NLRA Coverage – The Search for Answers:
Student Assistants, Religious Universities, Charter Schools, and Independent Contractors

by

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"That man must be very ignorant, for he answers every question that is asked him."

– Voltaire, *A Philosophical Dictionary (1764)*

The National Labor Relations Act ("NLRA" or "Act")[2] and the National Labor Relations Board ("NLRB" or "Board")[3] govern most private sector employers and employees in the United States, excluding employees of railroads and airlines which are subject to the Railway Labor Act ("RLA").[4] However, the Board's jurisdiction in four controversial areas has produced many questions and few clear answers for employees, employers, unions and labor lawyers.

First, the NLRB has had an uneven track record regarding the status of *college and university student assistants* as employees under NLRA Section 2(3). After going back-and-forth

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[2] ,29 U.S.C. §§ 151 *et seq*.

[3] The NLRB's authority to enforce the NLRA exists pursuant to NLRA Sections 3 and 4, 29 U.S.C. §§ 153, 154. The Supreme Court has held that the Board has "primary jurisdiction" to enforce the NLRA, *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 245 (1959), and it is charged with the "special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963). *See also NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 496-97 (1985); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1978); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

[4] *See* the Act's definition of "employer" and "employee," respectively, in NLRA §§ 2(2) and 2(3), 29 U.S.C. §§ 152(2), 152(3). Questions have also arisen in recent years regarding whether certain entities are employers under the NLRA or the RLA. *See, e.g., ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017). *See also* Molly Gabel, *Return to Decades of Precedent: Derivative Carriers Under the RLA and NLRB Deference to the NMB* (ABA Committee on Practice and Procedure Under the NLRA, March 4, 2020).

The NLRA's definition of employee also excludes, among others, individuals employed as agricultural laborers. NLRA § 2(3), 29 U.S.C. § 152(3).

on this issue, the Board decided that university student assistants were employees in *Columbia University*, 364 NLRB No. 90 (2016) and *Yale University*, 365 NLRB No. 40 (2017), but the NLRB issued a Proposed Rule in September 2019 that would exclude college and university student assistants from Section 2(3)'s "employee" definition. *See* pages 3-20 below.

Second, the NLRB and the courts – including the Supreme Court and, most recently, the Court of Appeals for the D.C. Circuit – have disagreed regarding what standard should govern determinations about whether *religiously affiliated schools and universities* are subject to the Board's jurisdiction, or whether the Board's exercise of jurisdiction would create an unacceptable risk of conflict with the First Amendment's Religion Clauses. *See* pages 21-32 below.

Third, the Board and the courts has grappled with the question of whether a *charter school* should be treated as a "State or political subdivision" – which NLRA Section 2(2) excludes from the definition of "employer" – and, in *Kipp Academy Charter School*,[5] the Board solicited briefs on whether the Board should decline to assert jurisdiction over charter schools pursuant to Section 14(c)(1) of the Act. *See* pages 32-42 below.

Fourth, as part of the Taft-Hartley amendments adopted in 1947, Congress added an express exclusion of "any individual having the status of an *independent contractor*" from the definition of "employee" in NLRA Section 2(3). In recent years, the Board has expanded and contracted the treatment of independent contractor status, with some back-and-forth reversals in the courts of appeals, especially the D.C. Circuit. *See* pages 42-54 below.[6]

During my tenure at the NLRB, I participated in Board decisions addressing many of these issues, and I applied the NLRA consistent with my understanding of the statute and its legislative history. However, I also recognize there are strongly held opinions on all sides regarding questions about the Act's potential application to university student assistants, religiously affiliated colleges, charter schools, and independent contractors. Prospectively, the Board will continue to devote attention to these issues, subject to almost certain review in the courts. Hopefully, this process will produce more definitive answers for parties and practitioners, and produce greater stability in the legal principles that govern these important areas.

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[5] Case 02-RD-191760 (pending).

[6] The treatment of independent contractors is also addressed in Susan Davis, *Narrowing Rights Under the NLRA: Independent Contractors and An Employer's Duty to Bargain* (ABA Committee on Practice and Procedure Under the NLRA, March 4, 2020).

A. Student Assistants

1. *Development of the Law*. For many years, NLRB cases appeared to exclude student assistants from the Act's definition of employees, and during the first several decades of the NLRA, the NLRB declined to exercise jurisdiction over nonprofit universities generally.

Among the earliest Board decisions addressing private nonprofit educational institutions was *Columbia University*,[7] in which the Board declined to assert jurisdiction over a petitioned-for unit of university clerical library employees. The Board relied in large part on legislative history indicating that, when Congress adopted the Taft-Hartley amendments to the Act in 1947, the Act expressly excluded nonprofit hospitals, but the Conference Report stated that other nonprofit organizations were not specifically excluded "for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act."[8]

In *Cornell University*,[9] which involved union petitions to represent certain nonacademic and library employees, the Board revisited the appropriateness of declining to assert jurisdiction over nonprofit educational institutions. The Board noted that, as part of the Landrum-Griffin amendments adopted in 1959, Congress adopted NLRA Section 14(c), which "both authorized and set limits on the Board's discretionary refusal to exercise jurisdiction."[10] The Board overruled *Columbia University*, based in part on evidence that universities were "enlarging both their facilities and their economic activities to meet the needs of mounting

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[7] 97 NLRB 424 (1951).

[8] *Id.* at 427 (emphasis and footnote omitted), *quoting* H. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act 505, 536 (1947) (hereinafter "LMRA Hist."). The Taft-Hartley amendments to the Act were part of the Labor Management Relations Act ("LMRA," also known as the "Taft-Hartley Act"), Pub. L. 80-101, 61 Stat. 136 (1947).

[9] 183 NLRB 329 (1970).

[10] *Id.* at 331. Section 14(c) of the Act states: "(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959. (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." 29 U.S.C. § 164(c). The Landrum-Griffin amendments to the Act were part of the Labor-Management Reporting and Disclosure Act ("LMRDA," also known as the "Landrum-Griffin Act"), Pub. L. 86-257, 73 Stat. 519 (1959).

numbers of students" which produced a "surge of organizational activity taking place among employees on college campuses."[11]

In *Adelphi University*,[12] the Board held that graduate student assistants were primarily students that should be excluded from a unit of regular faculty. Similarly, in *Leland Stanford*,[13] the Board held that graduate research assistants "are not employees within the meaning of Section 2(3) of the Act."[14] The Board in *Leland Stanford* reasoned as follows:

> Based on all the facts, we are persuaded that the relationship of the RA's and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer. Rather it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary, as determined by the project's needs. The situation is in sharp contrast with that of research associates, who are full-time professional employees who have already secured their Ph. D. degrees and work at research under direction, typically of a faculty member. Research associates are not simultaneously students, and the objective of a research associate's research is to advance a project undertaken by and on behalf of Stanford as directed by someone else. A research associate may not initiate projects and is not responsible for them. In contrast, the RA's are seeking to advance their own academic standing and are engaging in research as a means of achieving that advancement; at least in the final stage of study, each is likely to be working independently on a novel research project for which he or she is responsible. While research associates are subject to discharge, a graduate student whose work is rated unsatisfactory merely receives a nonpassing grade.[15]

In *NLRB v. Yeshiva University*,[16] the Supreme Court rejected the NLRB's approval of a bargaining unit consisting of Yeshiva University's full-time faculty members. The Supreme

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[11] 183 NLRB at 333.

[12] 195 NLRB 639 (1972).

[13] 214 NLRB 621, 623 (1974).

[14] Section 2(3) of the Act states: "The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." 29 U.S.C. § 152(3).

[15] 214 NLRB at 623.

[16] 444 U.S. 672 (1980).

Court – in agreement with the court of appeals – held that those faculty members were "endowed with 'managerial status' sufficient to remove them from the coverage of the Act."[17] Although the Supreme Court did not address the potential "employee" status of students who received financial support for work related to their academic pursuits, the Supreme Court made the following observations that, in the past 40 years, have received significant attention both by advocates who favor and those who oppose treating university student assistants as statutory employees:

> There is no evidence that Congress has considered whether a university faculty may organize for collective bargaining under the Act. Indeed, when the Wagner and Taft-Hartley Acts were approved, it was thought that congressional power did not extend to university faculties because they were employed by nonprofit institutions which did not "affect commerce." . . . Moreover, *the authority structure of a university does not fit neatly within the statutory scheme we are asked to interpret. The Board itself has noted that the concept of collegiality "does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world." Adelphi University*, 195 NLRB 639, 648 (1972).
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> *The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry. Ibid*. In contrast, authority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. See J. Baldridge, *Power and Conflict in the University* 114 (1971). This system of "shared authority" evolved from the medieval model of collegial decisionmaking in which guilds of scholars were responsible only to themselves. See N. Fehl, *The Idea of a University in East and West* 36-46 (1962); D. Knowles, The Evolution of Medieval Thought 164-168 (1962). At early universities, the faculty were the school. Although faculties have been subject to external control in the United States since colonial times, J. Brubacher & W. Rudy, *Higher Education in Transition: A History of American Colleges and Universities*, 1636-1976, pp. 25–30 (3d ed. 1976), traditions of collegiality continue to play a significant role at many universities, including Yeshiva.[10] For these reasons, *the Board has recognized that principles developed for use in the industrial setting cannot be "imposed blindly on the academic world." Syracuse University*, 204 NLRB 641, 643 (1973).
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> *The absence of explicit congressional direction, of course, does not preclude the Board from reaching any particular type of employment*. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124-131 (1944). Acting under its responsibility for adapting the broad provisions of the Act to differing workplaces, the Board asserted jurisdiction over a university for the first time in 1970. *Cornell University*, 183 NLRB 329 (1970). Within a year it had approved the formation of bargaining units composed of faculty members. *C. W. Post Center*, 189 NLRB 904 (1971). The Board reasoned that faculty members are

[17] *Id.* at 679 (footnotes omitted).

> "professional employees" within the meaning of § 2(12) of the Act and therefore are entitled to the benefits of collective bargaining.[18]

In *Boston Medical Center*,[19] a divided five-member Board held that medical interns and residents were statutory employees. The Board majority (consisting of Chairman Truesdale and Members Fox and Liebman) reasoned:

> Ample evidence exists here to support our finding that interns, residents and fellows fall within the broad definition of "employee" under Section 2(3), notwithstanding that a purpose of their being at a hospital may also be, in part, educational. That house staff may also be students does not thereby change the evidence of their "employee" status. . . . [N]othing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act. The essential elements of the house staff's relationship with the Hospital obviously define an employer-employee relationship.[20]

Board Member Hurtgen and Brame authored separate dissenting opinions in *Boston Medical Center*.[21] Member Hurtgen indicated that, although the statute did not necessarily preclude an interpretation that the hospital house staff fell within the Act's "employee" definition, "as a policy matter, the Board should continue to exercise its discretion to exclude them for purposes of collective bargaining."[22] Member Brame emphasized the fixed, limited tenure of students who were medical residents, which culminated in their receipt of a diploma, with any subsequent employment being "entirely separate from the residency program."[23] Member Brame also expressed his view that traditional collective bargaining was "completely unsuited to resolve differences" in many core subjects such as job assignments, rotations, training, starting dates and promotions, which were "under the control of attending physicians" or "governed by national standards imposed . . . on a national basis by accreditation agencies. . . ."[24]

The treatment of college and university student assistants changed in *New York University ("NYU")*,[25] where a three-member Board (consisting of Chairman Truesdale and Members Liebman and Hurtgen) held that most of the university's student graduate assistants

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[18] 444 U.S. at 679-681, *citing NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504-505 (1979) (emphasis added; footnotes omitted; selected other citations modified or omitted).

[19] 330 NLRB 152 (1999).

[20] *Id.* at 160.

[21] *Id.* at 168-170 (Member Hurtgen, dissenting); *id.* at 170-183 (Member Brame, dissenting).

[22] *Id.* at 169 (Member Hurtgen, dissenting).

[23] *Id.* at 176 (Member Brame, dissenting).

[24] *Id.* at 179-180 (Member Brame, dissenting).

