including the "powerful educational policy committee" and the rank and tenure committee.[64] He noted that the typical year-to-year contracts

[58] This committee "advance[s] the educational mission of the university with respect to information technology, learning spaces, the library, and related services and resources."

[59] The provost testified that the educational policy committee has an "absolutely" critical role to play in the curriculum revision process.

[60] The faculty constitution lists several "rights and duties" that "are inherent in the faculty collectively." These include: determination of degrees, certificates of merit, awards, and honors; establishment or discontinuation of colleges, schools, institutes, and departments; formulation and enactment of "educational policy which is the central concern of the university"; "requirements for admission to, and rank of, its [the faculty's] membership;" and establishment of its [the faculty's] own form of governance"; "formulation of courses of study"; "recommendation of requirements for admissions, academic status, and graduation, nomination of candidates for degrees"; "censure of any member of the academic community"; and provision for a fair and impartial hearing in cases of faculty accused of professional misconduct.

[61] The faculty handbook contains specific procedures governing an array of subject areas. These include: instructional responsibilities (course load, office hours, grading, examinations, teaching evaluations, registration, attendance); academic advising; academic integrity; honorary degrees; faculty discipline and dismissal; recruitment and selection of new faculty; review process for contingent faculty; compensation philosophy; reductions in teaching load; phased retirement; faculty awards; and leaves of absence (sabbatical, regular, and special).

[62] The record does not clearly indicate how often these matters become effective without faculty assembly approval. The record also does not establish whether full-time contingent faculty have the right to object and thus force further consideration of the measure. But even if they have such a right, there is no evidence that any of the full-time contingent faculty ever exercised it.

[63] Although it is undisputed that the full-time contingent faculty cannot vote on personnel matters, the provost testified that they may vote on procedures governing those actions. Before many of those policies reach the faculty assembly, of course, they must pass through the rank and tenure faculty standing committee, from which contingent faculty are barred.

[64] As stated above, in March 2013, the faculty assembly voted to allow full-time contingent faculty to serve on university committees but not faculty standing committees. As correctly found by the Regional Director, no evidence was presented that they yet had done so. Of the

of the full-time contingent faculty present an impediment to serving on such committees as the members are appointed for 3-year terms. The Regional Director found that, in any event, the university and faculty standing committees are purely advisory because PLU failed to meet its burden of demonstrating that recommendations from these committees were routinely approved without independent review.

The Regional Director also emphasized that the contested contingent faculty constitute a small minority of those who attend faculty assembly meetings and likely a smaller minority of its voting body because not all the contingent faculty who attend are eligible to vote. The Regional Director took account of the absence of evidence that any contingent faculty member ever participated in a vote of the faculty assembly, and of the rule that contingent faculty members may not vote in the assembly on personnel matters. The Regional Director found that despite the pronouncements of PLU's witnesses, in practice, power resides in the faculty standing committees, and Board law accords the actual practices of faculty greater weight. See *Cooper Union of Science and Art*, 273 NLRB 1768 (1985).

The Regional Director further found that, although the humanities division has taken a step towards granting greater participation to the contingent faculty in its decision-making, PLU failed to produce evidence of any significant decisions having been made at the division level. Moreover, the Regional Director observed that the language in the division's "Statement" regarding voting rights for full-time contingent faculty was "purely aspirational" and non-binding. As for departments, the Regional Director found that although contingent faculty may sit in on faculty hiring interviews, no evidence was presented regarding their roles and the record did not demonstrate that any recommendations flowing from the interviews were effective without independent review.

F. Contentions of the Parties

1. PLU

PLU argues that the "full-time contingent faculty are exempt under *Yeshiva"* as managerial employees because they have the same voice and vote in the faculty assembly on key academic policies as the regular tenure-eligible faculty. By having a voice and a vote in the faculty assembly, as in *Yeshiva*, PLU argues, these faculty members have the ability to determine admission criteria, curriculum, course offerings, grading procedures and many other matters related to academic policy and university governance.

According to PLU, under the Supreme Court's *Yeshiva* test, "the controlling consideration . . . is that the faculty . . . [may] exercise authority." *Yeshiva,* supra, 444 U.S. at 686. It therefore is irrelevant, PLU argues, how a given issue comes to the faculty assembly for decision. It is the right to vote on these subjects that makes faculty managerial under *Yeshiva*. PLU disputes the Regional Director's attempt to distinguish the status of the full-time contingent faculty on the basis that "no contingent faculty may vote in the assembly . . . on personnel matters." Decision at 19. In fact, PLU argues, the faculty assembly, including full-time contingent faculty, votes on the criteria for tenure and promotion, and all faculty personnel policies, including the level of compensation during sabbaticals, and the rules and guidelines to discipline or discharge faculty.

2. The Petitioner

The Petitioner agrees with the Regional Director that the full-time contingent faculty are not managerial employees under *Yeshiva*. The Petitioner emphasizes that the full-time contingent faculty do not have equal access or participatory rights within the faculty governance system. This includes lack of participation in faculty standing and university committees, their minority status within the faculty assembly, and limitations on what they can vote. The Petitioner further argues that there is a clear institutional divide between contingent and regular faculty. At the school and division levels, some decisions such as specific course offerings, course credit determinations, scheduling and hiring are made by department chairs. The Petitioner asserts that the record does not demonstrate that full-time contingent faculty as a whole can participate across all divisions and schools in these department decisions. Rather, full-time contingent faculty will always constitute a small, discrete minority with lesser rights in the voting population. Their vote is diluted by the way that successful faculty proposals are crafted at the faculty standing committee level, from which they are barred. Moreover, they are barred from personnel-related decisions, and PLU failed to show how it determines whether an issue is personnel-related and thus whether full-time contingent faculty can vote.

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current faculty representatives on the university committees, there is no evidence that any are full-time contingent faculty.

G. Application of the Analytical Framework[65]

We agree with the Regional Director that PLU has failed to carry its burden of proving that full-time contingent faculty are managerial employees. As more fully discussed below, the record fails to show that full-time contingent faculty actually control or make effective recommendations in any of the primary or secondary areas of decision-making.

1. Areas of university decision making

a. Primary areas

As described, full-time contingent faculty have limited participation in decisions affecting academic programs (curricula, major and minor areas of study, and related academic requirements). These decisions originate in the divisions, schools, and various academic departments within PLU. PLU has not shown that full-time contingent faculty have the right to vote on such matters at this level, and there is no evidence that they have done so. Further, proposals from divisions, schools, and their departments are typically forwarded to the faculty standing committee on educational policies for its review. The full-time contingent faculty likewise have no vote at this level because they are barred from serving on faculty standing committees. Of course, full-time contingent faculty have a vote on academic matters in the faculty assembly, but even this involvement is limited. While the faculty standing committee's decisions on new degrees, majors, minors, and programs must go through the faculty assembly for approval, changes to degree requirements, new courses, and other curriculum course changes do not require the consent of the faculty assembly unless there is an objection.

We find no evidence that contingent faculty vote on enrollment management policies (the size, scope, and composition of the student body). Indeed, the provost testified that none of the faculty, including regular faculty, have the right to vote on the size of the student body or admission and retention standards. At most, the record shows that, as of 2013, full-time contingent faculty are eligible for membership on the university committee responsible for enrollment management policies, which includes a mix of faculty, students and administrators.[66] But there is no evidence that any full-time contingent faculty currently serve on this apparently advisory committee. And the record fails to demonstrate that any of the committee's recommendations are submitted to the faculty assembly—where full-time contingents would presumably have a vote—before they go to the president's council.

Finally, there is no evidence that contingent faculty are involved in decisions affecting PLU's finances (budget, tuition, financial aid, and related fiscal matters). Contingent faculty have no vote on financial aid or tuition, and there is no evidence of their involvement in other financial decisions. As with enrollment management, PLU at most proved that contingent faculty could one day have a vote on this apparently advisory university committee, but no contingent faculty member has sat on this committee to date. And again, the record fails to demonstrate that any recommendations from the university budget committee are submitted to the faculty assembly before they go to the president's council.

b. Secondary areas

Decisions affecting academic policy (teaching and research methods, grading policy, academic integrity, and related areas) appear to proceed through PLU's decision-making process in a manner similar to academic programs.

Finally, the record indicates that contingent faculty play a limited role in deciding personnel policy and related matters (e.g., hiring, promotion, tenure and leave). Most notably, PLU specifically excludes contingent faculty from voting on specific personnel decisions. In addition, contingent faculty are excluded from the faculty standing committee on faculty affairs, which recommends policies regarding faculty salaries, grants, leave, fringe benefits, and retirement. However, at least some personnel policies—most notably, those that are contained in the faculty handbook—go through the faculty assembly, at which time full-time contingent faculty can vote on them.

Nonetheless, as we now show, even to the extent the full-time contingent faculty have some involvement in these decision-making areas, PLU has not shown that their involvement rises to the level of actual or effective control.

2. Actual control or effective recommendation

As stated above, PLU established that full-time contingent faculty have voting privileges in the faculty as-

[65] We reject PLU's contention that this case should be remanded to determine the managerial status of the regular faculty. The burden of proving managerial status is on PLU. If PLU's argument is that the full-time contingent faculty are managerial employees because they have managerial authority comparable to that of the tenure-eligible faculty, then PLU had the burden of demonstrating that the regular faculty are managerial employees. PLU did not raise that issue at the hearing. Rather, it argued only that the full-time contingent faculty are managerial employees, and it agreed to exclude the regular faculty from the unit without taking a position on their status.

[66] Of course, the full-time contingent faculty are not eligible to serve on faculty standing committee on admission and retention.

sembly, although these voting privileges are limited in that they do not extend to specific personnel decisions. Moreover, the record indicates that only about 20 percent of those faculty who actually attend any particular faculty assembly meeting are contingent faculty, without specifying how many are *full-time* contingent faculty. Finally, PLU has not even established that any full-time contingent faculty member ever has cast a vote, or even spoken, in the faculty assembly.

But, even if there were such evidence, or evidence of greater contingent faculty involvement in the assembly, a closer review of the assembly reveals that it is little more than a conduit to transmit previously agreed-upon recommendations to the administration. Consistent with this conclusion, the only evidence PLU presented of the faculty assembly vetoing any action concerned the 2013–2014 academic calendar. But even in that case, the matter originated in the educational policies committee and was referred back to that committee, which ultimately worked out a compromise with the provost, a compromise that the faculty assembly ultimately endorsed.

To the extent that policy may be formulated or effectuated by faculty, that work appears to be done in the divisions, schools, and departments, the faculty standing committees, and the university committees.[67] However, PLU failed to present any evidence that full-time contingent faculty vote on matters pending before their division, school, or department. Further, faculty standing committees exclude the contingent faculty altogether, precisely because of their contingent status. Moreover, PLU now contends in its brief on review that the standing committees are only advisory bodies. And while contingent faculty may now vote in university committees, the record reflects that no contingent faculty member has yet served on a university committee. But even if they did, they would be a minority on the university committee as their membership is currently structured, and such committees appear to be purely advisory in any event.

Finally, the ability of the contingent faculty to control or make effective recommendations regarding university policy is inherently limited by the very nature of their employment relationship with PLU. As discussed, nationwide, contingent faculty tend to have a limited voice in university governance, if they have a role at all. PLU's treatment of its contingent faculty is consistent with that national norm. As the spring 2011 survey demonstrated, although many contingent faculty are employed for years by PLU, their hold on their positions is tenuous, subject to yearly renewal. And many are not even told of their basic rights and responsibilities relative to PLU.

Our examination of the decision-making authority in this case leaves little doubt that the contingent faculty simply do not, and in fact cannot, control or effectively control relevant decision-making within PLU.

H. Conclusion

We conclude that PLU has failed to prove that its full-time contingent faculty exercise managerial authority on behalf of their employer, PLU. In particular, we find that there is insufficient evidence that the full-time contingent faculty are substantially involved in decision-making affecting the key areas of academic programs, enrollment management, and finances. Even in the secondary areas of academic policy and personnel policy or decisions, their decision-making authority is essentially limited to matters concerning their own classrooms or departments. To the extent full-time contingent faculty do have opportunities to participate in those areas of decision making, the record is clear that their involvement falls well short of actual control or effective recommendation, given the university's decision making structure.

ORDER

This proceeding is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

MEMBER MISCIMARRA, concurring in part and dissenting in part.

"The values enshrined in the First Amendment plainly rank high in the scale of our national values." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (internal quotation marks omitted). In *Catholic Bishop* and other cases, the Board has had a challenging time deciphering when First Amendment concerns warrant a finding that the Board must refrain from exercising jurisdiction over faculty members at certain religious schools and universities.[1] I join my colleagues in abandoning the

[67] Although PLU presented evidence of an extensive committee system, it now contends that these committees are just advisory because the faculty assembly makes the important votes. Yet the provost testified, for example, that the educational policy committee plays a "critical role" in curriculum revisions and that "the committee process works pretty well."

[1] *NLRB v. Catholic Bishop of Chicago*, supra (invalidating the Board's policy of declining jurisdiction over institutions "only when they are completely religious, not merely religiously associated"); *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) (invalidating the Board's subsequent policy of declining jurisdiction only over schools that have a "substantial religious character"); *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 398 (1st Cir. 1985) (en banc) (evenly divided court denied enforcement of Board order against a church-operated college "that [sought] primarily to provide its students with a secular education, but which also maintain[ed] a subsid-

"substantial religious character" test that the D.C. Circuit rejected in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). However, for the reasons stated in Member Johnson's insightful separate opinion, I believe the majority errs in holding the exemption afforded to religious schools applies only if faculty members are held out as "performing a specific role in creating or maintaining their school's religious educational environment," and I further believe the Board should simply embrace and apply the three-part test articulated by the D.C. Circuit in *University of Great Falls*.[2] In my view, this test, applied here, compels the conclusion that Pacific Lutheran University should be deemed exempt from the Act's coverage based on First Amendment considerations.

The majority addresses a second important issue: whether Pacific Lutheran's contingent faculty members fall within the exemption applied to "managerial" employees, which is governed by *Yeshiva University v. NLRB*, 444 U.S. 672 (1980). Here, I agree with my colleagues that the record fails to support a finding that the contingent faculty members are exempt managerial employees. More generally—though subject to some qualifications described below – I agree with the framework outlined by the majority for determining whether faculty members are exempt "managerial" employees.

A. The Religious Educational Institution Exemption

Member Johnson's dissenting opinion sets forth a commanding and comprehensive analysis of *Catholic Bishop*, *Great Falls* and related cases. I join in Member Johnson's conclusion that the standards articulated by the majority suffer from the same infirmity denounced by the Supreme Court in *Catholic Bishop* and by the D.C. Circuit in *Great Falls*: those standards entail an inquiry likely to produce an unacceptable risk of conflict with the Religion Clauses of the First Amendment. As the Supreme Court has explained: "*The line* [*between religious and secular activities*] *is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission*. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987) (holding that Title VII's exemption from prohibition against religious discrimination in employment for secular non-profit activities of religious organizations did not violate the Establishment Clause) (emphasis added).

I also believe we are poorly served here by devising a standard that differs from the three-part test already endorsed by the D.C. Circuit in *Great Falls*, supra. The elements of that standard are understandable and relatively straightforward, and each one serves a reasonable function. The *Great Falls* standard appears to be consistent with *Catholic Bishop* and other Supreme Court cases, and it draws heavily on the *en banc* decision in *Universidad Central de Bayamon*, supra, authored by then-Circuit Judge Breyer (who now sits on the Supreme Court). Additionally, the Court of Appeals for the D.C. Circuit has squarely held that courts owe no deference to the Board's interpretation of the exemption to be afforded religious educational institutions.[3] Finally, not only has the D.C. Circuit addressed the very question presented here, every unfair labor practice decision by the Board may be appealed to the D.C. Circuit. 29 U.S.C. § 160(f). Thus, even if one disagreed with *Great Falls*, any attempt by the Board to chart a different path appears predestined to futility.[4] In any event, for the reasons set forth above and in Member Johnson's thoughtful analysis, I believe the *Great Falls* standard is appropriate and, applying that standard, I would find that the Board clearly lacks jurisdiction over the faculty at Pacific Lutheran University.

B. The Managerial Employee Exemption

With some important qualifications, I agree with the framework—which is governed by *Yeshiva*, supra—

iary religious mission"); *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980) (reversing Board's determination that a religious school was outside the scope of *Catholic Bishop* merely because it was operated by a private corporation rather than a religious order, finding that First Amendment concerns are implicated in both circumstances).

[2] Under the *University of Great Falls* test, the Board has no jurisdiction over faculty members at a school that (1) holds itself out to students, faculty and community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. 278 F.3d at 1343.

[3] *Great Falls*, 278 F.3d at 1340–1341 ("As *Catholic Bishop* was decided on grounds of constitutional avoidance, we give no deference to the NLRB's application of this exemption to the National Labor Relations Act.") (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); see also *NLRB v. Hanna Boys Center*, 940 F.2d 1295 (9th Cir. 1991) ("We review de novo the Board's purely legal conclusion that *Catholic Bishop* applies only to teachers in parochial schools.").

[4] Of course, the Board's interpretation of the Act, including the exemption applicable to religious educational institutions, is subject to review by various courts of appeals, not merely the D.C. Circuit, and our resolution of particular issues—though contrary to the D.C. Circuit—may be endorsed by other courts and ultimately upheld by the Supreme Court. In the instant case, however, I believe the D.C. Circuit's interpretation in *Great Falls* is appropriate, in addition to being consistent with decisions by other courts and the Supreme Court.

outlined by the majority regarding factors that influence whether faculty members are exempt "managerial" employees.[5] I also generally agree with the distinction between three "primary" areas (academic programs, enrollment management, finances) and two "secondary" ones (academic policy, personnel policy and decisions). However, I make the following additional observations.

First, for reasons similar to those expressed in Member Johnson's separate opinion, I believe the majority's test and its application of these factors – including the treatment of authority, control, and effective recommendation – are too onerous and inflexible and would improperly confer "employee" status on some faculty members who should be considered "managerial" employees under *Yeshiva* and its progeny.

Second, I do not believe relevant documentation describing the role played by faculty members (for example, faculty handbooks or position descriptions) can be freely disregarded by the Board as what the majority calls "mere paper authority." When the evidentiary record contains uncontroverted evidence—documentary or otherwise—hat faculty members have "managerial" authority in one or more of the five areas of consideration, the Board should not discount or disregard such evidence based on a characterization that it is "self-serving."

Third, I believe it is unrealistic and inconsistent with the Act to regard faculty members as "managerial" employees only if their recommendations are "almost always" followed. Few managers in any work setting have this type of overwhelming influence within their organizations, even though they undisputedly qualify as "managerial" employees for purposes of the Act.

Fourth, as noted above, I believe the distinction between "primary" and "secondary" factors is likely to be useful in most cases. However, there are many non-university contexts in which individuals who undisputedly qualify as "managerial" have specialized responsibility in only one area, and not others. I believe the Board must allow for the same possibility in the university context and find that faculty members, in some instances, may qualify as "managerial" employees when their influence in "secondary" areas is substantial to a degree that outweighs their lack of involvement in any "primary" areas.

Finally, like my colleagues, I agree that the record in the instant case is insufficient to establish that Pacific Lutheran's full-time, contingent faculty members are exempt "managerial" employees. However, as noted previously, I believe it is not necessary to reach this issue because the record clearly establishes, in my view, that Pacific Lutheran University should be considered outside the Board's jurisdiction based on its religious affiliation, and I would dismiss the election petition.

C. Conclusion

For these reasons, I concur in part and dissent in part.

MEMBER JOHNSON, dissenting.

Introduction

The story of this case fundamentally starts with—and should end with—the Constitution. In 1979, on the basis of avoiding a constitutional conflict, the Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, soundly rejected the Board's attempt to exert its jurisdiction over lay teachers at "church-operated" schools. In the years since that landmark decision, the Board has occasionally attempted to push back against the Court's decision, narrowly construing it in order to once more advance Board jurisdiction over religious schools. The courts of appeals, however, have refused to go along for the same reason that *Catholic Bishop* originally had, declining to enforce the Board's attempted expansions. See *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009); *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002); *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986) (en banc) (decision by then-Judge Breyer); *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980). These courts found that the Board's exercise of jurisdiction over teachers in religiously affiliated schools, colleges, and universities implicates the guarantees set forth in the very first lines of the Bill of Rights, namely the promises to the American people that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] Therefore, these courts uniformly found the Board's repeated attempts to assert jurisdiction prohibited under *Catholic Bishop*.