[25] 332 NLRB 1205 (2000).

were statutory employees. Chairman Truesdale and Member Liebman applied *Boston Medical Center*, and reasoned:

> Consistent with Supreme Court and Board precedent, we find that the graduate assistants are employees within the meaning of Section 2(3). We reject the contention of the Employer and several of the *amici* that, because the graduate assistants may be "predominately students," they cannot be statutory employees. Like the Regional Director, we find there is no basis to deny collective-bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students. Section 2(3) of the Act broadly defines the term "employee" to include "any employee." This interpretation is buttressed by the Supreme Court's long support for our historic, broad and literal reading of the statute. *NLRB v. Town & Country*, 516 U.S. 85, 91-92 (1995); *Sure-Tan, Inc. v. NLRB*, 467 NLRB 883, 891-892 (1984); *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189-190 (1981); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-186 (1941). As the Court explained in *Sure-Tan*, unless a category of workers is among the few groups specifically exempted from the Act's coverage, the group plainly comes within the statutory definition of "employee." 467 U.S. at 891-892. The definition of the term "employee" reflects the common law agency doctrine of the conventional master-servant relationship. *Town & Country*, 516 U.S. at 93-95. This relationship exists when a servant performs services for another, under the other's control or right of control, and in return for payment.[26]

Member Hurtgen wrote a concurring opinion in *NYU*, in which he distinguished between New York University's graduate students – who Member Hurtgen agreed should have the right to engage in collective bargaining as statutory employees – and the hospital house staff members in *Boston University* (who Member Hurtgen previously indicated should not have been treated as statutory employees).[27] In this regard, Member Hurtgen reasoned: "the residents and interns [in *Boston University*] perform their services as a necessary and fundamental part of their medical education. By contrast, the graduate students involved herein do not perform their services as a necessary and fundamental part of their studies."[28]

In *Brown University*,[29] a five-member Board (consisting of Chairman Battista and Members Liebman, Schaumber, Walsh and Meisburg) revisited the question of whether teaching assistants, research assistants and proctors were employees within the meaning of Section 2(3) of the Act. The Board majority (consisting of Chairman Battista and Members Schaumber and Meisburg) overruled *NYU* and held that a unit of roughly 450 graduate students employed as teaching assistants ("TAs"), research assistants ("RAs") and proctors was

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[26] *Id.* at 1205-1206, *citing NLRB v. Town & Country*, 516 U.S. at 90–91, 93–95; and *Seattle Opera Assoc.*, 331 NLRB No. 148, slip op. at 2 (2000) (*citing WBAI Pacifica Foundation*, 328 NLRB 1273 (1999)).

[27] 332 NLRB at 1209 (Member Hurtgen, concurring).

[28] *Id.* (Member Hurtgen, concurring).

[29] 342 NLRB 483 (2004).

not appropriate for purposes of collective bargaining, based on the majority's conclusion that "graduate student assistants, including those at Brown, are primarily students and have a primarily educational, not economic, relationship with their university."[30]

The Board majority in *Brown University* relied on the Board's rationale in *St. Clare's Hospital*,[31] where the Board previously reaffirmed that the Act's definition of employees excluded students "who perform services at their educational institutions which are directly related to their educational program" and stated that the Board "has universally excluded students from units which include nonstudent employees, and in addition has denied them the right to be represented separately."[32] The Board majority in *Brown University* concluded:

> The concerns expressed by the Board in *St. Clare's Hospital* 25 years ago are just as relevant today at Brown. Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution like Brown. Although these issues give the appearance of being terms and conditions of employment, all involve educational concerns and decisions, which are based on different, and often individualized considerations.
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> Based on all of the above-statutory and policy considerations, we concluded that the graduate student assistants are not employees within the meaning of Section 2(3) of the Act. Accordingly, we decline to extend collective bargaining rights to them, and we dismiss the petition.[33]

Board Members Liebman and Walsh dissented in *Brown University*, and started with the observation that "[c]ollective bargaining by graduate student employees is increasingly a fact of American university life."[34] They continued:

> Today's decision is woefully out of touch with contemporary academic reality. Based on an image of the university that was already outdated when [*Leland Stanford* and *St. Clare's Hospital*] . . . were issued in the 1970's, it shows a troubling lack of interest in empirical evidence. Even worse, perhaps, is the majority's approach to applying the Act.

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[30] *Id.* at 487.

[31] 229 NLRB 1000 (1977).

[32] 342 NLRB at 487, *quoting St. Clare's Hospital*, 229 NLRB at 1002. The Board in *Brown University* also relied on the prior Board decision finding that student assistants were non-employees in *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976).

[33] 342 NLRB at 490 (footnotes omitted).

[34] 342 NLRB at 493 (Members Liebman and Walsh, dissenting).

> It disregards the plain language of the statute – which defines "employees" so broadly that graduate students who perform services for, and under the control of, their universities are easily covered – to make a policy decision that rightly belongs to Congress. The reasons offered by the majority for its decision do not stand up to scrutiny. But even if they did, it would not be for the Board to act upon them. The result of the Board's ruling is harsh. Not only can universities avoid dealing with graduate student unions, they are also free to retaliate against graduate students who act together to address their working conditions.[35]

Dissenting Board Members Liebman and Walsh reasoned that "[n]othing in Section 2(3) excludes statutory employees from the Act's protections, on the basis that the employment relationship is not their 'primary' relationship with their employer," and "[a]bsent compelling indications of Congressional intent, the Board simply is not free to create an exclusion from the Act's coverage for a category of workers who meet the literal statutory definition of employees."[36] Board Members Liebman and Walsh not only criticized the Board majority's legal analysis, they criticized the Board majority's description of the non-economic relationship between graduate assistants and universities. In this regard, they stated:

> Even assuming that the Board were free to decide this case essentially on policy grounds, the majority's approach, minimizing the economic relationship between graduate assistants and their universities, is unsound. It rests on fundamental misunderstandings of contemporary higher education, which reflect our colleagues' unwillingness to take a close look at the academic world. Today, the academy is also a workplace for many graduate students, and disputes over work-related issues are common. As a result, the policies of the Act – increasing the bargaining power of employees, encouraging collective bargaining, and protecting freedom of association – apply in the university context, too. Not only is the majority mistaken in giving virtually no weight to the common- law employment status of graduate assistants, it also errs in failing to see that the larger aims of Federal labor law are served by finding statutory coverage here. Indeed, the majority's policy concerns are not derived from the Act at all, but instead reflect an abstract view about what is best for American higher education—a subject far removed from the Board's expertise.[37]

2. *More Recent Developments*. In the past five years, the Board addressed the potential "employee" status of different types of students in three significant cases, and most recently, in a proposed rule.

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[35] *Id*. at 493-494 (Members Liebman and Walsh, dissenting).

[36] *Id*. at 496 (Members Liebman and Walsh, dissenting).

[37] *Id*. at 497 (Members Liebman and Walsh, dissenting).

(a) *Northwestern University*. In *Northwestern University*,[38] a unanimous five-member Board (consisting of Chairman Pearce and Members Miscimarra, Hirozawa, Johnson and McFerran) decided not to assert jurisdiction over a representation petition in which a union sought to represent a bargaining unit consisting of Northwestern's football players who received "grant-in-aid scholarships." The Board declined to reach or decide the question of whether these student-athletes were statutory employees.[39] Among other things, the Board reasoned:

> There has never been a petition for representation before the Board in a unit of a single college team or, for that matter, a group of college teams. And the scholarship players do not fit into any analytical framework that the Board has used in cases involving other types of students or athletes. . . . Moreover, as explained below, even if scholarship players were regarded as analogous to players for profession-al sports teams who are considered employees for purposes of collective bargaining, such bargaining has never involved a bargaining unit consisting of a single team's players, where the players for competing teams were unrepresented or entirely outside the Board's jurisdiction.[40]

The Board attached significance, among other things, to the fact that Northwestern was the only private university that was a member of the "Big Ten" competitors (the rest of which were public universities that, as government institutions, were not subject to the NLRB's jurisdiction); and of the roughly 125 colleges and universities participating in the NCAA's Division I Football Bowl Subdivision ("FBS"), all but 17 were state-run institutions (which, therefore, were not subject to the NLRB's jurisdiction).[41] The Board found that, even if the scholarship student-

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[38] 362 NLRB 1350 (2015).

[39] *Id*. at 1350 ("we find that it would not effectuate the policies of the Act to assert jurisdiction in this case, even if we assume, without deciding, that the grant-in-aid scholarship players are employees within the meaning of Section 2(3)"); *id.* at 1352 ("we have determined that, even if the scholarship players were statutory employees (which, again, is an issue we do not decide), it would not effectuate the policies of the Act to assert jurisdiction"). Although the Board in *Northwestern University* declined to reach the question of whether Northwestern's scholarship football student-athletes were statutory employees under Section 2(3) of the Act for purposes of collective bargaining, NLRB General Counsel Richard F. Griffin Jr. issued a General Counsel's Memorandum in January 2017 embracing the view that NCAA Division I Football Bowl Subdivision scholarship football student-athletes (including those at Northwestern University) are statutory employees, especially in non-bargaining contexts involving, for example, whether a private university's actions might violate Section 8(a)(1) of the Act as unlawful interference with the exercise of NLRA-protected rights. NLRB GC Memorandum 17-01, pp. 16-23 (Jan. 31, 2017) (available at https://apps.nlrb.gov/link/document.aspx/09031d4582342bfc). However, GC Memorandum 17-01 was rescinded on December 1, 2017 by General Counsel Peter B. Robb. *See* NLRB GC Memorandum 18-02, pp. 4-5 (Dec. 1, 2017) (available at https://apps.nlrb.gov/link/document.aspx/09031d4582342bfc).

[40] 362 NLRB at 1352-53 (footnotes omitted).

[41] 362 NLRB at 1354.

athletes were assumed to be employees, there would be "an inherent asymmetry of the labor relations regulatory regimes" applicable to different teams, and the Board declined to assert jurisdiction based on a conclusion that this "would not promote stability in labor relations"[42] and "would not effectuate the policies of the Act. . . ."[43]

(b) *Columbia University*. In *Columbia University*,[44] a divided four-member Board (consisting of Chairman Pearce and Members Miscimarra, Hirozawa and McFerran) overruled *Brown University* and reinstated the Board's prior holding (in *New York University*) that college and university student assistants were statutory employees in representation cases and for other purposes under Section 2(3) of the Act.

The union in *Columbia University* sought to represent a broad-based bargaining unit consisting of "[a]ll student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities. . . ."[45] The Board majority (consisting of Chairman Pearce and Members Hirozawa and McFerran) concluded that the petitioned-for student assistants were statutory employees; that the petitioned-for unit was appropriate; and that the petitioned-for classifications were not occupied by any temporary employees who should have been excluded from the unit.[46]

The Board majority in *Columbia University* reviewed the development of the law, including the Board's reversals in *NYU* (in which "[t]he Board first held that certain university graduate assistants were statutory employees") and *Brown University* (in which the Board indicated that the relationship between universities and student assistants was "primarily educational" which prompted the Board to declare that *NYU* was "wrongly decided").[47] The *Columbia University* Board majority expressed agreement with *NYU*, and stated:

> The Act does not offer a definition of the term "employee" itself. But it is well established that "when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute 'must infer, unless the statute otherwise

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[42] *Id.* at 1354.

[43] *Id.* at 1355.

[44] 364 NLRB No. 90 (2016).

[45] *Id.*, slip op. at 1 n. 1. For ease of reference below, I refer to all of the students encompassed by this bargaining unit description as "student assistants."

[46] *Id.*, slip op. at 2.

[47] *Id.*, slip op. at 2-3.