[5] Because I would find that Pacific Lutheran University is exempt from the Act because of its religious affiliation, it is unnecessary for me to reach the question of whether the faculty members at issue in this case (the University's full-time contingent faculty) are exempt managerial employees. However, the majority does reach this issue (having first decided to exercise jurisdiction); and because the Board has been criticized for its application of *Yeshiva*'s various "managerial" factors—and specifically, for failing to state "which factors are significant and which less so, and why," *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004)—I join Member Johnson in reaching this issue, and I generally agree with the framework articulated by the majority, subject to the qualifications described in the text.

[1] These guarantees are commonly referred to as "the Religion Clauses" of the First Amendment of the Constitution, and I adopt the same phrase herein.

The majority decision today represents yet another effort to push back against the Supreme Court's mandate that we avoid striving for jurisdictional boundaries that could violate the First Amendment. Although the majority announces its intent to "articulate a new test that is . . . faithful to the holding of *Catholic Bishop*," the majority's new test falls short in that goal in many regards. Most of these errors flow from a single source: misunderstanding the nature of the relationship between the Constitution and the Act.

The Act that we enforce is a very important statute. It embodies the national policy "to eliminate the causes of certain substantial obstructions to the free flow of commerce [arising from industrial strife] and to mitigate and eliminate these obstructions when they have occurred" by means of "encouraging the practice and procedure of collective bargaining and [] protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ." 29 U.S.C. § 151. But the Act, like every Federal statute, must bow to the supreme law of the United States, the Constitution. There is where the majority takes its wrong turn.

Because of the overwhelming force of the Constitution, the Supreme Court and lower courts have created interpretive rules that keep federal statutes from constantly being drawn into direct conflict with the Constitution, and thus inexorably being supplanted or undermined on a regular basis. The underlying premise is that the Constitution's framers intended—and successive Congresses typically intend—for the Constitution and subordinate federal statutes to work hand in hand, rather than be regularly pitted against one another, with the invariable result of the statutes being systematically obliterated by the Constitution. One of these rules for statutory interpretation is the doctrine of constitutional avoidance, the basic theory underpinning the decision in *Catholic Bishop*. That rule requires us to interpret the Act to avoid *even the risk of* a constitutional conflict. We should "decline to construe the Act in a manner that could in turn call upon [a court] to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." 440 U.S. at 507. In other words, unless we can say that Congress clearly desired to start a fight between the Constitution and the Act, we should not interpret the Act to start that fight.

As such a fight would be so ultimately one-sided, and will simply result in the undermining of the Act, we should not instigate it unless there is *no other possible construction* of the Act. The Court in *Catholic Bishop*, indeed, has already given us the answer to this question. It determined that, because a possible construction of the Act is one in which the Board does not have jurisdiction over lay teachers at parochial schools, that interpretation should be followed. I see no need to attempt to color outside the lines of the Court's clear interpretive mandate and equally clear result here, where we are presented with a substantively identical scenario involving lay teachers at religious universities. This is not a hard question to resolve, especially given that we have no inherent expertise in deciding constitutional issues, which might allow us to draw our own conclusions afield from *Catholic Bishop*'s teachings. Three court of appeals decisions have drawn essentially the same conclusion: that the jurisdictional borders of the Act do not extend to faculty at church-operated universities. So also should we.

Accordingly, because the majority's proposed test fails to avoid the possibility of conflict with the Religion Clauses of the First Amendment, both by encroachment on the religious freedom of church-operated universities and by excessive government entanglement in the operations of such universities, I cannot support this new formulation. Rather, as explained below, I would adopt a test similar to that prescribed by the D.C. Circuit in *Great Falls* in determining whether the Board may exercise jurisdiction in these cases. Applying that test to the circumstances presented here, I would find that the Board cannot assert jurisdiction over PLU's petitioned-for faculty members. I also point out that the Board cannot assert jurisdiction under any fair application even of its new test here, highlighting the inherent susceptibility of that test to fall prey to subjective results.

Because I conclude that the Board cannot exercise jurisdiction over 'PLU's faculty, I would not ordinarily reach the issue whether the contingent adjunct faculty members in this case are managerial employees under the Act. In light of the fact that the majority reaches this issue, however, and because the majority creates and then applies a whole new standard for determining managerial status of faculty members in a university setting, I will discuss the issue in part II, below. I do not disagree with the majority's conclusion that these faculty members are not managerial employees, but their test for reaching that conclusion is off base.

Analysis

I.

A. There Is No Balancing Act Between The First Amendment And The NLRA: The Premise Underlying The Majority's New Standard Is Incorrect

It is important to start with what the majority decision does right: it properly abandons the Board's prior test for deciding whether to exercise jurisdiction over teachers at non-secular schools. That test, which required a

case-by-case determination whether an educational institution claiming a religious affiliation had a "substantial religious character," unavoidably resulted in the exact "process of inquiry leading to findings and conclusions" with regard to the internal operations and tenets of religiously affiliated educational organizations that has concerned the courts. See *Catholic Bishop*, 440 U.S. at 502; *Great Falls*, 278 F.3d at 1341. In light of that fact, the Board clearly needed to develop a new methodology for reviewing these cases.

From that point forward, however, the majority embarks on an analysis that, in my view, not only fails to adequately appreciate the constitutional issues at play here but also underplays the courts' significant concerns with regard to Board entanglement in investigating the methods in which religiously-affiliated educational institutions carry out their missions.

We can begin with the very first sentence of the majority's analysis. The majority states that "an examination of prior Board *and court cases* demonstrates that the Board *and the courts* have attempted to accommodate two competing interests when deciding whether the Board may assert jurisdiction over faculty members at religiously affiliated colleges and universities." (Emphases added.) The two competing interests referred to in the preceding sentence are described as (1) an avoidance of any impingement on a school's religious rights, as well as of "the type of intrusive inquiry forbidden by *Catholic Bishop*," and (2) "Section 7 rights," i.e., rights under the Act.

Because the majority implicitly puts the Act on the same footing as the Constitution, I can understand why it comes up with two "competing interests" that it then must "accommodate" in, what is in effect, a balancing test. But this implicit assumption is stark error. There is no balancing test, because no federal statute commands the gravitas of the Constitution. Simply stated, while the Act is of paramount importance in almost every other scenario—it is dwarfed by the First Amendment's protection of religion. Instead of a balancing act of any kind, what *Catholic Bishop* and the doctrine of constitutional avoidance establish is a warning for us: "make absolutely sure the Act was intended to encompass religious universities, and that the Act mandates your test of jurisdiction for teachers at those universities" before we impose it on religious universities. As *Catholic Bishop* put it, we must find a "clear expression of an affirmative intention of Congress that teachers in [religious universities]" should be covered by the Act.[2] 440 U.S. at 504. And, then and only then, *Catholic Bishop* would require us to determine that the ensuing infringement of the Religion Clauses, both in the form of interfering with free exercise and in the form of entanglement, is constitutionally sustainable. We are commanded, in any situation in which the rights protected by the Act could be interpreted as violating the Constitution, to determine whether there is a possible construction of the Act that would avoid such problems.

Thus, it is unsurprising that *none* of the court cases cited in the majority decision enunciate that the courts are undertaking any sort of balancing or accommodation of these stated interests, contrary to the majority's assertion. Rather, the courts' focus appears to be ensuring that the *Catholic Bishop* exemption is applied *only* to "*bona fide* religious institutions." *Great Falls*, 278 F.3d at 1344. Where *bona fide* religious institutions are not involved, of course, the concerns raised by *Catholic Bishop* would be completely inapplicable, since there would be no *risk* that the Board's exercise of jurisdiction would implicate constitutional concerns. Thus, their decisions amply show that the courts are not undertaking a balancing test here but, rather, are following the constitutional avoidance prescription set forth in *Catholic Bishop* to its logical conclusion; i.e., if an institution is not, in fact, a religious institution, there are no constitutional questions to be avoided.[3]

In any event, to the extent that any balancing is conceivably taking place, it is noteworthy that the courts have concluded that "it is difficult to find any unusually strong interest arising out of the Labor Act itself that calls for jurisdiction" over religiously affiliated colleges and universities. See *Universidad Central de Bayamon*, 793 F.2d at 403. This is not surprising, as there is almost nothing in the text of the Act even recognizing the possibility of regulating activity connected to religiously-

[2] This is at least the equivalent of the Board's "clear and unmistakable waiver" standard for determining whether there has been a waiver of Section 7 rights. It is hard to imagine that the majority would find that the Act's near deafening silence on religion (other than one exception for religious objectors, see above) could be construed as evincing "clear and unmistakable" intent by Congress to cover the faculty of religious institutions. See, e.g., *Catholic Health Initiatives*, 360 NLRB 689 (2014) (where "nothing in parties' agreements . . . addresses the Union's right to request and obtain presumptively relevant information about those subjects," then union did not intend to waive bargaining rights).

[3] The majority's failure to incorporate the doctrine of constitutional avoidance into its analysis is demonstrated, for instance, by its attempt to analogize the Supreme Court's analysis in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012), with the issues presented here. In *Hosanna-Tabor*, the Court was not faced with determining whether the Americans with Disabilities Act should be read in a particular manner in order to avoid constitutional questions. Rather, the Court decided the case by construing the ministerial exception at issue as an affirmative defense, not a jurisdictional bar. *Id.* at 709 fn.4.

based beliefs. As I note in the Introduction, the Congressionally-stated purpose of the Act was to eliminate obstructions to "commerce" by the means of Section 7 rights and their exercise in collective bargaining. Teaching connected with a religious belief system is not commonly thought of as commerce.[4] See *Catholic Bishop*, 440 U.S. at 504 (finding nothing in explicit text of Act evincing clear intent to cover church-operated schools). Moreover, as *Catholic Bishop* noted, the singular reference to religion in the text of the Act as it stands today is a *religious exemption* allowing persons subscribing to a religious belief to pay charitable contributions instead of union dues, an exemption which came about when the overall jurisdictional exemption for nonprofit *hospitals* was repealed in 1974 and such hospitals thus fell under our jurisdiction.[5] I would interpret this "religious objector" exemption as evidence of congressional intent for the Act to steer well clear of infringing the Religion Clauses. But, in any event, this one bare mention of religion is not an "affirmative intention of the Congress clearly expressed" to take jurisdiction over religious universities, as *Catholic Bishop* would require. 440 U.S. at 506. Accordingly, our analysis should really stop there with a finding of no jurisdiction. However, the majority continues on, necessitating a discussion of all the problems with the majority's new test, most of which derive from this flawed foundation.