> dictates, that Congress means to incorporate the established meaning'" of the term, with reference to "'common-law agency doctrine.'"[48]

The Board majority in *Columbia University* criticized the characterization in *Brown University* of student assistant relationships as being "primarily educational" rather than an "economic relationship."[49] Thus, the Board majority in *Columbia University* reasoned:

> The fundamental error of the *Brown University* Board was to frame the issue of statutory coverage not in terms of the existence of an employment relationship, but rather on whether some other relationship between the employee and the employer is the primary one – a standard neither derived from the statutory text of Section 2(3) nor from the fundamental policy of the Act. Indeed, in spite of the *Brown University* Board's professed adherence to "Congressional policies," we can discern no such policies that speak to whether a common-law employee should be excluded from the Act because his or her employment relationship co-exists with an educational or other non-economic relationship. The Board and the courts have repeatedly made clear that the extent of any required "economic" dimension to an employment relationship is the payment of tangible compensation. Even when such an economic component may seem comparatively slight, relative to other aspects of the relationship between worker and employer, the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for purposes of the Act. Indeed, the principle that student assistants may have a common-law employment relationship with their universities – and should be treated accordingly – is recognized in other areas of employment law as well.
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> In sum, we reject the *Brown* Board's focus on whether student assistants have a "primarily educational" employment relationship with their universities. The Supreme Court has cautioned that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." The crucial statutory text here, of course, is the broad language of Section 2(3) defining "employee" and the language of Section 8(d) defining the duty to bargain collectively. It seems clear to us, then, that the Act's text supports the conclusion that student assistants who are common-law employees are covered by the Act, unless compelling statutory and policy considerations require an exception.[50]

The Board majority further reasoned that asserting jurisdiction over student assistants as statutory employees was consistent with the Act's purposes and policies, and would not

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[48] *Id*., slip op. at 4-5.

[49] *Id*.

[50] *Id*., slip op. at 5-6.

infringe upon academic freedom within colleges or universities to a degree that raised serious constitutional questions under the First Amendment.[51]

I dissented in *Columbia University*, while stating that "I respect the views presented by my colleagues and by advocates on all sides regarding the issues in this case."[52] However, I believed that the issues "require more thoughtful consideration than the Board majority's decision gives them," and I suggested that "my colleagues – though armed with good intentions – engage in analysis that is too narrow, excluding everything that is unique about the situation of college and university students."[53]

In particular, three considerations referenced in my *Columbia University* dissent prompted me to conclude that university student assistants should not be treated as employees under Section 2(3) of the Act.

First, I stated "my colleagues disregard a fundamental fact that should be the starting point when considering whether to apply the NLRA to university students,"[54] which involved the immense financial investment made by university students and their families when they enroll in a college or university. I explained:

> Full-time enrollment in a university usually involves one of the largest expenditures a student will make in his or her lifetime, and this expenditure is almost certainly the most important financial investment the student will ever make. In the majority of cases, attending college imposes enormous financial burdens on students and their families, requiring years of preparation beforehand and, increasingly, years of indebtedness thereafter. Many variables affect whether a student will reap any return on such a significant financial investment, but three things are certain: (i) there is no guarantee that a student will graduate, and roughly 40 percent do not; (ii) college-related costs increase substantially the longer it takes a student to graduate, and roughly 60 percent of undergraduate students do not complete degree requirements within four years after they commence college; and (iii) when students do not graduate at all, there is likely to be no return on their investment in a college education.
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> I respect the views presented by my colleagues and by advocates on all sides regarding the issues in this case. However, Congress never intended that the NLRA and collective bargaining would be the means by which students and their families might attempt to exercise control over such an extraordinary expense. This is not a commentary on the potential benefits associated with collective bargaining in the workplace. Rather, it is a recognition that for students enrolled in a college or university,

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[51] *Id.*, slip op. at 6-7.

[52] *Id.*, slip op. at 23 (Member Miscimarra, dissenting).

[53] *Id.*, slip op. at 22, 25.

[54] *Id.*, slip op. at 22-23 (Member Miscimarra, dissenting).

> their instruction-related positions do not turn the academic institution they attend into something that can fairly be characterized as a "workplace." For students, the least important consideration is whether they engage in collective bargaining regarding their service as research assistants, graduate assistants, preceptors, or fellows, which is an incidental aspect of their education. If one regards college as a competition, this is one area where "winning isn't everything, it is the only thing," and I believe winning in this context means fulfilling degree requirements, hopefully on time.[55]

A second consideration that, in my view, undermined a conclusion that student assistants were employees under NLRA Section 2(3) involved the Board's obligation to interpret the NLRA in a manner that accommodated *other* federal statutes, policies and objectives.[56] I elaborated on this point as follows:

> The Board has no jurisdiction over efforts to ensure that college and university students satisfy their postsecondary education requirements. However, Congress has certainly weighed in on the subject: an array of federal statutes and regulations apply to colleges and universities, administered by the U.S. Department of Education, led by the Secretary of Education. My colleagues disregard the Board's responsibility to accommodate this extensive regulatory framework.
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> Regarding the need to accommodate other "Congressional objectives," id., there is no shortage of federal mandates applicable to colleges and universities that, to borrow my colleagues' words, "might weigh against permitting student assistants to seek union representation and engage in collective bargaining." Again, a broad range of federal statutes and regulations apply to colleges and universities, with significant involvement by the U.S. Department of Education, led by the Secretary of Education. Relevant laws include, among many others, the Higher Education Opportunity Act, enacted in 2008, which reauthorized the Higher Education Act of 1965, and the Family Educational Rights and Privacy Act (FERPA), enacted in 1974. These statutes govern, among other things, the accreditation of colleges and universities, the enhancement of quality, the treatment of student assistance, graduate/postsecondary improvement programs, and

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[55] *Id.* (footnotes omitted) (Member Miscimarra, dissenting). In relation to the costs and challenges associated with a student's enrollment in a college or university, I quoted Dr. Peter Cappelli, George W. Taylor Professor of Management at the University of Pennsylvania's Wharton School, who has observed: "college is for many people the biggest financial decision they will ever make," it "makes more demands on our cognitive abilities than most of us will ever see again in our lives," and the "biggest cost associated with going to college . . . is likely to be the risk that a student does not graduate on time or, worse, drops out altogether. There is virtually no payoff from college if you don't graduate." *Id.*, slip op. at 26 n. 19 (Member Miscimarra, dissenting), *quoting* Dr. Peter Cappelli, *Will College Pay Off*?, pp. 8, 26, 48 (2015).

[56] *Id.*, slip op. at 23-24, 26-28 (Member Miscimarra, dissenting), citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942), where the Supreme Court stated that "the Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives."

> the privacy of student records. In 2015, a task force created by a bipartisan group of U.S. Senators reviewed the Department of Education's regulation of colleges and universities and recommended, among other things, that the Department's regulations "be related to education, student safety, and stewardship of federal funds" and "not stray from clearly stated legislative intent." The extensive federal regulation of colleges and universities focuses on access, availability, affordability and effectiveness, all of which relate to the ability of students to satisfy educational objectives. This supports my view that collective bargaining . . . is likely to substantially affect the educational process, separate from any impact on the economic interests of student assistants.[57]

The third consideration that, in my opinion, disfavored treating student assistants as employees under Section 2(3) of the Act involved my view that, in the context of collective bargaining between universities and students under the NLRA, either side's resort to economic weapons in a labor dispute could have an especially disastrous impact on students. I acknowledged that conventional work settings had "many examples of constructive collective-bargaining relationships" and I stated that "one cannot assume that all or most negotiations involving student assistants at universities would result in strikes, slowdowns, lockouts, and/or litigation."[58] However, I explained that

> the potential resort to economic weapons is part and parcel of collective bargaining. Therefore, applying our statute to university student assistants may prevent them from completing undergraduate and graduate degree requirements in the allotted time, which is the primary reason they attend colleges and universities at such great expense. It is not an adequate response to summarily dismiss this issue, as the majority does, with the commonplace observation that "labor disputes are a fact of economic life." For the students who may find themselves embroiled in them, labor disputes between universities and student assistants may have devastating consequences.
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> Now that, with today's decision, student assistants are employees under the NLRA, what economic weapons are available to student assistants and the universities they attend? They would almost certainly include the following:
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> - *Strikes*. Student assistants could go on strike, which would mean that [they] would cease working, potentially without notice, and the university could suspend all remuneration.
> - *Lockouts*. The university could implement a lockout, which would require student assistants to cease working, and all remuneration would be suspended.
> - *Loss, Suspension or Delay of Academic Credit*. If a student assistant ceases work based on an economic strike or lockout, it appears clear they would have no

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[57] 364 NLRB No. 90, slip op. at 23, 26-27 (Member Miscimarra, dissenting).

[58] *Id*., slip op. at 28 (Member Miscimarra, dissenting).

entitlement to credit for requirements that are not completed, such as satisfactory work in a student assistant position for a prescribed period of time. . . .

- *Suspension of Tuition Waivers*. In the event of a strike or lockout where the university suspended tuition waivers or other financial assistance that was conditioned on the student's work as a student assistant, students would likely be foreclosed from attending classes unless they paid the tuition. Thus, the student assistant's attendance at university could require the immediate payment of tuition, which averages $32,410 annually at private universities.
- *Potential Replacement.* In the event of a strike, the university would have the right to hire temporary or permanent replacements. If permanent replacements were hired during an economic strike, this would mean that even if a student unconditionally offered to resume working at the end of the strike, the university could retain the replacements, and the student assistant would not be reinstated unless and until a vacancy arose through the departure of a replacement or the creation of a new position. . . .
- *Loss of Tuition Previously Paid*. If a student assistant paid his or her own tuition (again, currently averaging $32,410 per year at a private university) and only received a cash stipend as compensation for work as a student assistant, there appears to be little question that the student's tuition could lawfully be retained by the university even if a strike by student assistants persisted for an entire year, during which time the student was unable to satisfy any requirements for satisfactory work in his or her student assistant position.
- *Misconduct, Potential Discharge, Academic Suspension/Expulsion Disputes*. During and after a strike, employees remain subject to discipline or discharge for certain types of strike-related misconduct. Correspondingly, there is little question that a student assistant engaged in a strike would remain subject to academic discipline, including possible suspension or expulsion, for a variety of offenses.

Based on these considerations, I believed it was important to evaluate the full spectrum of education- and bargaining-related issues implicated in treating university students engaged in research or other assistant positions like other "employees" who engage in collective bargaining under the NLRA. In my view, there was insufficient evidence that Congress contemplated that the NLRA would apply in this context, and I believed that (a) "collective bargaining and, especially, the potential resort to economic weapons [would] fundamentally change the relationship between university students, including student assistants, and their professors and academic institutions"; (b) "collective bargaining often produces short-term winners and losers, and a student assistant in some cases may receive some type of transient benefit as a result of collective bargaining . . . [but] there are no guarantees, and they might end up worse off"; and (c) "collective bargaining [was] likely to detract from the far more important goal of completing degree requirements in the allotted time, especially when one considers the potential consequences if students and/or universities resort to economic weapons against one

another. . . ."[59] I concluded that "the sum total" would be "uncertainty instead of clarity, and complexity instead of simplicity, with the risks and uncertainties associated with collective bargaining—including the risk of break-down and resort to economic weapons—governing the single most important financial decision that students and their families will ever make."[60]

(c) *Yale University*. In contrast with the *single* bargaining unit consisting of student assistant positions that the Board majority found to be appropriate in *Columbia University*,[61] a divided Board majority (consisting of Board Members Pearce and McFerran) in *Yale University* upheld a Regional Director's decision providing for separate elections in *nine bargaining units* corresponding to the University's nine academic departments.[62]

I dissented in *Yale University* based in part on my dissenting opinion in *Columbia University*.[63] However, I also disagreed with the Board majority's denial of review, which

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[59] *Id.*, slip op. at 23 (Member Miscimarra, dissenting).

[60] *Id.*, slip op. at 23-24 (Member Miscimarra, dissenting). In my *Columbia University* dissent, I also expressed concern that the Board's processes and procedures were poorly suited to deal with representation and unfair labor practice cases involving university students, given that each student's tenure at a particular institution was limited, by definition, to the period associated with their attainment of relevant degree requirements, which contrasted with the often cumbersome and time-consuming nature of case-handling by the Board, where "blocking charges" often delayed scheduled elections for months or years, and unfair labor practice proceedings routinely required three to five years before the Board issued a decision, with some cases taking even longer. See 364 NLRB No. 90, slip op. at 31-32 (Member Miscimarra, dissenting). I concluded that: "In the time it takes a typical NLRA case to be litigated and decided by the Board and the courts, the academic world may experience developments that dramatically change or even eliminate entire fields of study. Moreover, not only does a student assistant's position have a fixed duration, but the student status of the individual occupying that position may itself come to an end long before a Board case affecting him or her is resolved. Students generally attend university for the purpose of doing something else – *i.e.*, to obtain post-graduation employment, or to go on to post-doctoral or other post-graduate studies. Moreover, it is not uncommon for students to change majors, and faculty members also come and go. In these respects, treating student assistants as employees under the NLRA is especially poorly matched to the Board's representation and ULP procedures." *Id.*, slip op. at 31-32 (Member Miscimarra, dissenting).

[61] *See* text accompanying note 45, *supra*.

[62] 365 NLRB No. 40 (2017). The petitioned-for bargaining unit included teaching fellows, discussion section leaders, part-time acting instructors, associates in teaching, lab leaders, grader/tutors, graders without contact, and teaching assistants, and the nine different units corresponded to the following University departments: English, East Asian Languages and Literature, History, History of Art, Political Science, Sociology, Physics, Geology and Geophysics, and Mathematics. See *id.*, slip op. at 1 (Acting Chairman Miscimarra, dissenting).

[63] *See Yale University, id.*, slip op. at 1. In *Yale University*, the university also contended that the student assistants were materially different from those found to be statutory employees in *Columbia University*, but this contention was rejected by the Regional Director, and the denial of review meant the

prevented the parties from having a pre-election decision by the Board about the appropriateness of separate elections involving student assistants in nine different departmental bargaining units. Because the Board in *Columbia University* found that a "*single*, expansive, multi-faceted bargaining unit" was appropriate,[64] I believed this warranted an evaluation of the *Yale University* multiple-unit questions before the elections took place, because otherwise the same issues would "almost certainly remain in dispute for a substantial period of time until [they were] resolved in postelection proceedings."[65]

(d) *Notice of Proposed Rulemaking Regarding Student Assistants*. On September 23, 2019, a divided Board published a Notice of Proposed Rulemaking ("NPRM" or "Proposed Rule") addressing questions regarding Board jurisdiction over "students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies. . . ."[66]

The Board's Proposed Rule would amend 29 CFR part 103.1 to include a subsection "b" that would state:

> Students who perform any services, including, but not limited to, teaching or research assistance, at a private college or university in connection with their undergraduate or graduate studies are not employees within the meaning of Section 2(3) of the Act.[67]

The NPRM described the back-and-forth development of the law regarding university student assistants, and stated in part:

> Under the proposed rule, students who perform services at a private college or university related to their studies will be held to be primarily students with a primarily educational, not economic, relationship with their university, and therefore not statutory employees. See *Brown University*, 342 NLRB at 487. The Board believes, subject to potential revision in response to comments, that the proposed rule reflects an understanding of Section 2(3) that is more consistent with the overall purposes of the Act than are the majority opinions in *NYU* and *Columbia University*. Thus, the proposed rule is based on the view that the common-law definition of employee is not conclusive because the Act, and its policy promoting collective bargaining, "contemplates a primarily economic relationship between employer and employee, and provides a

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Board did not pass on this issue prior to the election. Id., slip op. at 2 (Acting Chairman Miscimarra, dissenting).

[64] *Columbia University*, 364 NLRB No. 90, slip op. at 23, 26-27 (Member Miscimarra, dissenting) (emphasis added). For a description of the bargaining unit that was approved in *Columbia University*, see text accompanying note 45, *supra*.

[65] 365 NLRB No. 40, slip op. at 1 (Acting Chairman Miscimarra, dissenting).

[66] 84 Fed. Reg. 49,691-49,699 (Sept. 23, 2019).

[67] *Id.* at 49,699.

mechanism for resolving economic disputes that arise in that relationship." *Brevard Achievement Center*, 342 NLRB 982, 984-985 (2004).[68]

The Board majority in the NPRM agreed with the *Brown University* holding that "the student teaching assistants and research assistants had a primarily educational, not economic, relationship with their school. . . ."[69] The Board majority also relied on observations that (i) "students spend a limited amount of time performing these additional duties because their principal time commitment is focused on their coursework and studies,"[70] (ii) the remuneration given to students, "provided to help pay the cost of students' education," was "better viewed as financial aid than as 'consideration for work,'"[71] (iii) "the goal of faculty in advancing their students' education differs from the interests of employers and employees engaged in collective bargaining,"[72] and (iv) the NPRM advanced "the important policy of protecting traditional academic freedoms" which – if subjected to collective bargaining – would, according to the Board, "necessarily and inappropriately involve the Board in the academic prerogatives of private colleges and universities as well as in the educational relationships between faculty members and students."[73]

In addition to soliciting comments generally, the NPRM invited comments on "whether the rule should also apply to exclude from Section 2(3) coverage students employed by their own educational institution in a capacity unrelated to their course of study due to the 'very tenuous secondary interest that these students have in their part-time employment.'"[74]

Member McFerran dissented from the student assistant NPRM. Among other things, Member McFerran stated:

> In the wake of the Board's 2016 *Columbia University* decision, which held that students who work for their universities are protected by the National Labor Relations Act, student employees across the country have been seeking – and often winning – better working conditions: Better pay, better health insurance, better child care, and more. Today, the majority proposes to reverse this progress, in the name of preserving higher education. While student employees clearly see themselves as workers, with workers' interests and workers' rights, the majority has effectively decided that they need protecting from themselves. I disagree.
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[68] 84 Fed. Reg. at 49,693.

[69] 84 Fed. Reg. at 49,694 (citation omitted).

[70] *Id.* (citation omitted).

[71] *Id.* (citation omitted).

[72] *Id.* (citation omitted).

[73] *Id.* (citation omitted).

[74] *Id.*, *quoting San Francisco Art Institute*, 226 NLRB 1251, 1252 (1976).

> Recycling a made-up distinction, the majority argues that only employees whose relationship with their employer is ''primarily economic'' (as opposed to ''primarily educational'') should be covered. But as the *Columbia* Board explained, the Act clearly contemplates coverage of any common-law employment relationship; it does not care whether the employee and the employer also have some other non-economic relationship, beyond the reach of the Act. The *Columbia* Board went on to explain why covering student employees promoted the goals of federal labor policy, why it did not infringe on First Amendment academic freedom, and why empirical evidence (as well as the Board's experience) demonstrated that coverage was appropriate. As the *Columbia* Board correctly concluded, "there is no compelling reason – in theory or in practice – to conclude that collective bargaining by student assistants cannot be viable or that it would seriously interfere with higher education."[75]

Member McFerran indicated that "evidence from contemporary bargaining shows that student employees are not trying to alter aspects of their own educational experience, nor to exert control over academic matters, but instead have focused on bread-and-butter issues – while accepting efforts to preserve universities' control over academic matters."[76] Member McFerran stated that the NPRM seemed to "disregard the genuine difficulties faced – whether working long hours and juggling research and coursework, or struggling to afford health care and child care – by student employees, and the obvious fact that they might benefit by exercising their rights under the National Labor Relations Act."[77] Member McFerran concluded:

> As explained, the majority proposes to permanently exclude a class of employees from statutory coverage, in contravention of the law's language and its policies. There is no reason to revisit the *Columbia* decision, now on the books for over three years, particularly in the absence of any empirical evidence that any educational interests have been harmed in any way. To the contrary, student employees have already succeeded in bargaining with their universities for better working conditions, the very interests that spurred their organizing movement— just as the National Labor Relations Act encourages. Because the proposed rule has no plausible foundation, I must dissent.[78]

The NPRM initially solicited comments on or before November 22, 2019.[79] However, the Board extended this deadline several times, and the most recent extension set February 28, 2020 as the deadline for submitting comments[80]

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[75] 84 Fed. Reg. at 49,695-49,696 (footnotes omitted) (Dissenting View of Member McFerran).

[76] *Id*. at 49,697 (Dissenting View of Member McFerran).

[77] *Id*. at 49,698 (footnote omitted) (Dissenting View of Member McFerran).

[78] *Id*. at 49,699 (dissenting view of Member McFerran).

[79] *Id*. at 49,691.

[80] .85 Fed. Reg. 6,120-6,121 (Feb. 4, 2020).

B. Religiously Affiliated Universities

The NLRB and the courts – including the Supreme Court and, most recently, the Court of Appeals for the D.C. Circuit – have disagreed regarding what standard should govern determinations about whether *religiously affiliated schools and universities* are subject to the Board's jurisdiction, or whether the Board's exercise of jurisdiction would create an unacceptable risk of conflict with the First Amendment's Religion Clauses.

In *NLRB v. Catholic Bishop of Chicago*,[81] the Supreme Court rejected the Board assertion of jurisdiction over two groups of Catholic high schools in Chicago, and the Supreme Court addressed two questions: "(a) Whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act; and (b) if the Act authorizes such jurisdiction, does its exercise violate the guarantees of the Religion Clauses of the First Amendment?"[82]

The Court in *Catholic Bishop* did not squarely resolve the First Amendment question, because the Court held, in the absence of a clearly expressed affirmative intention of Congress to apply the NLRA to church-operated schools, that "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" supported a conclusion that the Act did not support the Board's exercise of jurisdiction over a church-operated school's teachers.[83] The Court noted that the Board's assertion of jurisdiction over private schools was "a relatively recent development," because the Board's 1951 decision in *Columbia University* indicated that the Board would refrain from exercising jurisdiction over nonprofit educational institutions.[84] (As noted above, the Board overruled *Columbia University* when the Board in 1970 decided *Cornell University*.[85]) In *Catholic Bishop*, the rest of the Court's analysis centered around three points.

First, the Supreme Court stated that, when addressing "whether Congress intended the Board to have jurisdiction over teachers in church-operated schools," a number of prior cases

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[81] 440 U.S. 490 (1979).

[82] *Id*. at 491.

[83] *Id*. at 507. The Court appeared to make clear, at one point in its analysis, that it was not resolving the "constitutional issue" of whether the Board's exercise of jurisdiction was actually "excessive" in relation to the First Amendment, but rather the Court was making a more "narrow inquiry whether the exercise of the Board's jurisdiction presents a *significant risk* that the First Amendment will be infringed." *Id.* at 502 (emphasis added).

[84] *Id*. at 497, *citing Columbia University*, 97 NLRB 424 (1951); and *Cornell University*, 183 NLRB 329 (1970).

[85] *See* text accompanying notes 9-11, *supra*.

held "that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."[86]

Second, the Court echoed other decisions (involving aid to parochial schools) that recognized "the critical and unique role of the teacher in fulfilling the mission of a church-operated school."[87] The Court rejected arguments that the Board could limit itself to a secular role – for example, only resolving "factual issues" in response to an unfair labor practice charge – without raising serious First Amendment concerns. In this regard, the Court stated:

> "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." . . . Good intentions by government – or third parties – can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by the church-operated schools which we found unacceptable. . . .
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> The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. *It 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*.
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> The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.[88]

Third, the Court stated there was "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act"[89] and the Court concluded that the serious risk of infringing First Amendment concerns warranted a finding that the NLRB lacked jurisdiction in the absence of "a clear expression of Congress'

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[86] 440 U.S. at 500, citing *Murray v. The Charming Betsy,* 2 Cranch 64 (1804) (other citations omitted).

[87] *Id*. at 501, citing *Lemon v. Kurtzman,* 403 U.S. 602, 617 (1971).

[88] 440 U.S. at 501-502, 504 (emphasis added), *quoting Meek v. Pittenger,* 421 U.S. 349, 370, (1975); *Wolman v. Walter,* 433 U.S. 229, 244 (1977).

[89] *Id*. at 504.

intent to bring teachers in church-operated schools within the jurisdiction of the Board."[90] As to these issues, the Court stated:

> Admittedly, Congress defined the Board's jurisdiction in very broad terms; we must therefore examine the legislative history of the Act to determine whether Congress contemplated that the grant of jurisdiction would include teachers in such schools.
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> In enacting the National Labor Relations Act in 1935, Congress sought to protect the right of American workers to bargain collectively. The concern that was repeated throughout the debates was the need to assure workers the right to organize to counterbalance the collective activities of employers which had been authorized by the National Industrial Recovery Act. But congressional attention focused on employment in private industry and on industrial recovery. See, *e. g.,* 79 Cong. Rec. 7573 (1935) (remarks of Sen. Wagner), 2 National Labor Relations Board, Legislative History of the National Labor Relations Act, 1935, pp. 2341-2343 (1949).
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> Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools. It is not without significance, however, that the Senate Committee on Education and Labor chose a college professor's dispute with the college as an example of employer-employee relations *not* covered by the Act. S. Rep. No. 573, 74th Cong., 1st Sess., 7 (1935), 2 Legislative History *supra*, at 2307.
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> The absence of an "affirmative intention of the Congress clearly expressed" fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers.[91]

After *Catholic Bishop* was decided, the Board engaged in a tug-of-war with the courts of appeals in several cases. The Board adopted a test that reflected a case-by-case determination of whether a religiously affiliated school had a "substantial religious character" that presented a significant risk of infringing on First Amendment religious rights.[92] In *Universidad Central de Bayamon*,[93] the Board determined that it was appropriate to assert jurisdiction over the University (excluding its "Center for Dominican Studies in the Caribbean") based on findings that it was "not owned, financed, or controlled by the Dominican Order or by the Roman Catholic Church" and that "the University's academic mission is secular."[94] An evenly divided

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[90] *Id*. at 507.