B. The Majority's New Standard Is Just As Guilty Of Trolling Through Religious Beliefs As The Prior Standard Was

I move on to faults with the specifics of the majority's new test. I agree that the first prong of the new standard —whether the institution holds itself out as providing a religious educational environment—appropriately ensures that the college or university in question is a *bona fide* religious institution such that the Board's exercise of jurisdiction raises the possibility of violating the religious clauses of the First Amendment. The majority has adopted this prong from the D.C. Circuit's *Great Falls* decision and, for the reasons set forth in that decision and as discussed further below, I agree that this is a reasonable threshold requirement to apply.

1. The "specific role" test requires making the same "religious function" versus "secular function" distinction that the constitution and courts have condemned

Unfortunately, the standard's second prong—whether the institution holds its faculty members out to the public "as performing a *specific* role in creating and maintaining" its "religious educational environment" —utterly fails to avoid the significant constitutional concerns at issue in *Catholic Bishop*. Indeed, this interpretation of the jurisdictional bounds of our statute not only fails to avoid the First Amendment questions, it plows right into them at full tilt. As a result, under *Catholic Bishop* and the doctrine of constitutional avoidance, requiring a religious institution to meet the burden of establishing this second prong of the test is improper.

The Court has consistently frowned upon governmental inquiry into an institution's religious identity, especially when the inquiry attempts to distinguish between the "religious" and "secular." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) ("inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary, but offensive"); *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 694 (1989) (noting, in connection with a proposal requiring courts to distinguish between "religious" and "secular" benefits and services, "that 'pervasive monitoring' for 'the subtle or overt presence of religious matter' is a central danger against which we have held the Establishment Clause guards"); *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) (Litigation between church and state "about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."). Most recently, in *Town of Greece, New York v. Galloway*, 134 S.Ct. 1811 (2014), the Supreme Court upheld the constitutionality of prayer at the Town of Greece's monthly board meetings. In doing so, the Court rejected the view that only nonsectarian prayer should be permissible, noting that the very act of sifting the "sectarian" from "nonsectarian" would be futile and unconstitutionally entangle courts with religion. Id. at 1820.

[4] The majority analogizes to other kinds of religiously-affiliated institutions in justifying its jurisdictional approach, but as *Catholic Bishop* and its progeny emphasize, schools involve special considerations. Even the outdated "substantial religious character" precedent cited by the majority recognizes this. See *NLRB v. St. Louis Christian Home*, 663 F.2d 60, 64, 65 (8th Cir. 1981) (holding that "inquiry into the operation of the Home should not intrude on any activity *substantially religious in character*," while noting "the actual business of the Home and its employees *does not involve a religious enterprise comparable to a church-operated school*") (emphases added).

[5] The exemption reads: "Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of title 26, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee." 29 U.S.C. § 169.

The prohibition on inquiries into religious beliefs also animated the Supreme Court's decision in *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), upholding a religious exemption in Title VII as applied to the firing of a janitor by a church-owned gymnasium. In that case, the Court addressed the significant burden placed on religions of applying a "secular versus religious activity" test, stating:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission. (footnote omitted)

Id. at 336. In other words, the very test proposed by the majority imposes a significant burden, because it subjects the religious organization to ongoing scrutiny of its beliefs. Requiring a university's public expressions to demonstrate performance of a "specific religious function" by the faculty will likely consequently warp the expression of the university's religious mission itself. The Supreme Court long ago in *Amos*, above, recognized this type of pernicious "observer effect" resulting from the imposition of a "secular vs. religious activity" distinction upon the practices of religious institutions. The Board should recognize this also, and avoid creating a test that will act as a harmful mutagen to a religious university's expressions of its own religion. Therefore, the majority should not attempt to differentiate activities—or the publicly-held-out versions of those activities—as "secular" or "religious."

The majority's test impermissibly requires the Board to do just that—to judge the religiosity of the functions that the faculty perform. Here, the majority's test holds that the Board will exercise its jurisdiction over faculty members, *unless* they are held out as "performing a *specific religious function*." Thus, in practice, the test will require the very type of inquiry into religious beliefs that have led the courts to conclude that such jurisdiction inevitably raises the risk of impinging on First Amendment rights. It amounts to an analysis of what is "religious" as opposed to what is "secular," thereby placing the Board in the untenable position of deciding what can, and what cannot, be deemed a *sufficiently* religious role or a sufficiently religious function.[6] Tellingly, the majority's associated conclusion that faculty members at religiously affiliated schools are "indistinguishable from secular teachers" gives away the game that the majority's test simply evaluates the "religiousness" of what PLU's faculty do, or are held out as doing. This kind of line-drawing has been repeatedly considered — and rejected — by the courts.[7] See, e.g., *Bayamon*, 793 F.2d at 398 (answering in the affirmative the question "whether *Catholic Bishop* applies to a church-operated college--a college that seeks primarily to provide its students with a secular education, but which also maintains a subsidiary religious mission").

The majority also errs fundamentally here by assuming a false dichotomy between "religious" and "secular" instruction, for lack of better phraseology. The majority seemingly finds that if a belief is held widely by society at large as essentially a secular principle—the majority uses the examples of "academic freedom" and "diversity" several times in its opinion—then, ipso facto, that principle cannot be part of a religious doctrine. Ergo, the majority holds that such a secular principle cannot be part of a religious university's religious mission and thus should not count at all to prove up a faculty's "specific role in creating or maintaining" a religious educational environment, under the majority's new test. But that is simply wrong.

Many religions have a good deal of parallelism with widely accepted secular principles for living a moral, just, and productive life.[8] The phenomenon of parallel-

[6] As a corollary, my own inclusion, omission, or description of examples of religious beliefs herein is not intended to offend any reader.

[7] The majority's reliance on *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694 (2012), for the proposition that its holding out factor inquiry into the teacher's function is permitted, is misplaced. That case concerned the application of Title VII's ministerial exception, which *necessarily involved determining whether the plaintiff had a proselytization function*. Unlike the person in *Hosanna–Tabor*, we do not have to test PLU's faculty members for a proselytization function. Indeed, as I explain in section B.3. below, *Hosanna-Tabor* exposes another weakness of the majority's test, arising where the religion itself does not accept non-ecclesiastical sources of dispute resolution for disputes among its members.

[8] One can accept and understand the phenomenon of symmetry between religions and secular principles of good conduct, with or without crediting the claims of any religion. There are many possible explanations for this parallelism, for example:

- the carrying out by believers of God's received wisdom will, of course, result in morality, justice, and happiness, because the religion is the truth; or
- secular society's own codes originated mostly from religious beliefs, so, of course, substantial parallelism between the two will exist; or
- religions that do not encourage living a moral, just, and productive life will disappear over time because, of course, their followers will be disadvantaged and dwindle, as opposed to religions that do. (For example, there are few modern followers of the ancient Phoenician and Carthaginian god Baal, who reputedly required sacrifice of one's children.)

ism, however it might have come about, is inescapable and readily observed. Take, for example, the Ten Commandments. People who follow the Ten Commandments are going to be considered by secular society as leading a more moral, just, and productive life than those who do exactly the opposite. Indeed, those who do exactly the opposite will end up on the wrong end of the civil and criminal justice system in the United States. But that does not transform, for example, "thou shalt not kill" from a religious to solely a secular belief unworthy of First Amendment consideration when the government decides whether or not to exert control over the believer. Contrary to the majority, "diversity" is a belief that can indeed be wholeheartedly consonant with and part of a religious belief system; so is "academic freedom."[9] The majority's dismissal of the fact of religious and secular parallelism in its test is a major mistake, "disqualifying" what could be large parts of a university's religious mission from consideration for jurisdictional purposes. In the context of this case, as I discuss in section I.D. below, it translates into a dismissive attitude toward PLU's own arguments about its religious mission.

Being a mere Board member, I have no special place in determining which, if any, of these explanations is correct. But there can be many reasons why parallelism exists between religions and what we regard as "correct" principles of secular society.

[9] I will discuss "freedom of thought" a/k/a academic freedom as a religious perspective specifically within Lutheranism in section I.D. below, but here are three obvious examples of "diversity" as part of religious doctrine. First, the concept of interdenominational tolerance is expressed today in many Christian churches through the idea of ecumenism. Second, Unitarian Universalism, is open to *any* religious or non-religious tradition: "In Unitarian Universalism, you can bring your whole self: your full identity, your questioning mind, your expansive heart. We are creating a force more powerful than one person or one religion. By welcoming people who identify with Atheism and Agnosticism, Buddhism, Christianity, Humanism, Judaism, Earth-Centered Traditions, Hinduism, Islam, and more, we are embodying a vision 'beyond belief:' a vision of peace, love, and understanding. We are building an action-oriented community, bridging races, religions, and creeds with a shared desire to make faith, religion, and spirituality verbs." See http://www.uua.org/beliefs/welcome/index.shtml (last visited Nov. 22, 2014). Third, Islamic religious doctrine recognizes a long tradition of coexistence with other religions, even in Muslim-dominated nations. E.g., Bernard Lewis and Buntzie Ellis Churchill, "Diversity and Tolerance in Islam," *Islam: The Religion and the People* (FT Press, 2008) at 57–58 ("In the Ottoman Empire, until the 19th century reforms, dhimmi communities, Jews and Christians of various churches, formed their own communities, under their own heads and subject to their own laws, administered by their own courts, in such matters as marriage and divorce, inheritance, and much else. This autonomy included education, jurisdiction of their own courts in civil matters and, even in some criminal matters, of a religious nature. Thus, a Christian could be tried and punished by a Christian court for bigamy, or a Jew by a Rabbinic court on a charge of violating the Sabbath, though these were in no sense offenses against the generally accepted laws of the state and of the society.").