[91] *Id*. at 504-505, 506.

[92] *See, e.g., Jewish Day School*, 283 NLRB 757, 761–762 (1987) (declining jurisdiction); *Livingstone College*, 286 NLRB 1308, 1310 (1987) (granting jurisdiction).

[93] 273 NLRB 1110 (1984), *enforcement denied*, 793 F.2d 383, 399-403 (1st Cir. 1985) *(en banc)*.

[94] *Id*. at 1110.

Court of Appeals for the First Circuit, sitting *en banc*, denied enforcement of the Board's decision, and then-Circuit Judge Breyer stated that the Board's decision – finding the Catholic Church did not "control" the University – was "legally unsupportable" and, therefore, lacked substantial evidence in the record.[95]

In *University of Great Falls*,[96] the Board found that the University lacked a substantial religious character, focusing not "solely on the employer's affiliation with a religious organization, but rather . . . evaluat[ing] the purpose of the employer's operations, the role of the unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction."[97] This prompted the Board to assert jurisdiction, and the Court of Appeals for the D.C. Circuit stated that the Board "reached the wrong conclusion because it applied the wrong test."[98] The court rejected the Board's "substantial religious character" standard based on the court's view that it involved the type of scrutiny into religious beliefs that the Supreme Court held was inappropriate in *Catholic Bishop*. Thus, the court of appeals in *Great Falls* stated:

> Here too we have the NLRB trolling through the beliefs of the University, making determinations about its religious mission, and that mission's centrality to the "primary purpose" of the University. . . . Indeed, "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims,'" but that is what the Board has set about doing. . . . The Supreme Court "[r]epeatedly and in many different contexts [has] warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim,". . . and that admonition is equally applicable to the agencies whose actions we review.
>
> Despite its protestations to the contrary, the nature of the Board's inquiry boils down to "is it *sufficiently* religious?" The Regional Director's opinion approved by the Board and the NLRB's brief before this Court present a dissection of life and beliefs at the University. Before the NLRB's Hearing Officer, the University president was questioned about the nature of the University's religious beliefs and how the University's religious mission was implemented: "So what you are saying is that the first part of your Mission Statement here, to implement the Gospel values and the teaching of Jesus within the Catholic tradition, may very well be sometimes contrary, which oftentimes it is, to other religious beliefs?" . . . The president was asked how to "jibe" the acceptance of other beliefs at the University with its teaching mission: "If we are teaching a course, we have a class here in witchcraft, and how do we meld that into the teaching of beliefs that Jesus and the strong Catholic tradition? They are contrary, aren't they?". . . Further, the president was required to justify the method in which the

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[95] 793 F.2d at 399.

[96] 331 NLRB 1663 (2000), *enforcement denied*, 278 F.3d 1335 (D.C. Cir. 2002).

[97] 331 NLRB at 1664.

[98] 278 F.3d at 1340.

> University teaches gospel values, and to respond to doubts that it was legitimately "Catholic." He was asked, "What good is a Catholic institution unless we espouse the values and the teachings and the traditions of the Catholic Church?" . . . This is the exact kind of questioning into religious matters which *Catholic Bishop* specifically sought to avoid.[99]

The court in *Great Falls* stated that *Catholic Bishop* required a "different approach,"[100] and the court adopted a three-part "bright-line test"[101] – derived from *Universidad Central de Bayamon v. NLRB*[102] – that would permit the Board "to determine whether it has jurisdiction without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands."[103] The court explained that its three-part test

> would exempt an institution 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. . . . We find this . . . test to be such a useful and accurate method of applying Catholic Bishop that we adopt the same fully as to the first two steps, although we need not determine whether we reach the full expanse of the third step here. It is undisputed that the University is "affiliated with ... a recognized religious organization," that is, the Catholic Order of the Sisters of Providence, St. Ignatius Province. Therefore, we need not 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.
>
> Our approach avoids the constitutional infirmities of the NLRB's "substantial religious character" test. It does not intrude upon the free exercise of religion nor subject the institution to questioning about its motives or beliefs. It does not ask about the centrality of beliefs or how important the religious mission is to the institution. Nor should it. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection," . . . , and to require an explanation of beliefs and how they are compatible with other aspects of life at the University is to tread upon that which the First Amendment protects. Further, this three-

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[99] *Id.* at 1342-43 (citations omitted).

[100] *Id.* at 1343.

[101] *Id.* at 1345.

[102] 793 F.2d 383, 399-400 (1st Cir. 1985) (opinion of then-Circuit Judge Breyer) *(en banc)*.

[103] *Id.*

part approach avoids asking how effective the institution is at inculcating its beliefs, an irrelevant inquiry that permeates the NLRB proceedings below.

At the same time, however, it is a test that provides the Board and the courts with some assurance that the institutions availing themselves of the Catholic Bishop exemption are bona fide religious institutions.[104]

Following the D.C. Circuit's decision in *Great Falls*, the Board in some cases assumed without deciding that the *Great Falls* standard governed questions regarding the Board's jurisdiction.[105] However, in *Carroll College. v. NLRB*,[106] the Board asserted jurisdiction over the College even though it satisfied the *Great Falls* test, and the D.C. Circuit denied enforcement to the Board's decision even though the College did not even raise the jurisdictional issue before the Board because, in the words of the Court, the College was "patently beyond the NLRB's jurisdiction."[107]

In *Pacific Lutheran University*,[108] a divided five-member Board reevaluated this area[109] after granting review of a Regional Director's decision and direction of an election, and after

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[104] *Id.* at 1343-44 (citations omitted).

[105] *See, e.g., Salvation Army*, 345 NLRB 550, 550 (2005); *Catholic Social Services*, 355 NLRB 329, 329 (2010).

[106] 558 F.3d 568 (D.C. Cir. 2009).

[107] *Id.* at 574.

[108] 361 NLRB 1404 (2014).

[109] In addition to addressing the standard for evaluating Board jurisdiction over religiously affiliated educational institutions, the Board in *Pacific Lutheran* also addressed the appropriate way to apply the *Yeshiva* standards governing when university faculty members should be deemed excluded managerial employees under the Act. *See* 361 NLRB at 1404-1405, 1417-1428. Former Member Johnson and I generally agreed with the majority's framework – which separated various *Yeshiva* standards into "primary" and "secondary" factors. However, I believed that aspects of the majority's treatment of primary factors was "too onerous and inflexible" because, among other things, it premised managerial status on a requirement that the administration "almost always" follow faculty recommendations because "[f]ew managers in any work setting have this type of overwhelming influence . . . even though they undisputedly qualify as 'managerial' employees. . . ." *Id.* at 1429-1430 (Member Miscimarra, concurring in part and dissenting in part). Member Johnson had similar criticisms. *Id.* at 1441-44 (Member Johnson, dissenting).

In *University of Southern California*, 365 NLRB No. 11 (2016), a divided Board upheld a Regional Director's decision and direction of an election involving nontenure track faculty members, applying the *Pacific Lutheran* framework regarding managerial employees. *Id.* I dissented because, among other things, the Regional Director concluded that, even if particular faculty committees exercised managerial authority, a petitioned-for faculty subgroup (e.g., nontenure track faculty members) could not be considered managerial unless the subgroup "constitute[d] a majority" of the committees. *Id.*, slip op. at 3-4 (Member Miscimarra, dissenting). In *University of Southern California v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019), the Court of Appeals for the D.C. Circuit rejected this aspect of the *Pacific Lutheran* framework –

inviting supplemental briefing by interested parties. Rather than adopt the D.C. Circuit's three-part test articulated in *Great Falls*, the Board majority (consisting of Chairman Pearce and Members Hirozawa and Schiffer) held that the *Great Falls* standard "overreaches" because it did not consider "whether the petitioned-for faculty members act in support of the school's religious mission."[110]

Therefore, the Board majority in *Pacific Lutheran* created a new standard, which the majority described as combining "elements" of the *Great Falls* test with a new "teacher religious role" element.[111] The new standard – including the "teacher religious role" element – was described by the *Pacific Lutheran* majority as follows:

> [U]nder 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*.[112]

Former Member Harry I. Johnson III and I authored separate dissenting opinions in *Pacific Lutheran*.[113] In contrast with the Board majority's rejection of the court of appeals' three-part *Great Falls* standard,[114] Member Johnson expressed agreement with the *Great Falls* three-part test, and he sharply criticized the *Pacific Lutheran* majority's new standard (especially the inquiry into whether a university "holds out" faculty members as performing a "specific role" in the university's "religious educational environment") as engaging in precisely the type of

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which the court referred to as a "subgroup majority status rule," and denied enforcement to the Board's decision in *University of Southern California* regarding the nontenure track faculty unit. *Id.* at 135. Consistent with my dissent in the *University of Southern California* representation case, the court held that the "subgroup majority status rule" rested on "a fundamental misunderstanding of *Yeshiva*." *Id.* at 136. The court concluded that, as to this issue, "the question the Board must ask is not a numerical one – does the subgroup seeking recognition comprise a majority of a committee – but rather a broader, structural one: has the university included the subgroup *in a faculty body vested with managerial responsibilities*?" *Id.* at 137 (emphasis added). The court concluded that "the question before [the NLRB] in any case in which a faculty subgroup seeks recognition is whether *that* university has delegated managerial authority to a faculty body and, if so, whether the petitioning faculty subgroup is a part of that body." *Id.* at 139-140.

[110] *Id.* at 1408-1409.

[111] 361 NLRB at 1409.

[112] *Id.* (emphasis added).

[113] *Id.* at 1428-1430 (Member Miscimarra, concurring in part and dissenting in part); *id.* at 1430-1445 (Member Johnson, dissenting).

[114] *Id.* at 1438 (Member Johnson, dissenting).

scrutiny into "religiousness" that the Supreme Court rejected in *Catholic Bishop*.[115] Member Johnson stated:

> 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.
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> 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.[116]

I also dissented from the *Pacific Lutheran* Board majority's standard for evaluating Board jurisdiction over religiously affiliated universities, although I endorsed the Board majority's abandonment of the "substantial religious character" test (which the D.C. Circuit had rejected in *Great Falls*). In agreement with Member Johnson, I indicated that the Board majority's inquiries into the religious role of teachers "suffer[ed] from the same infirmity denounced by the Supreme Court in *Catholic Bishop* and by the D.C. Circuit in *Great Falls*: [the new] standards entail an inquiry likely to produce an unacceptable risk of conflict with the Religion Clauses of the First Amendment."[117]

I also believed the Board (and parties) would be "poorly served" by adopting a standard different from the three-part test already endorsed by the D.C. Circuit in *Great Falls*. I explained:

> 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

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[115] *Id.* at 1435-36 (Member Johnson, dissenting).

[116] *Id*. at 1436 (Member Johnson, dissenting).

[117] *Id.* at 1429 (Member Miscimarra, concurring in part and dissenting in part).

> (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. 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. . . . Thus, even if one disagreed with Great Falls, any attempt by the Board to chart a different path appears pre-destined to futility.* 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.[118]

My prediction that the *Pacific Lutheran* majority's disagreement with the D.C. Circuit appeared "pre-destined to futility"[119] proved to be prescient, because the Board's subsequent decision in *Duquesne University*[120] applied the newly created *Pacific Lutheran* test, and after the Board decided it was appropriate to assert jurisdiction over most part-time adjunct faculty members, the University's subsequent refusal to bargain was found to violate Section 8(a)(5), which was appealed to the D.C. Circuit.[121]

In *Duquesne University*, the Board majority (consisting of Members Pearce and McFerran) relied on two post-*Pacific Lutheran* cases interpreting the *Pacific Lutheran* "teacher religious role" test,[122] the Board majority found, however, that the University's Department of Theology must be excluded from the certified bargaining unit, but the Board majority rejected the University's other arguments against the Board's assertion of jurisdiction over other bargaining unit faculty members.[123]

I dissented in *Duquesne University*, based on my conclusion that a substantial issue[124] existed regarding the Board's potential lack of jurisdiction over the entire petitioned-for unit.

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[118] *Id*. (Member Miscimarra, concurring in part and dissenting in part), *citing* NLRA § 160(f), 29 U.S.C. § 160(f).

[119] *Id.* (Member Miscimarra, concurring in part and dissenting in part).

[120] *Duquesne University of the Holy Spirit ("Duquesne University")*, Case 06-RC-080933 (April 10, 2017) (available at http://apps.nlrb.gov/link/document.aspx/09031d45823f7bd3) (Board majority decision denying review in part from Regional Director's decision overruling election objections and issuing certification, with Acting Chairman Miscimarra dissenting).

[121] *Duquesne University of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020).

[122] *Seattle University*, 364 NLRB No. 84 (2016); *Saint Xavier University*, 364 NLRB No. 85 (2016). I dissented in both of these cases for reasons similar to those I expressed in *Pacific Lutheran. See Seattle University*, 364 NLRB No. 84, slip op. at 3–5 (2016) (Member Miscimarra, dissenting); *Saint Xavier University*, 364 NLRB No. 85, slip op. at 3–5 (2016) (Member Miscimarra, dissenting).

[123] *Duquesne University of the Holy Spirit ("Duquesne University")*, Case 06-RC-080933 (April 10, 2017) (available at http://apps.nlrb.gov/link/document.aspx/09031d45823f7bd3).

[124] The *Duquesne University* decision involved the University's request for review of the Regional Director's decision and recommendation to overrule objections to an election and to certify a union on

Among other things, I indicated that "the distinction my colleagues draw between part-time adjunct faculty who teach courses with 'religious content' (who my colleagues find are exempt from the Board's jurisdiction) and the other petitioned-for unit faculty (who my colleagues find are subject to the Board's jurisdiction, presumably on the basis that those faculty teach courses with exclusively 'secular' content) is forbidden by the main teaching of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Supreme Court emphasized that the "very process of inquiry" associated with this type of evaluation raises First Amendment concerns."[125] I also reiterated my disagreement with *Pacific Lutheran* and my view that the Board should apply the three-part standard adopted by the D.C. Circuit in *Great Falls*, and concluded:

> In my view, the University has clearly raised a substantial issue regarding whether it is exempt from the Act's coverage under that three-part test. The Regional Director found that the University holds itself out to the public as providing a religious educational environment. Additionally, the University is organized as a nonprofit, and it is affiliated with the Catholic Church and the Congregation of the Holy Spirit, a Catholic religious order. Accordingly, I would grant the University's request for review because substantial questions exist regarding (i) whether the Board lacks jurisdiction over the University as a religiously affiliated educational institution, and (ii) whether the *Pacific Lutheran* standard is unconstitutional under the First Amendment. I would consider these jurisdictional and constitutional issues on the merits.[126]

On January 28, 2020, a divided panel of the Court of Appeals for the D.C. Circuit vacated and denied enforcement of the Board's decision in *Duquesne University*, and rejected the standard adopted by the Board majority in *Pacific Lutheran*.[127] The court noted that former Member Johnson and I "vigorously dissented" in *Pacific Lutheran*[128] and the court majority stated that "[t]his case begins and ends with our decisions in *Great Falls* and *Carroll College*."[129] The court held that the *Pacific Lutheran* test "impermissibly intrudes into religious matters."[130] The court rejected the Board's argument that First Amendment issues could be avoided by limiting the Board's inquiry to whether a religious school "holds out" faculty members as playing a "specific religious role," because the court indicated that "such an inquiry would still

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behalf of a unit consisting of adjunct faculty. Therefore, one of the standards governing the Board's disposition was whether a "substantial issue" warranted granting the request for review.

[125] *Id.*, slip op. at 3 (Acting Chairman Miscimarra, dissenting), *quoting Catholic Bishop of Chicago*, 440 U.S. at 502.

[126] *Id.* (Acting Chairman Miscimarra, dissenting).

[127] *Duquesne University of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020). The D.C. Circuit panel consisted of Circuit Judges Rogers and Griffith in the majority, with Circuit Judge Pillard dissenting. *Id.*

[128] *Id.* at 831-32.

[129] *Id.* at 832.

[130] *Id.* at 834.

require the Board to define what counts as a "religious role" or a 'religious function.' Just as the Board may not determine whether a university is '*sufficiently* religious,' . . . the Board may not determine whether various faculty members play sufficiently religious roles."[131]

The court majority in *Duquesne University* illustrated its conclusion that the "very process" of inquiry required under the *Pacific Lutheran* test would "impinge on rights guaranteed by the [First Amendment] Religion Clauses,"[132] by reference to distinctions made by the Board majority in *Pacific Lutheran* itself:

> For example, consider how the Board intended to determine which faculty roles count as sufficiently religious. Some roles would qualify: "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.". . . But, the Board said, "general or aspirational statements" that faculty members must support the religious mission of a school would not establish that they play sufficiently religious roles, and "[t]his 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." . . .
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> With these distinctions, the Board impermissibly sided with a particular view of religious functions: Indoctrination is sufficiently religious, but supporting religious goals is not, and especially not when faculty enjoy academic freedom. This "threaten[s] to embroil the government in line-drawing and second-guessing regarding matters about which it has neither competence nor legitimacy." . . . And the Board's distinctions refuse to accept that faculty members might contribute to a school's religious mission by exercising their academic freedom, even though many religious schools understand the work of their faculty to be religious in just this way. Indeed, 194 schools (including Duquesne) represent that academic freedom is an "essential component" of their religious identities, critical to their mission of "freely searching for all truth." Am. Br. of the Ass'n of Catholic Colls. & Univs. 16-17 (quoting U.S. Conference of Catholic Bishops, *Ex Corde Ecclesiae: The Application to the United States* art. 2 (June 1, 2000)). This commitment to academic freedom does not become "any less religious" simply because secular schools share the same commitment, nor because it advances the school's religious mission in an "open-minded" manner as opposed to "hard-nosed proselytizing." . . . Yet rather than accepting at face value that academic freedom serves a religious function, the Board sees academic freedom as the opposite: a sign that "religion has no bearing on faculty members' job duties." . . . The Board may not

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[131] *Id.* at 834-835 (emphasis in original), *quoting Great Falls*, 278 F.3d at 1343.

[132] 947 F.3d at 835, *quoting Catholic Bishop*, 440 U.S. at 502, and *Great Falls*, 278 F.3d at 1341.

> "second-guess" or "minimize the legitimacy of the beliefs expressed by a religious entity" in this way. . . .[133]

Circuit Judge Pillard dissented in the *Duquesne University* appeal, based in part on his view that, when evaluating Board jurisdiction under the Supreme Court decision in *Catholic Bishop*, it was "not at all apparent that temporary, part-time adjuncts whom the school does not even hold out as agents of its religious mission necessarily fall within an exemption from the National Labor Relations Act that was drawn [in *Catholic Bishop*] to account for the "critical and unique role" of faculty in "fulfilling the mission of a church-operated school."[134] Among other things, Circuit Judge Pillard expressed the view that the Board's *Pacific Lutheran* test was a reasonable effort "to adapt the holding-out test . . . adopted in *Great Falls*" to part-time adjunct faculty,[135] and he reasoned:

> In contrast to the automatic presumption of religiosity that the court adopts today, the Board's approach adds a measure of tailoring at the exemption's outer edge, eliminating needless sacrifice of adjuncts' NLRA rights but extending the exemption to them where called for by a religious role the school itself identifies.
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> * * *
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> Not every religious school's religious character necessarily requires that its adjuncts leave their NLRA rights at the door. A holding that presumes as a jurisdictional matter that all genuinely religious universities have no labor law coverage for their adjuncts imposes a fixed religious footprint at corresponding cost on every religious school, including schools that may not want, and adjuncts who may not have expected, that cost. Because I conclude that the Board's answer to the open question whether *Catholic Bishop* applies to adjunct teachers at religious schools better protects the religious liberty the First Amendment secures and more faithfully follows the NLRA's broad, remedial scheme, I respectfully dissent.[136]

Since the court of appeals' decision in *Duquesne University*, the Board has not yet addressed or revisited the *Pacific Lutheran* standard governing religiously affiliated colleges or universities.

C. Charter Schools

Section 2(2) of the NLRA defines the term "employer" as "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." The question of what constitutes a "State or political subdivision thereof"

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[133] 947 F.3d at 835-36 (citations omitted).

[134] *Id.* at 837 (Circuit Judge Pillard, dissenting), *quoting Catholic Bishop*, 440 U.S. at 501.

[135] *Id.* at 842 (Circuit Judge Pillard, dissenting).

[136] *Id.* at 838, 849 (Circuit Judge Pillard, dissenting).

is yet another area in which the NLRB and the courts have disagreed. In more recent cases, the Board has been required to address this issue in relation to charter schools (i.e., schools organized pursuant to state or local laws which, in varying degrees, operate with government support, serve the function of public schools and/or are subject to a variety of government-imposed requirements).

The leading case in this area originated before the NLRB in *Natural Gas Utility District of Hawkins County, Tennessee*.[137] There, the Board certified Plumbers and Steamfitters Local 102 as the representative of certain employees of a "utility district" organized under Tennessee law (the Utility District Law of 1937) which, as later described by the Supreme Court, permitted Tennessee residents to "create districts to provide a wide range of public services such as the furnishing of water, sewers, sewage disposal, police protection, fire protection, garbage collection, street lighting, parks, and recreational facilities as well as the distribution of natural gas."[138] The Board held that, although the Supreme Court of Tennessee held that utility districts were "arms or instrumentalities" of the State of Tennessee,[139] the Board indicated that "while such State law declarations and interpretations are given careful consideration by the Board, they are not necessarily controlling."[140] The Board concluded:

> [T]he determination of whether a particular entity falls within the exemption for political subdivisions entails an assessment of all relevant factors. Upon examination of the instant record in the light of the "economic realities and statutory purposes," we are satisfied that the Employer exists as an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act. . . .

The Board concluded that the gas utility district was an "employer" within the meaning of Section 2(2) of the Act. The utility district subsequently refused to bargain, which the Board concluded was a violation of Section 8(a)(5) of the Act.[141] The Court of Appeals for the Sixth Circuit denied enforcement of the Board's order, based on the court's conclusion that the utility

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[137] 167 NLRB 691 (1967).

[138] *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 605-606 (1971) *("Hawkins County")*.

[139] 167 NLRB at 691, *quoting First Suburban Water Utility Dist. v. McCanless*, 177 Tenn. 128, 146 (1941).

[140] *Id.* (footnote omitted).

[141] *Natural Gas Utility District of Hawkins County, Tennessee*, 170 NLRB 1409 (1968), *enforcement denied*, 427 F.2d 312 (6th Cir. 1970), *affirmed*, 402 U.S. 600 (1971).

district was a "political subdivision" of the State of Tennessee,[142] and the Supreme Court affirmed the court's decision.[143]

The Supreme Court in *Hawkins County* agreed that a state's own determination that a particular entity was a "political subdivision" did not control the entity's potential "employer" status under NLRA Section 2(2),[144] although this determination – involving a federal law interpretation of the NLRA – necessarily entailed an individualized assessment of state or local laws governing the entity's creation, structure, operation, responsibilities, potential taxing authority, public oversight, and other factors.[145] After evaluating these considerations on the merits, the Supreme Court rejected the Board's conclusion that the gas utility district was a statutory "employer." The Supreme Court reasoned as follows:

> The term "political subdivision" is not defined in the Act and the Act's legislative history does not disclose that Congress explicitly considered its meaning. The legislative history does reveal, however, that Congress enacted the § 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike. In the light of that purpose, the Board, according to its Brief, p. 11, "has limited the exemption for political subdivisions to entities that are either (1) *created directly by the state, so as to constitute departments or administrative arms of the government*, or (2) *administered by individuals who are responsible to public officials or to the general electorate*."
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> The Board's construction of the broad statutory term is, of course, entitled to great respect. . . . This case does not however require that we decide whether 'the actual operations and characteristics' of an entity must necessarily feature one or the other of the Board's limitations to qualify an entity for the exemption, for we think that it is plain on the face of the Tennessee statute that the Board erred in its reading of it in light of the Board's own test. The Board found that "the Employer in this case is neither created directly by the State, nor administered by State-appointed or elected officials." . . . But the Board test is not whether the entity is administered by "State-appointed or elected officials." Rather, alternative (2) of the test is whether the entity is "administered *by individuals who are responsible to public officials* or to the general electorate" . . . , and the Tennessee statute makes crystal clear that respondent is administered by a Board of Commissioners appointed by an elected county judge, and subject to removal proceedings at the instance of the Governor, the county prosecutor, or private citizens. Therefore, in the light of other "actual operations and characteristics" under that administration, the Board's holding that respondent "exists as an essentially private

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[142] *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 427 F.2d 312 (6th Cir. 1970), *affirmed*, 402 U.S. 600 (1971).