The majority disagrees, but effectively concedes the point. The majority acknowledges that "norms shared by both [the] religion and by wider society" *will never count to show* that the faculty have a "specific religious role" under the new test. Thus, one sees that the majority is really translating "specific religious role" here to mean "uniquely religious role." This highlights the entanglement problem that will be posed by measuring the "religious uniqueness" of a belief. Moreover, to reiterate, counting a belief as "religious" *only if it is unique* to a religion's believers will disqualify most religious tenets from our consideration, in violation of free exercise.

2. The evidence that the majority references in determining the existence of a "specific role in creating or maintaining" a "religious mission" simply shows that the majority is applying its own subjective notions of "religiousness"

The second prong of the majority's test also raises the inescapable question: *what precisely* is required to establish that faculty members are held out as serving a religious function, so that there is no risk of constitutional conflict should the Board exercise jurisdiction? Importantly, the majority fails to squarely answer this question. However, the majority's limited effort at clarifying this vague standard of "specific religious function" reveals why the standard must fail under *Catholic Bishop*. The majority's attempt, in this regard, is as follows:

> If the evidence shows that faculty members are required to serve a religious function, such as integrating the institution's religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training, we will decline jurisdiction. Likewise, if the college or university holds itself out as requiring its faculty to conform to its religious doctrine or to particular religious tenets or beliefs in a manner that is specifically linked to their duties as a faculty member, we will decline jurisdiction.

[Emphases added.] Therefore, to pass muster under the majority's test, it appears that it must be established that faculty engage in some type of religious indoctrination or proselytization, teach religion in a particular manner, believe in the religion, engage in religious training, be instructed to conform their behavior to what the religion requires, and perhaps insist on the institution's use of specific words or phrases within its documents. This appears to be the key and, indeed, the only touchstone of "religiousness"

for the majority.[10] The majority apparently believes that only proselytization, orthodoxy, and exclusion—culminating in straightforward, unvarnished attempts to inculcate faculty and students with a unitary religious creed — count to show that faculty have a religious function. This is an oversimplified imagining —if not an outright caricature—of all that a religion is and how a religion's conception of its earthly mission may translate into a university environment, as I demonstrate with the specific example of Lutheranism in section I.D., below.

Here, looking to the majority opinion, it appears that the majority unfortunately relies on several of these indicators to conclude that PLU does not hold out its faculty as serving a religious function. To begin with, the second prong of the majority's test assumes that religions typically *ab initio* would classify occupations (like faculty) into "specific roles advancing or maintaining the religion," which is simply not the way most religions work. Although some religions that focus on active proselytization might assign particular religious-specific advocacy tasks to certain occupations, it is certainly not typical for churches, let alone church-operated schools and universities, to do so. Most religions do not create specific "religious job descriptions" for each occupation, assigning each type of professional or worker some task in advancing the religion. Not every schoolteacher who is Catholic, for example, is somehow assigned by Catholicism the duty to exist in society teaching straight Catholic doctrine.

More importantly, a religion's own internal definition of what it means to "serve a specific religious function" often will not conform to the majority's stereotype of what a religious function should be. By requiring the secular Board to evaluate, and pass judgment on, whether the faculty is being held out as serving a sufficiently specific and sufficiently religious function, the majority has essentially repackaged the rejected "substantial religious character" test, which the majority ostensibly agrees intrudes on religious freedom. Under the Supreme Court's holding in *Catholic Bishop*, the majority's test, because it inherently requires the Board to investigate and make findings with regard to the sufficiency of the religious function proffered, raises a significant risk of excessive entanglement on the part of the Board into a religiously affiliated university's religious beliefs, motives, and mission. As a result, this test cannot pass muster.

3. The majority's test will inevitably entangle the Board in making religious distinctions and determinations in general, and the Board's assertion of jurisdiction itself *automatically* creates an entanglement where the religion at issue, like Lutheranism here, itself proscribes use of non-ecclesiastical authorities to resolve disputes among believers

Even assuming that the majority's formulation did not require the Board to undertake a constitutionally problematic inquiry into a religious institution's manner of effectuating its mission, however, the majority's new standard would nevertheless fail to avoid the significant constitutional concerns raised in *Catholic* Bishop. The "state/religion entanglement" problems at the heart of the Supreme Court's decision remain, regardless of whether or not a particular teacher is held out as playing a specific role vis-a-vis the school's religious mission. In other words, many of the questions typically arising in cases under the Act will thrust the Board into the prohibited role of arbiting issues of religious doctrine. For example, as noted in *Universidad Central de Bayamon*, "the Catholic Bishop Court feared that a teacher's filing of an unfair labor practice charge might well force the Board to decide the 'good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission.'" Id. at 401 (quoting *Catholic Bishop*, 440 U.S. at 502). As the Second Circuit recognized in *NLRB v. Bishop Ford Central Catholic High School*, however, the Board's possible entanglement in doctrinal matters with regard to investigating an unfair labor practice is "real and not theoretical" and does not necessarily turn on the teacher's specific role in furthering the school's religious mission. In that case, the court quoted the Seventh Circuit's decision in *Catholic Bishop* as follows:

> We are unable to see how the Board can avoid becoming entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but contrary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of this examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.

Bishop Ford, 623 F.2d at 822 (quoting *NLRB v. Catholic Bishop of Chicago*, 559 F.2d 1112 (7th Cir. 1977)). It is difficult to see how the Court's reasoning—that an inquiry by the Board into the school's reasons for terminating a

[10] The majority asserts that there are other examples outside this framework, but provides none.

teacher based on her lifestyle presents a significant risk of excessive entanglement—can be squared with the majority's conclusion that, unless the faculty is held out as performing a "specific religious function," there is no possible risk of excessive entanglement.[11]

The majority's conclusion that its test poses no risk of excessive entanglement is indeed dumbfounding when it comes to religions that believe fundamentally that *there is no role for a civil institution like the Board in solving their disputes*. Obviously, the Board inserting itself into a religious educational institution of this nature to certify bargaining representatives and then lodge and adjudicate unfair labor practice complaints against the institution—with remedies that include back pay, reinstatement, bargaining costs, and attorneys' fees[12]—is one of the most excessive levels of entanglement imaginable. This is not an academic concern, as the Supreme Court opined on just such a situation in *Hosanna-Tabor*.

What religion was involved in *Hosanna-Tabor* that considered it a violation of religious doctrine for believers to turn to the civil court system for redress? Why, it was Lutheranism, and Justices Kagan and Alito noted that this particular belief could be characterized as a central part of Lutheran doctrine:

> Hosanna-Tabor discharged respondent because she threatened to file suit against the church in a civil court. This threat contravened the Lutheran doctrine that disputes among Christians should be resolved internally without resort to the civil court system and all the legal wrangling it entails. [note omitted and set forth in full below] In Hosanna-Tabor's view, *respondent's disregard for this doctrine compromised her religious function*, disqualifying her from serving effectively as a voice for the church's faith. *Respondent does not dispute that the Lutheran Church subscribes to a doctrine of internal dispute resolution*, but she argues that this was a mere pretext for her firing, which was really done for nonreligious reasons.
>
> In order to probe the *real reason* for respondent's firing, a civil court—and perhaps a jury— would be required to make a judgment about church doctrine. The credibility of Hosanna-Tabor's asserted reason for terminating respondent's employment could not be assessed without taking into account both the importance that the Lutheran Church attaches to the doctrine of internal dispute resolution and the degree to which that tenet compromised respondent's religious function. If it could be shown that this belief is an obscure and minor part of Lutheran doctrine, it would be much more plausible for respondent to argue that this doctrine was not the real reason for her firing. If, on the other hand, the doctrine is a central and universally known tenet of Lutheranism, then the church's asserted reason for her discharge would seem much more likely to be nonpretextual. *But whatever the truth of the matter might be, the mere adjudication of such questions would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil fact finder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission*.
>
> [note quoted in full:] See The Lutheran Church-Missouri Synod, Commission on Theology and Church Relations, 1 Corinthians 6:1-11: An Exegetical Study, p. 10 (Apr. 1991) (stating that instead of suing each other, Christians should seek "an amicable settlement of differences by means of a decision by fellow Christians"). See also 1 Corinthians 6:1-7 ("If any of you has a dispute with another, dare he take it before the ungodly for judgment instead of before the saints?").

132 S.Ct. at 712–713 (Justices Alito and Kagan, concurring; most italics added for emphasis). I cannot think of a better passage than this to illustrate the inevitable clash with religious freedom—and the pernicious effects on same—if we take jurisdiction over a Lutheran university. Whether Lutheran doctrine considers me as a Board member too "ungodly" to judge disputes among Lutherans (which is fine, I don't take it personally), and thus whether the very act of the Board adjudicating unfair labor practices is a violation of Lutherans' free exercise, is just the most basic example of the acute entanglement that would occur. Another example is the *Bishop Ford* scenario, also alluded to in *Hosanna-Tabor*: whether a "legitimate business reason" for an employee termination under the *Wright Line* doctrine is truly part of PLU's religious beliefs. It is not hard to imagine many others. As Justices Alito and Kagan describe, entanglement is inevitable. There is no way the Board can avoid this problem, unless it (1) requires the petitioning union to have no Lutheran members in its PLU bargaining unit and (2) refuses to assume jurisdiction over unfair labor practice charges brought by PLU employees who happen to be Lu-

[11] Of course, this line of reasoning supports the position, suggested by some *amici*, that the Board's exercise of jurisdiction over *any* employees of a *bona fide* religious organization raises the significant risk of Constitutional concerns. See, e.g., Amicus Brief of General Conference of Seventh-Day Adventists, et al., at p. 2 fn.2. That issue is not presented here, however, so I decline to reach it.

[12] *Pacific Beach Hotel*, 361 NLRB 709 (2014).

therans, actions that would likely be impermissible as well.[13]

Because I have no reason to imagine that any of the Supreme Court justices have changed their views since *Hosanna-Tabor* on what Lutheran doctrine potentially entails, the Supreme Court has all but decided this case. I would urge the majority to relent on this basis alone.[14]

For all the reasons set forth above, the majority's test fails to avoid the constitutional pitfalls identified by the Supreme Court in *Catholic Bishop* and emphasized in subsequent court decisions.