[143] *Hawkins County, supra* note 138.

[144] 402 U.S. at 602-603 (citations omitted).

[145] *Id.* at 605-609.

> venture, with insufficient identity with or relationship to the State of Tennessee," . . . has no "warrant in the record" and no "reasonable basis in law."[146]

The Board addressed the status of charter schools, under the Supreme Court's *Hawkins County* standard, in two divided companion cases: *Hyde Leadership Charter School–Brooklyn ("Hyde Leadership")*,[147] and *Pennsylvania Virtual Charter School ("Pennsylvania Virtual")*.[148]

In *Hyde Leadership*, the Board majority (consisting of Members Hirozawa and McFerran) found that the Hyde Leadership Charter School-Brooklyn was an employer under NLRA Section 2(2). Significantly, the New York Charter Schools Act of 1998 gave charter school employees the right to form a union and to engage in collective bargaining under the New York Public Employees' Fair Employment Act ("NY PEFEA").[149] In 2011, the New York Public Employment Relations Board ("PERB") decided that it had jurisdiction over New York charter schools.[150] After the PERB decision was upheld by a state trial court, a further appeal to the Appellate Division of the New York Supreme Court was held in abeyance after an NLRB majority in *Chicago Mathematics* asserted jurisdiction over the charter school in that case.[151] In 2013, the Appellate Division stayed the PERB appeal indefinitely "pending a determination of the NLRB whether the NLRA applies to the collective bargaining matters herein at issue and thus preempts PERB's jurisdiction."[152] In 2014, however, the Supreme Court's *Noel Canning* decision resulted in the invalidation of the NLRB's decision in *Chicago Mathematics*.[153]

Thus, as illustrated by these events, the employees of Hyde Leadership and other charter schools in New York appeared to have collective bargaining rights under New York

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[146] *Id.* at 604-605 (emphasis added and in original), *citing NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62 (1965); *quoting NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944) (other citations and footnote omitted).

[147] 364 NLRB No. 88 (2016).

[148] 364 NLRB No. 87 (2016).

[149] N.Y. Civ. Serv. §§ 200-214. *See also* New York Charter Schools Act of 1998, as amended, § 2854(3)(a). Some of these facts were recited in my *Hyde Leadership* dissenting opinion. See 364 NLRB No. 88, slip op. at 15 (Member Miscimarra, dissenting).

[150] *Brooklyn Excelsior Charter School*, 44 NY PERB ¶ 3001 (2011).

[151] *See Chicago Mathematics & Science Academy Charter School*, 359 NLRB No. 41 (2012). The Board's decision in *Chicago Mathematics* was invalidated by the Supreme Court decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014), because some Board members who participated in Chicago Mathematics received recess appointments that were held to be unconstitutional in Noel Canning. Former Member Hayes dissented from the majority decision in *Chicago Mathematics. Id.*, slip op. at 12-14 (Member Hayes, dissenting).

[152] *Buffalo United Charter School v. New York State Public Employment Relations Board*, 107 A.D.3d 1437 (N.Y. App. Div. 2013).

[153] *See* explanation in note 151, *supra*.

state law, which was disrupted by the possibility that the NLRB might instead exercise jurisdiction over New York charter schools. In fact, the United Federation of Teachers, AFT Local 2 (the "Union") – seeking to represent Hyde Leadership's teachers – filed representation petitions on the same day (April 14, 2014) with *both* the New York State PERB *and* the NLRB.[154] And in the NLRB case, *the Union* sought a determination that the NLRB *lacked* jurisdiction, and the Union argued (in the alternative) that the Board should exercise its discretion to *refrain* from exercising jurisdiction over Hyde Leadership and other New York charter schools even if they constituted an "employer" under Section 2(2).

The Board majority in *Hyde Leadership* rejected the Union's arguments, and found that the charter school *was* an "employer" subject to NLRB jurisdiction under NLRA Section 2(2). The Board majority engaged in an assessment of the New York Charter Schools Act of 1998 (as amended in 2014), and details regarding the creation, structure and operation of Hyde Leadership, prompting the Board majority to conclude that Hyde Leadership did not qualify as an exempt "State or political subdivision" under either of the two prongs of the *Hawkins County* test. Thus, regarding *Hawkins County* prong one, the majority held that "Hyde was not created directly by any New York government entity, special statute, legislation, or public official, but instead [was created] by private individuals as a nonprofit corporation."[155] Regarding *Hawkins County* prong two, the majority stated:

> Given the method of appointment and removal of Hyde's board members, we find that none of the trustees are responsible to public officials in their capacity as board members, and therefore that Hyde is not "administered" by individuals who are responsible to public officials or the general electorate. Accordingly, Hyde is not a political subdivision under the second prong of Hawkins County.[156]

The Board majority decided not to exercise the Board's discretion under Section 14(c)(1) of the Act, which (as noted above) empowers the Board to "decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction."[157]

I dissented in *Hyde Leadership* based on my view that the New York Charter Schools Act ("CSA") and the process by which Hyde Leadership Charter School went into existence established that it was "created directly by the state, so as to constitute departments or

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[154] *Hyde Leadership*, 364 NLRB No. 88, slip op. at 1.

[155] *Id*., slip op. at 5.

[156] *Id*., slip op. at 7.

[157] *Id.* slip op. at 7-9. For the full text of NLRA Section 14(c)(1), see note 10, *supra*.

administrative arms of the government,"[158] which satisfied the first prong of the *Hawkins County* standard. Among other things, regarding this point, I reasoned:

> Under any reasonable interpretation of the *Hawkins County* standard, Hyde Leadership was "created directly by the state." It did not exist as a legal entity until the New York State Board of Regents – the governing body of the New York State Education Department – exercised the power bestowed on it by the state legislature in the CSA and created Hyde Leadership on January 12, 2010, through the certificate of incorporation or "provisional charter." In fact, Hyde Leadership is entirely a creature of the state: it was created by the state, and it will cease to exist as a legal entity if and when the Board of Regents or the New York City Schools Chancellor either terminates or decides not to renew the provisional charter.
>
> My colleagues reason that Hyde Leadership was not "created directly by the state" because Dr. Dupree [who first submitted a charter school application to the New York City Schools Chancellor] provided the "initiative" for Hyde Leadership and was responsible for "preparatory work," which, in turn, "created" the School. I believe this analysis distorts the unambiguous language in *Hawkins County*, which makes no reference to who provides the "initiative" or engages in "preparatory work." The Supreme Court in *Hawkins County* stated that an entity is a "political subdivision" of a state if it was "created" directly by the state to constitute a department or administrative arm of the government. The term "create" means "to bring into existence." An entity is not "created" whenever someone takes the "initiative" to do "preparatory work" that is followed by the entity's creation. As a matter of law under the New York Charter Schools Act, a single governmental body "created" Hyde Leadership: the Board of Regents brought Hyde Leadership into existence, just as it creates every other charter school in New York State.[159]

Unlike my colleagues, I also disagreed with the majority's finding that Hyde Leadership failed to satisfy the second prong of the *Hawkins County* standard, which rendered an entity exempt if it was "administered by individuals who are responsible to public officials or to the general electorate."[160] On this front, I relied on the fact that the New York Board of Regents (the governing body of the state's Department of Education) appointed Hyde Leadership's initial trustees; the New York City Schools Chancellor's Office of Portfolio Development had sole and exclusive authority to approve new trustees; and the school's trustees were subject to removal by the New York Board of Regents.[161]

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[158] *Hawkins County*, 402 U.S. at 604-605.

[159] 364 NLRB No. 88, slip op. at 12 (Member Miscimarra, dissenting).

[160] *Hawkins County*, 402 U.S. at 604-605.

[161] 364 NLRB No. 88, slip op. at 13-14 (Member Miscimarra, dissenting).

Finally, in *Hyde Leadership*, I agreed with the Union's position that – even if this particular school could be regarded as an "employer" under Section 2(2) – there were compelling reasons for the Board not to assert jurisdiction over charter schools generally. I indicated that – like other employers over which the Board had declined to exercise jurisdiction under Section 14(c)(1) of the Act – charter schools were "essentially local in nature" and their operations were "peculiarly related to, and regulated by, local governments."[162] More importantly, I believed that several considerations would render "self-defeating" the NLRB's efforts to assert jurisdiction over charter schools, which would "operate to the substantial detriment of the parties in many or most cases."[163] I elaborated:

> First, the Board can only choose to exercise jurisdiction over charter schools in those cases where Section 2(2) jurisdiction exists, and this means the Board will not even have the option of exercising jurisdiction when charter schools qualify as "political subdivisions" of a state under the Hawkins County test described and applied above. *The result of Board efforts to assert jurisdiction over charter schools will be a jurisdictional patchwork—where federal jurisdiction exists here and state jurisdiction exists there, depending on how the "political subdivision" question is resolved—with substantial uncertainty for employees, unions, employers, and state and local governments*.
>
> Second, one of the Board's primary roles is to foster "stability of labor relations," and the policy underlying our statute is to produce a "single, uniform, national rule" displacing the "variegated laws of the several States." Declining to exercise jurisdiction is the only way that the Board can foster stability, certainty and predictability in this important area. *Based on the fact-specific inquiry required under Hawkins County, there is no way for parties to reliably determine, in advance, whether or not Section 2(2) jurisdiction exists, and this uncertainty will persist given the length of time that it takes to obtain a Board determination regarding Section 2(2) jurisdiction, not to mention the uncertainty associated with potential court appeals from any Board decision*. Therefore, the only certain outcome of the Board's attempted exercise of jurisdiction here and in other charter school cases will be substantial uncertainty and long-lasting instability.
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> Third, the instant case and *Pennsylvania Virtual* illustrate these problems. Here, New York law gives charter school employees the right to form a union and bargain under the New York Public Employees' Fair Employment Act, and the New York's [PERB] decided in 2011 that it has jurisdiction over New York charter schools. After the PERB decision was upheld by a state trial court, a further appeal to the Appellate Division of the New York Supreme Court was held in abeyance after an NLRB majority in *Chicago Mathematics* asserted jurisdiction over the charter school in that case. In 2013, the Appellate Division stayed the PERB appeal indefinitely "pending a determination of

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[162] *Id.*, slip op. at 14 (Member Miscimarra, dissenting), *quoting Hialeah Race Course, Inc.*, 125 NLRB 388, 391 (1959) and 38 Fed. Reg. 9537, 9537 (1973).

[163] *Id.* (Member Miscimarra, dissenting).

the NLRB whether the NLRA applies to the collective bargaining matters herein at issue and thus preempts PERB's jurisdiction." In 2014, however, the Supreme Court's *Noel Canning* decision resulted in the invalidation of the NLRB's decision in *Chicago Mathematics*, and even if *Chicago Mathematics* had not been invalidated, it would not control the jurisdictional determination here, which depends on the particular facts presented in this case. *In sum, the Board's efforts to assert jurisdiction over charter schools have produced years of uncertainty regarding the applicability of federal law, and employees have been denied years of protection they would otherwise have had under New York state law*. The NLRB's efforts to exercise jurisdiction over charter schools produced a similar sequence of events in *Pennsylvania Virtual*, where *for years, employees, unions and employers have been denied the protection of Pennsylvania state law regarding union representation and collective bargaining*.