C. The Great Falls Test is the Appropriate Standard to Apply

I conclude that, in place of the majority's test, the Board should apply a test closely analogous to that formulated by the D.C. Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), vacating 331 NLRB 1663 (2000). Under the bright-line *Great Falls* test, an institution is exempt from the Board's jurisdiction if it (a) holds itself out to students, faculty and community as providing a religious educational environment; (b) is organized as a nonprofit; and (c) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. This test properly leaves matters of religious identity in the hands of the institutions, their affiliated churches, and the relevant religious community, and requires examination of objective evidence of an institutions own statements. Most importantly, it allows the Board to identify *bona fide* religious institutions without engaging in the type of intrusive inquiries *Catholic Bishop* and numerous other Supreme Court cases expressly forbid.

As fully addressed in *Great Falls*, and in part by the majority, the first prong of the test—whether the institution holds itself out as providing a religious educational environment—is helpful as a proxy for sincerity because religious identification will attract some potential students but repel others, and will avoid constitutionally problematic inquiries. The second prong—whether the institution is a nonprofit—is easy to determine, helpful in ensuring that the institution is organized for religious charitable purposes, and is used by other Federal agencies, such as the IRS, to make a similar determination. Although I agree that nonprofit status is a straightforward and objective assessment method, I find that it is not a necessary element in deciding whether the Board could assert jurisdiction over a school that claims religious ties. Therefore, in agreement with the majority, I would consider nonprofit or for-profit status as relevant in the evaluation of the first prong—how the institution holds itself out. In contrast, I find that the third prong of the *Great Falls* test is a necessary separate factor for consideration. The description of affiliation and religious organization is necessarily quite broad in scope and simply ensures that only *bona fide* religious institutions invoke an exemption from the Board's jurisdiction.

Applying the *Great Falls* factors, I find that PLU should be exempt from the Board's jurisdiction. It is undisputed that PLU holds itself out to its students, faculty, and community as providing a religious educational environment. PLU is organized as a not-for-profit organization for education purposes, is granted Federal tax exemption as such, and is one of 26 colleges and universities affiliated with the Evangelical Lutheran Church in America.

D. Even Under New Majority Standard, the Exercise of Board Jurisdiction is Not Appropriate Here

Even applying the majority's new test, I find that the Board should not assert jurisdiction over PLU's faculty. As found and properly analyzed by the majority, it is indisputable that PLU holds itself out to students, faculty, and the community as providing a religious educational environment. Contrary to the majority's opinion, PLU has also broadly held out its faculty as performing a religious function as described on the face of its public documents. Therefore, I conclude that we should not assert jurisdiction.

Numerous public documents distributed by PLU reveal that its faculty are held out as performing an important role in creating and maintaining PLU's unquestionable religious educational environment. PLU tells us that the Lutheran faith and heritage are central to PLU, and that three core values of the Lutheran faith underpin PLU's mission, values and what it does as an educational institution. The three cornerstones are vocation, the dialectic between the right hand (religious matters) and left hand (secular matters), and academic freedom. Significantly, these public documents reveal that PLU's petitioned-for faculty has an essential role in upholding these Lutheran principles.[15]

[13] Obviously, bestowing selective immunity to PLU from only Lutherans' (and unions with Lutherans') claims would constitute religious discrimination, if not a constitutional violation, against Lutheran employees themselves.

[14] The majority's "solution" of requiring publicity of the belief is inadequate. Forcing a religious university to engage in a dispute resolution process that potentially violates its beliefs is both an entanglement and free exercise issue regardless of whether or not it widely publicized those beliefs to faculty before a particular dispute occurred.

[15] As seen herein, my application of the majority's test in order to determine whether the Board can exert its jurisdiction over PLU's faculty

A review of PLU's documents reveals that the notion of vocation focuses on the sense of having a purpose in life. First, the Lutheran vocation is a calling to become the best at a particular field or endeavor in order to use said vocation to serve others *and thereby to serve God*. That concept is therefore a religious belief that is part of Lutheran doctrine. Importantly, the belief in connecting the pursuit of excellence to the divine has been a religious concept long before Lutheranism, or the Act, existed.[16]

Second, a review of these documents reveals a religious belief in the power of a dialectic. The Lutheran dialectic seeks to understand religious matters in the context of secular pursuits and vice-versa through thoughtful questioning. Both religious and secular realms are considered to be God's creations (described as "the right hand" and "the left hand") and must interact with and aid one another to achieve truth. Although juxtaposition between religious and secular may not immediately spring to mind as a religious doctrine, the Lutherans sincerely believe it aids in the understanding of each realm toward the other. Conceptually, this is not too dissimilar from a school taking an interdisciplinary approach to teaching, presenting students with perspectives from various fields of study on the same topic; this form of teaching is not uncommon. Regardless, the Lutheran belief in the dialectic is *a religious belief*, and PLU is set up and managed precisely that way so that its students can enjoy the supposed benefit of the dialectic.

Finally, PLU's documents show that academic freedom has been a fundamental principle of the Lutheran faith since its inception and remains an essential component of PLU's identity. At this point, the reader may exclaim "how can academic freedom possibly be a religious belief?" But, bear me out, because freedom of thought was a core issue of dispute that caused Lutheranism to come into being in the first place, as recounted by PLU. I will answer how in the following simplified summary.

Martin Luther's original problem was with the selling of indulgences by the Catholic church of the time, with the promise that indulgences themselves would expiate sin. Luther believed that this idea was heresy, as a matter of biblical text and doctrine. In 1516, when the Pope sent Dominican friar and papal commissioner Johann Tetzel to Germany to offer indulgences for the giving of alms to rebuild St. Peter's Basilica in Rome, Luther felt compelled to write the 95 Theses. Under a long history of Catholic tradition, however, the Pope was essentially considered to be infallible on matters of Christian religious interpretation. So, Luther, in opposing indulgences, eventually had to contest the deep-rooted tradition of papal infallibility as well. Accordingly, he gradually refined the idea that each person needed to come to their own conclusions about what the Bible meant, rather than relying on a decree from a central authority. Ergo, the Lutherans have a strong commitment to freedom of inquiry i.e. academic freedom; as demonstrated, this concept inheres to the genesis of Lutheranism itself. Luther's idea of free inquiry was radical at the time, and indeed, his challenge to papal authority resulted in his excommunication from the Catholic world within a few years after he wrote the 95 Theses, his first public expression of problems with the indulgence issue.[17]

As PLU's evidence describes, these cornerstones of Lutheranism were initiated by Martin Luther and have been present since the Reformation, as Luther gradually broke from the Catholic Church, the sole Christian church at the time. From the onset, Luther consequently urged the nation to reform education for the sake of service, with a commitment to the advancement of knowledge, thoughtful inquiry, and preparation of citizens in service to the world. These three principles are repeatedly discussed and referred to in PLU's publications, including the Faculty Handbook, Course Catalog, and PLU's strategic plan, used with donors, alumni, and the public. A summary of PLU, entitled, "A Lutheran University," which was later updated and titled, "Core Elements in Lutheran Higher Education," is used during incoming faculty orientations and also for other members of the campus community. The summary provides a history of Lutheranism, explains the main elements of the religion, including the three aforementioned, and

members, without implicating the protections of the First Amendment, necessitates an inquiry into the basic tenets of Lutheranism, in the first place, and the faculty's communicated role in furthering these tenets, in the second place. Again, I emphasize that this fact-based inquiry into the religious beliefs of Lutherans,as well as the ways in which PLU represents that it uses its faculty members to further its religious mission, is not permissible under *Catholic Bishop*.

[16] For example, nearly 2,000 years before Lutheranism, the pagan Greek goddess Areté represented the same ideals of excellence, and the divine command to strive for excellence, regardless of the difficulty of the struggle. See, e.g., http://www.theoi.com/Daimon/Arete.html (presenting Xenophon's account of Areté's oration to Hercules on the meaning of life: "For of all things good and fair, the gods give nothing to man without toil and effort. If you want the favour of the gods, you must worship the gods: if you desire the love of friends, you must do good to your friends: if you covet honour from a city, you must aid that city: if you are fain to win the admiration of all Hellas for virtue, you must strive to do good to Hellas . . . and if you want your body to be strong, you must accustom your body to be the servant of your mind, and train it with toil and sweat.") (last visited Nov. 22, 2014).

[17] The History Channel, *Martin Luther and the 95 Theses*, http://www.history.com/topics/martin-luther-and-the-95-theses (last visited Nov. 24, 2014); see also Hillerbrand, Hans J., "Martin Luther: Indulgences and salvation," Encyclopædia Britannica, 2007.

connects these principles to the mission and work of PLU. The Faculty Constitution and Bylaws provides that each faculty member " . . . becomes a member of a community of scholars who respect and uphold the principles of Lutheran Higher Education with certain rights and obligations. Preeminent among these is the obligation to uphold the objectives of the university and the right of academic freedom . . . ." These Lutheran concepts are also expressed to current and prospective students and parents in several ways, including mailings, speeches, ceremonies, and through PLU's website. One page of the website, specifically addressed as information for parents, states, "PLU faculty and staff encourage students to find their passion in life, and they help students put that passion to good use—for themselves, their communities, and the world. We call this process the pursuit of one's vocation. *It's very much connected to PLU's Lutheran heritage* and broad educational philosophy." (Emphasis added.)

In sum, the evidence establishes that the work, mission, values and community of PLU flow from its Lutheran faith and heritage. PLU publicly explains its Lutheran values and tradition in Lutheran terms.[18] The mission statement is written in profoundly Lutheran language with specific meaning, incorporating specific teachings of the Lutheran faith, incorporating the basic tenets of the religion—vocation, dialectic and academic freedom. Furthermore, *PLU clearly holds out its faculty to be an important part of achieving its mission and promoting the values of the faith practice.* Here, PLU teachers educate students for a wide range of careers and professional callings, and are not disciplined for advocating ideas contrary to Lutheran beliefs.

The failings of the majority's new test are made manifest by the majority's dismissive treatment of the actual record here. The majority's analysis is too narrowly focused on evidence of documented commitment of the faculty to indoctrination, orthodoxy, and exclusion. As a result, the majority appears to require that, to meet its burden, there must be evidence establishing that the university's mission centers on blatant religious indoctrination or proselytization , that the institution fails to grant religious freedom or freedom of inquiry, and that the institution denies nonbelievers from participating on campus as students and faculty members. Because PLU, in its literature, does not correspond to this crabbed view of how a religion should express itself in a university environment, the majority finds that the faculty are, ipso facto, not held out as performing a specific religious function.

In contrast, PLU tells us that it fulfills its Lutheran mission precisely by avoiding a narrow focus on religious indoctrination and orthodoxy. Vocation is a part of Lutheranism, and the school states in multiple ways that it strives for excellence in serving others so that ultimate service to God results. PLU opens its doors to non-Lutheran students and faculty, precisely because of its religious commitment to academic freedom. And Lutheranism assigns to faculty teaching secular subjects at PLU the specific role of being the secular representatives in a dialogue with the religious teachers in the school, in service of the dialogue which is part of Lutheranism's core belief in finding the greater truth of life—part of Lutheranism's self-defined religious environment.

The majority willfully ignores all that to declare that the concentration on vocation, the freedom of inquiry, and the work performed by faculty members teaching secular subjects is no different than what teachers at secular schools do, and thus is not nearly religious enough. But, as described above in section B.1., the majority cannot rely on a false dichotomy to discount evidence of a religious purpose simply because there might be a parallel principle in a secular educational environment. Thus, in regard to vocation, this is a Lutheran *religious concept* (and no one disputes otherwise), regardless of whether or not people in secular society would consider it a given that a university would teach students "to be the best they can be." Again, the majority's failure to recognize the religiosity of the Lutheran concept of vocation is an outgrowth of its general failure to understand that parallelism that occurs between religious and secular beliefs and does not diminish the religiosity of those religious beliefs.

Similarly, the fact that academic freedom is also a principle at wholly secular universities does not detract from its indisputable religious significance for Lutherans. Here, requiring faculty to be Lutheran or conform to Lutheran values, or to teach a religious curriculum, would be inconsistent with Lutheran teachings, since they believe that education should be open to all faiths and all disciplines are part of God's calling, That PLU's religious commitment to academic freedom may also happen to square with secular society's current beliefs on effective teaching is absolutely irrelevant and an inappropriate analysis. Finally, the Lutheran juxtaposition in dialogue between teachers of the overtly religious and the ostensibly secular may be a religious concept unique to Lutheranism, but it is easily understandable as a reli-

[18] PLU's mission is "to educate students for lives of thoughtful inquiry, service, leadership, and care for other persons, for their communities and for the earth." That PLU's mission statement does not mention God, religion, or Lutheranism does not make it any less Lutheran, given the three concepts described above, all of which are extensively mentioned in materials held out to faculty and the general public.

gious concept if one understands Lutheranism on its own terms—which is the point. Lutheranism appears to be an "interdisciplinary religion" in the sense that Lutherans apparently believe that interaction with the secular world apparently enhances the understanding of religion (and even may cause some to reconsider whether the "secular world" is really all that secular). It is not for me or the majority to state whether that makes any sense; it is undeniably part of the religious mission of a Lutheran school, and the majority should credit it as such.

In short, PLU clearly holds itself out as providing a religious educational environment and holds its faculty members out as performing a specific role in creating and maintaining PLU's religious environment. Even the majority concedes that faculty are required under the Faculty Constitution to "uphold the principles of Lutheran Higher Education" and "to uphold the objectives of the university and the right of academic freedom," which includes *all* the religious aspects I have described above. But the majority does not find these requirements to be "specifically" religious enough. Id. With due respect to my colleagues in evaluating PLU's evidence, I suggest that the Lutherans might know a little bit more about "specific" Lutheran precepts of education than we do.[19] Accordingly, I respectfully disagree with my colleagues and find that, *even applying their new test*, the Board's exercise of jurisdiction over the petitioned-for faculty members is precluded. At the end of the day, my colleagues' formulation and application of their new test proves only one thing: If a secular government agency (1) mistakenly puts its own statute on the same footing as the Religion Clauses of the First Amendment, (2) fails to understand that it cannot evaluate the religiosity of a belief, (3) fails to understand that the existence of a parallel secular justification does not cancel out the religiosity of a religious belief, and (4) ultimately doesn't understand how religions work in an university-educational environment, that agency will find that its statute *almost always* gives itself jurisdiction over faculty at religious institutions, with the effective power to ultimately regulate their instructional practices. But four wrongs don't make a right, and I predict the courts will have to, once again, reintroduce the Board to the doctrine of constitutional avoidance.

II.

Because I would not assert the Board's jurisdiction over PLU's petitioned-for faculty, I would not reach the question of whether those faculty members are managerial employees and therefore excluded from the Act's protection. However, because the majority not only reaches this issue but formulates a new test for determining the managerial status of faculty members, it is necessary that I express my significant concerns about both the majority's formulation of this new standard and its method for applying the new standard.

A. Primary vs. Secondary Areas of University Decision Making

In their decision, my colleagues effectively detail the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and how, in the intervening 30-plus years, the Board has attempted, somewhat unsuccessfully, to effectuate the *Yeshiva* holding. As the majority recognizes, the test developed by the Board over the years, which requires the examination of faculty participation in decision-making across virtually all areas in which faculty members could have input, has resulted in "innumerable permutations" of analysis and, as a result, has not proven productive. Particularly problematic, especially to reviewing courts, has been the Board's failure to specifically address the relative significance and weight to be afforded to the various factors considered. See, e.g., *Point Park University v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006); *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004).

The first part of the new majority test, in my view, represents an admirable effort in addressing the problems that the Board has faced in attempting to apply the *Yeshiva* holding, including providing guidance with regard to the relative weight to be afforded different factors. For the most part, I believe that the factors set forth will provide effective guidance, both for the Board as well as for interested parties, in considering and resolving the issue of managerial status for faculty members.

Having said that, I do have a concern that, if applied too inflexibly, the new division of areas of decision-making into "primary" and "secondary importance could fail to give adequate weight to certain instances in which faculty members are effectively making decisions in areas affecting—to paraphrase *Yeshiva*—the university's overall product, the terms upon which that product will be offered and delivered, and the customers who will be served by that product.[20] Specifically, I am concerned that two of the areas currently afforded only secondary weight by the majority actually directly affect the customers of the university in such a way as to warrant primary consideration instead.

First, I would caution that the majority test should provide greater flexibility in recognizing those areas of "ac-

[19] It is undisputed that PLU did not originate any of these beliefs in any manner that might imply they were simply artifices to avoid Board jurisdiction.

[20] *Yeshiva*, 444 U.S. at 686.

ademic policy" that, in fact, can significantly affect the university as a whole and, therefore, are entitled to significant weight in determining managerial status. For example, it seems clear that the grading policy can have a significant effect in attracting students as well as in retaining students. One can imagine a hypothetical graduating college senior choosing between three law schools, each of which has a different grading policy: one school has traditional grades for all classes; another offers all its classes under a pass/fail system; and the third allows students to elect to take one class as a pass/fail grade per grading period.[21] It cannot be disputed that schools publicize their grading policies, that applicants take note of these policies, and that grading policies can be an important consideration for potential enrollees in choosing between competing institutions.[22]

Second, I would similarly caution that there will be examples of "personnel policy and decisions" that should be considered of primary importance. For example, these include hiring policies that affect employment and hiring throughout the entire university, particularly personnel decisions regarding faculty.[23] With regard to faculty hiring and tenure decisions, the *quality of the faculty* is a significant factor in a university's reputation and its desirability to potential students.[24] As the Supreme Court remarked in *Yeshiva*, the "nature and quality of a university depend so heavily on the faculty attracted to the institution."[25] Accordingly, the Board's test should consider these factors of primary importance notwithstanding that they are part of the majority's "academic policy" and "personnel policy and decisions" areas, based on evidence establishing their importance to universities and consumers.

I have another concern about this first part of the majority's test—the majority does not really give guidance concerning how our regional directors and future Boards will decide the ultimate outcome based on the factors. For instance, if no primary factors are established, but one secondary factor is, is that sufficient to establish managerial status? If no primary, but two secondary factors? Is one primary factor alone sufficient? It appears that the majority finds no need to reach that issue, in light of their finding that the record does not establish that the faculty at issue actually control or make effective recommendations in any of the primary or secondary areas of decision making. But the majority has decided to create a comprehensive test here, and, therefore, the actual weighting of its factors, including what showing is sufficient to meet the majority's test, is a rather large analytical question to be left unresolved, particularly if the hope is to provide predictability and guidance with regard to how the Board will make these determinations in the future. My own view would be that one primary factor or two or more secondary factors should be sufficient.

B. Actual Control or Effective Recommendation

Although I have minor concerns with the formulation of the first part of the majority's test, my real objection is to the manner in which the majority interprets, and then applies, the second part of the test. Specifically, by increasing the burden of proof for what the Board considers to be "effective" recommendations, and by failing to consider the actual, diverse processes of university business operations and governance, the Board has raised the bar for establishing managerial status of faculty to an

[21] This is, of course, not a purely hypothetical situation: In general terms, this was a consideration faced by students choosing between Harvard, Yale, and Stanford law schools back in 1990.

[22] For example, the National Association for Law Placement's directory of law schools, which is designed to help recruiters learn more about students from particular law schools, include information about each law school's grading systems. National Association for Law Placement, *NALP Directory of Law Schools*, http://www.nalp.org/nalpdirectoryoflawschools (last visited Nov. 14, 2014); see also Silverstein, *A Case for Grade Inflation in Legal Education*, 47 U.S.F.L. Rev. 487, 497–501 (2013) (describing how law schools differ from other graduate institutions in requiring a higher grade point average to remain in good standing and graduate, and noting that "more prestigious schools tend to give better grades to their students than less prestigious schools").

[23] In finding managerial status, the Board has previously relied on the faculty's involvement in faculty hiring and tenure decisions. See, e.g., *American Interational College*, 282 NLRB 189, 201 (1986) (relying additionally on the faculty's influence in hiring, promotion, and tenure decisions); *Boston University*, 281 NLRB 798 (1986) (noting that the faculty played an effective role in recommending faculty hiring, tenure, promotions, and reappointments).

[24] In published rankings of universities, methodologies usually include consideration of faculty quality. See, e.g., U.S. News and World Report, *How U.S. News Calculated the 2015 Best Colleges Rankings*, http://www.usnews.com/education/best-colleges/articles/2014/09/08/how-us-news-calculated-the-2015-best-colleges-rankings (last visited Nov. 14, 2014) (20% of a university's score based on "faculty resources," including professors' educational background, class size, student-faculty ratio, and faculty full-time or part-time status; 25% of a university's score based on other institution administrators' assessment to account for intangibles such as faculty dedication to teaching); Forbes, *Ranking America's Top Colleges 2014*, http://www.forbes.com/sites/carolinehoward/2014/07/30/ranking-americas-top-colleges-2014/ (last visited Nov. 14, 2014) (25% of a university's score based on student satisfaction, including student evaluations of professors); Money, *How Money Ranked the Best Colleges*, http://time.com/money/3020573/methodology-short-moneys-best-colleges/ (last visited Nov. 14, 2014) (a third of a university's score based on quality of education including instructor quality).

[25] *Yeshiva*, 444 U.S. at 689 fn. 27.

unattainable height, one beyond the reach even of Areté.[26]

The majority begins by citing the principle that "the party asserting managerial status must prove actual--rather than mere paper--authority." This is an accurate recitation of well-settled Board law, and I have no disagreement with the majority in this regard.

The majority then, however, states that "to be 'effective,' recommendations *must* almost always be followed by the administration.'" (Emphasis added.) In support of this statement, the majority cites six separate cases—none of which supports the majority's position that this requirement, in fact, must be met in order to establish that faculty members make effective recommendations. Let's start with the specific quotation used by the majority, which comes from the case *College of Osteopathic Medicine & Surgery*, 265 NLRB 295, 297 (1982). To be sure, the Board found that the record in that case established that faculty recommendations were almost always followed by the administration, and that, further, that the faculty at issue established that they possessed the actual authority to make effective recommendations. But that is a different matter entirely than stating that such an exacting standard *must be met* in order to establish that faculty members make effective recommendations into important academic and nonacademic matters. To use an analogy, assume that a college maintains an honor roll. The college may be asked whether a particular student qualifies for the honor roll. Let's say that student has a 3.99 grade-point average. If the college decides that the group of students with 3.99 grade-point averages qualifies for the honor roll, it does not follow from that decision that students *must* have a 3.99 grade-point average to qualify, nor does that decision shed much light on what the "cutoff" for the honor roll actually is. Similarly, if it is determined that students with 2.75 grade-point averages do not qualify for the honor roll, that does not tell us the fate of students who have, say, 3.5 grade-point averages.

Similarly, it seems as though Board precedent pertaining to effective recommendation has delineated the extremes. Thus, it seems clearly established that when faculty members make recommendations that are *virtually always* followed by the administration, *effective recommendation is established*. It also seems clear that when faculty committee recommendations are *routinely ignored or reversed*, those faculty do *not effectively recommend the decisions at issue.* See, e.g., *St. Thomas University*, 298 NLRB 280, 286 (1990) (faculty committee recommendations were not effective where the committees "met infrequently, and any recommendations they have made regarding academic or nonacademic policy have usually been ignored or reversed by the administration"). But, contrary to the majority's suggestion, the Board has *not* required that an administration must almost always" follow the recommendations of its faculty in order for those faculty to be acting in a managerial capacity. I disagree strongly with the majority's imposition of this new, overly onerous standard, which will result in the under-recognition of faculty who actually act in a managerial capacity.

Further, in my view, the majority commits serious error by establishing a false dichotomy between persuasive faculty recommendations that are subject to independent review — which, under their test, are not considered "effective" for purposes of establishing managerial status—and persuasive faculty recommendations not subject to independent review—which may be used to establish managerial status.[27] It seems evident that a recommendation that is implemented, even after independent review, can still be considered "effective," and reflective of managerial authority. For example, faculty members could be making an effective recommendation, even if an independent review occurred, if the reviewer's ultimate decision hinged on the persuasiveness of the faculty's research, analysis, and advocacy.[28] It is worth noting

[26] Areté, the aforementioned Greek Goddess of excellence (also of virtue, goodness, and valor) was believed to dwell at a great height, close to the gods, on rocks unclimbable by most mortals.

[27] The verbiage setting forth the standard confusingly cites two distinct concepts in evaluating "effective" recommendation: that recommendations must "*almost always* be followed" to be effective and that recommendations are effective if "they *routinely* become operative without independent review." (Emphasis added.) The first standard seems to say that, regardless of whether or not independent review takes place, so long as the faculty recommendations are followed a high percentage of the time (99%? 95%? 90%? Who knows?), there is effective recommendation. The latter standard says that, even if the recommendations are followed 100% of the time, so long as the administration undertakes an independent review before deciding, there is no effective recommendation. The majority does not make clear how these two standards are meant to be considered in tandem, and it seems likely that most of our field personnel and the regulated community will find this hard to understand.

[28] This rationale is equally applicable to the majority's strange suggestion that if the administration and the faculty assembly engage in feedback and dialogue before the faculty makes a recommendation, that the recommendation is advisory and not "effective." That is, the majority's assumption that dialogue or feedback constitutes independent review that negates the effectiveness of a recommendation ignores the possibility that the administration *could well be motivated or influenced* by the faculty's recommendation in ultimately making a decision. In fact, it makes sense that feedback and dialogue would increase the effectiveness of a recommendation because the administration would have more information on the faculty's rationale and motivation for its recommendation and the faculty would have more opportunity to advocate for its position.

that, in most hierarchical operations, including universities, levels of review are generally built into the decision-making process. To conclude that the act of review *in and of itself* strips away the extent to which the substantial managerial input of those individuals who actively decided to develop and advocate for a certain policy seems to utterly disregard the realities of decision- and policy-making in complex organizations. Here, I agree with the majority that university environments are "places rich in dialogue," but that means we should establish an "effective recommendation" standard to reflect this fact. Accordingly, I would find that faculty members effectively recommend policies where, historically and a majority of the time, the faculty's recommended actions are adopted and implemented without substantial change, regardless of whether another level of administration engaged in an "independent review" or whether the ultimate decision was the result of a collaboration between faculty members and administrators.[29]

C. Application of the Majority's New Test to Determine the Managerial Status of PLU Full-Time Contingent Faculty

Despite my disagreement with aspects of my colleagues' formulation of the new test in this area, particularly as concerns the establishment of "effective recommendations," I would ultimately reach the same conclusion: that the full-time contingent faculty here do not have managerial authority and thus are employees protected under the Act because PLU has provided no evidence to establish, at minimum, that they have actual control or input in any of the PLU's decisionmaking areas. Significantly, the University has not shown any meaningful participation by the petitioned-for contingent faculty at any level of administration. Although they may participate at the department level on various curriculum matters, PLU failed to explain exactly what that participation involves, i.e, how participants decide and vote on matters and to what extent the petitioned-for faculty are allowed to participate in that process. At most, there is evidence that the division of humanities has recommended giving those faculty members voting privileges; there is no evidence, however, that this recommendation was implemented. Contingent faculty are also expressly barred from the faculty standing committees, which recommend policy on a variety of primary and secondary areas of decision-making. Furthermore, PLU presented no evidence that any of the contingent faculty serve on a University committee, despite the fact that such "paper" authority has existed since 2013. Finally, although contingent faculty have the right to vote in the faculty assembly, PLU did not provide specific evidence showing that any of those faculty members has actually ever voted or even spoken in the faculty assembly.

Conclusion

For nearly four hundred years now, religious believers have come to our shores because of their religion. Some were fleeing their homelands because of religious persecution by their rulers, and others were escaping from outright religious wars. All left behind family or friends, sometimes never to see their loved ones again. Their migration to America was rarely easy, and many lost their own lives trying to settle in the New World, early in our history.

They came for a reason. They endured all the hardship of that journey for that reason. They wanted to be free to determine, and to practice, their own relationship with God on their own terms, and to educate successive generations in those religious beliefs. The idea that impelled them—of religious freedom, without state favoritism toward or influence over religious beliefs—was so powerful that it became part of the very First Amendment in the Bill of Rights in our Constitution. What the Founding Fathers there declared to be inalienable rights in 1789, justices and judges subsequently expanded and refined over the course of our national history.

This arc of progress has moved only in one direction: toward more religious freedom and less state interference in religion. Today, it is inconceivable in the United States that a government agency would tell religious educational institutions how they must define—and "hold out"— their religious traditions to the public, or else the agency will begin regulating them, just as it regulates secular bodies. Or, so it should be.

[29] The majority appears bent on downplaying or undermining any potential influence that the full-time contingent faculty here could have. See, e.g., fn. 25, supra. The majority notes that even if they have a vote on academic matters in the faculty assembly, it is limited involvement because while the faculty standing committee's decisions on new degrees, majors, minors, and programs must go through the faculty assembly for approval, "changes to degree requirements, new courses, and other curriculum course changes do not require the consent of the faculty assembly unless there is an objection." This distinction, however, is meaningless. Whether the faculty assembly has the right to object to certain decisions, or that it has to officially approve decisions, both mean that it must independently review those decisions to either affirmatively decide that it will not object or that it will officially approve or reject them.

The majority also seems to suggest that, because the contingent faculty members serve one-year employment terms, the effectiveness or potential influence of their votes and/or recommendations is diminished. This reasoning is inconsistent with how voting bodies work. To analogize, the votes of politicians are not given less weight and their legislative work is not automatically ignored just because they serve time-limited terms. Rather, it seems more likely that the principal effect that the contingents' limited terms would have on the faculty assembly or committees on which they participate is that their voting interests might differ from those of regular or tenured faculty.

The issue posed is how the government should determine the line between what is Caesar's and what is God's. Here, a religious order operates a university following its religious tradition, and amply explains how the educational instruction within that operation is inspired by, and connected to, its religious faith. In such circumstances, and under the doctrine of constitutional avoidance, the government should tread with caution. The state cannot substitute its judgment for the university's over what is "truly" religious, and whether something is "specifically religious enough" to qualify as religious, in order to come to an opposite determination. In short, the Board cannot tell the religion what it must believe—and what it must express to the public—in order to be religious.

Reverence for the Religion Clauses in the Constitution, and the values they embody, compels that conclusion. The courts have already determined this several times over. My colleagues err by not acknowledging the courts' expertise in constitutional interpretation and by not following their well-reasoned decisions. Whatever the importance of a government statute, it cannot overcome the idea of religious freedom, contained today in the First Amendment. Not in 1620 at Plymouth Rock, not in 1789, and not now.

I respectfully dissent.