Finally, charter schools remain relatively new, and the states – along with local governments and school districts – have been laboratories for experimentation. *Based on the approach embraced by my colleagues today, employees concerned about their working conditions will not know what set of rules apply to them or to whom to turn if the employer infringes on their rights, and employees are likely to face years of delay if they try to secure relief from the NLRB*. Unions and employers will have difficulty understanding their respective rights and obligations, given the uncertainty about whether federal, state, or local laws apply. Most poorly served will be the students whose education is the primary focus of every charter school. *In most instances, the likely result will be protracted disputes that are not definitively resolved until many or most students (and many teachers and other employees) have come and gone*.[164]

In *Pennsylvania Virtual*,[165] the Board majority (consisting of Chairman Pearce and Members Hirozawa and McFerran) concluded that the Pennsylvania Virtual Charter School – created under the Charter School Law, which was part of the Pennsylvania School Code – was an "employer" under Section 2(2) of the Act, and I similarly dissented. In this case, unlike *Hyde Leadership*, the Union argued in *favor* of NLRB jurisdiction, and the Board majority – in agreement with the Union – held that neither of the *Hawkins Country* factors warranted a finding that Board lacked jurisdiction.[166] The Board majority was also unpersuaded that the

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[164] *Id.* at 14-15 (Member Miscimarra, dissenting) (emphasis added), *quoting Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations."); *Northwestern University*, 362 NLRB No. 167, slip op. at 1 (2015) (declining to assert jurisdiction where the union sought to represent grant-in-aid scholarship football players because doing so "would not serve to promote stability in labor relations") (other citations omitted).

[165] 364 NLRB No. 87 (2016).

[166] *Id.*, slip op. at 5-9.

Board should decline to exercise jurisdiction consistent with the discretion afforded to the Board under Section 14(c)(1) of the Act.[167]

I dissented in *Pennsylvania Virtual* without addressing whether the Pennsylvania Virtual Charter School was an "employer" or a "political subdivision" under Section 2(2) of the Act.[168] Rather, consistent with other aspects of my *Hyde Leadership* dissent, I indicated that the Board should decline to assert jurisdiction over charter schools because they were "essentially local in nature" and were "peculiarly related to, and regulated by, local governments."[169] I also indicated, as I had in *Hyde Leadership*, that the case-by-case scrutiny required by the Supreme Court *Hawkins County* standard – when applied to charter schools – would necessitate a detailed evaluation of each charter school's creation, structure and applicable state and local laws, which prevented anyone from having certainty regarding whether or when NLRB jurisdiction would actually exist in a particular situation.[170]

In *Pennsylvania Virtual*, I also indicated that the structure of Pennsylvania state law, combined with relevant events, illustrated that the Board's assertion of jurisdiction operated in many ways to *diminish* the legal protection afforded to charter school employees,[171] and to place those employees in a "jurisdictional no-man's land." I explained the latter problem by reference to what had actually happened in Pennsylvania based on the NLRB's efforts:

> In this case, the record reveals that Pennsylvania law gives charter school employees the right to form a union and bargain under Pennsylvania's Public Employee Relations Act. Yet, a hearing examiner for the Pennsylvania Labor Relations Board

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[167] *Id*., slip op. at 9-11.

[168] *Id*., slip op. at 11 (Member Miscimarra, dissenting).

[169] *Id*., slip op. at 12-13 (Member Miscimarra, dissenting), *quoting Hialeah Race Course*, 125 NLRB 388, 391 (1959); and 38 Fed. Reg. 9537, 9537 (1973).

[170] *Id*., slip op. at 16 (Member Miscimarra, dissenting). I explained: "The problem in this area is not created merely by disagreements among NLRB members regarding statutory interpretation or policy issues. Rather, the possibility of any 'bright-line rule' is foreclosed by (i) the nature of the *Hawkins County* test, which governs whether the Board possesses jurisdiction over particular charter schools under Section 2(2) of the Act, and (ii) the immense factual variation in the creation, structure, and operation of different charter schools, which are continuing to evolve, and which vary widely depending on the particular state, county, city, or school district." *Id.* (Member Miscimarra, dissenting).

[171] For example, in *Pennsylvania Virtual*, the Pennsylvania cyber charter school law gave Pennsylvania Virtual Charter School employees the same health care benefits as employee of the local school district, and if the School does not have its own retirement plan, employees must be enrolled in the Public School Employees' Retirement System. Additionally, the School's employees had a right to form a union and bargain under the Pennsylvania Public Employee Relations Act. *Id*., slip op. at 14 (Member Miscimarra, dissenting). Thus, I indicated that the Board's assertion of jurisdiction, if upheld by the courts, would divest the School's employees of this state law protection based on the NLRA's preemption of relevant state laws. *Id*., slip op. at 15 (Member Miscimarra, dissenting), *citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

> (PLRB) dismissed two proceedings in 2013 involving Pennsylvania charter schools similar to PVCS, relying on an NLRB case decided in 2012 – *Chicago Mathematics* – where the NLRB majority, over one member's dissent, purported to exercise NLRB jurisdiction. However, the United States Supreme Court decided in 2014 that certain recess appointments to the Board were unconstitutional, which rendered the NLRB's *Chicago Mathematics* decision invalid. Consequently, *the Board's refusal to decline jurisdiction over charter schools generally has not only produced years of uncertainty regarding the applicability of federal law, employees have been denied years of protection they otherwise would have had under Pennsylvania state law*.
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> * * *
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> And even after the Board decides whether it has jurisdiction over a particular charter school, the jurisdictional situation may evolve based on changes in state law, applicable regulations, or the school's charter, and the school itself may be replaced by a new or successor entity. *The Board's effort to assert case-by-case jurisdiction cannot possibly result in uniformity. Rather, in most situations, parties are likely to experience a jurisdictional no-man's land, and the existence or non-existence of NLRB jurisdiction under Section 2(2) of the Act will remain a moving target even after the Board renders a decision*.[172]

The latest NLRB case involving charter schools – *Kipp Academy Charter School ("Kipp Academy")*[173] – provides further evidence of the confusion that can result from the Board's efforts to assert jurisdiction over charter schools. Kipp Academy, like the charter school in *Hyde Leadership*, was created pursuant to the New York State Charter Schools Act of 1998, but many details regarding the creation, structure and operation of Kipp Academy were unique.[174]

In *Kipp Academy*, the United Federation of Teachers, Local 2, AFT ("Union) already represented Kipp Academy's employees pursuant to *New York state law* in a unit consisting of teachers, deans, counselors, social workers, teaching fellows, team leaders, specialists, and director of support services in Bronx, New York.[175] In this regard, the New York PERB had previously asserted its jurisdiction over Kipp Academy in *Matter of Corcoran (KIPP Academy Charter School)*, 45 PERB ¶ 3013 (2012), which recognized the Academy's status as a "conversion charter school" whose employees were part of a city-wide New York Department of Education bargaining unit.[176] After the Board asserted jurisdiction over the charter school in *Hyde Leadership*, two represented Kipp Academy employees filed a union decertification petition with

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[172] Id., slip op. at 17 (Member Miscimarra, dissenting) (footnotes and citations omitted). For the history of *Chicago Mathematics* and the Supreme Court's *Noel Canning* decision, which rendered it invalid, see note 151, *supra*.

[173] Case 02-RD-191760.

[174] See *Kipp Academy*, Case 02-RD-191760, Decision and Direction of Election ("DDE"), Aug. 24, 2018, p. 3 (available at http://apps.nlrb.gov/link/document.aspx/09031d45828e88ef).

[175] Id., DDE, p. 1.

[176] *Id*., DDE p. 20 (footnote omitted).

the NLRB.[177] Subsequently, the Union has argued *against* NLRB jurisdiction, based on its position that Kipp Academy – as a "conversion" charter school – is a "political subdivision" under NLRA Section 2(2) which divests the NLRB of jurisdiction; and, alternatively, the Union has argued that the Board should exercise its discretion under Section 14(c)(1) to refrain from asserting jurisdiction.[178] The parties opposing the Union's contentions – the Academy and the petitioner – support a finding that the Academy is an "employer" under Section 2(2) and argue the Board should assert jurisdiction and conduct a decertification election (which was, in fact, directed by the Board's Regional Director for Region 2).[179]

On February 4, 2019, the Board in *Kipp Academy* denied the Union's request for review of the Regional Director's finding that the Academy was an "employer" under NLRA Section 2(2). In this regard, the Board indicated that the Regional Director "correctly applied the test in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), in finding that the Employer KIPP Academy Charter School is not exempt as a political subdivision . . . because the Employer was not created directly by the state so as to constitute a department or administrative arm of the government."[180] However, the Board majority (consisting of Chairman Ring and Members Kaplan and Emanuel) granted review and invited briefing on "whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) of the Act and, therefore, modify or overrule *Hyde Leadership Charter School-Brooklyn*, 364 NLRB No. 88, slip op. at 6 fn. 15, 7-9 (2016), and *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 7, 9-10 (2016)." Board Member McFerran dissented from the partial grant of the Union's request for review based on her view that there were "no new policy justifications or legal grounds to revisit the Board's approach to analyzing jurisdictional questions involving charter schools."[181]

D. <u>Independent Contractor Status</u>

As noted above, Congress added an express exclusion of "any individual having the status of an *independent contractor*" from Section 2(3)'s definition of "employee" as part of the Taft-Hartley amendments adopted in 1947, and in recent years, the Board has engaged in a back-and-forth struggle with the courts of appeals, especially the D.C. Circuit, which caused the treatment of independent contract status to expand and contract.

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[177] *Id*., DDE p. 1.

[178] *Id*., DDE pp. 1-2.

[179] *Id*.

[180] *Id*., Order Granting Review In Part and Invitation To File Briefs ("Order"), Feb. 4, 2019, p. 1 n. 1 (available at http://apps.nlrb.gov/link/document.aspx/09031d4582ac6cb2).

[181] *Id*., Order, pp. 2-3 (Member McFerran, dissenting).

The Supreme Court addressed the Board's evaluation of "independent contractor" status in *NLRB v. United Insurance Co. of America*,[182] where the Court indicated that the "obvious purpose" of Congress' exclusion of independent contractors from Section 2(3)'s definition of "employee" was "to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."[183] The ten non-exhaustive factors governing "independent contractor" determinations are identified in Restatement (Second) of Agency, which states:

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> (d) the skill required in the particular occupation;
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is a part of the regular business of the employer;
> (i) whether or not the parties believe they are creating the relation of master and servant; and
> (j) whether the principal is or is not in business.[184]

The Supreme Court in *United Insurance* commented on the difficulty of discerning the difference between "employee" and "independent contractor" status. In what has become one of the Court's most oft-cited prophetic understatements, the Court observed:

> There are innumerable situations which arise in the common law *where it is difficult to say whether a particular individual is an employee or an independent contractor*, and these cases present such a situation. On the one hand, these debit agents perform their work primarily away from the company's offices and fix their own hours of work and work days, and clearly they are not as obviously employees as are production workers in a factory. On the other hand, however, they do not have the independence, nor are they allowed the initiative and decisionmaking authority, normally associated with an independent contractor. *In such a situation as this, there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be*

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[182] 390 U.S. 254 (1968).

[183] *Id.* at 256 (footnote omitted).

[184] RESTATEMENT (SECOND) OF AGENCY § 220(2).

> *assessed and weighed, with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common law agency principles*.[185]

Predictably, the "independent contractor" standard produced by *United Insurance* has, in practice, caused extensive unpredictability. Throughout the past 50 years, our economy has been characterized by a mix of overlapping employer-employee and service-provider relationships. Especially in this context, scant guidance is provided by a test that turns on "the total factual context" and "all of the incidents of the relationship," with "no one factor being decisive," and resting on "pertinent common law agency principles," without any "shorthand formula or magic phrase that can be applied to find the answer."[186]

The challenges in this area have been magnified by the NLRB's own efforts, some of which have appeared to celebrate the futility of looking for clarity. In *Standard Oil Co*.[187] and *Roadway Package System*,[188] the Board appeared to reject arguments that a predominant factor when evaluating independent contract status involved whether an employer had a "right to control" the manner and means of the work. In *Austin Tupler Trucking*,[189] the NLRB stated:

> Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.[190]

Conversely, in *Dial-A Mattress Operating Corp*.,[191] the Board found that delivery drivers were independent contracts based, in part, on the employer's lack of control over their performance of the work and the extent of entrepreneurial opportunities provided by the contractual arrangement between the drivers and the employer. In *St. Joseph News-Press*, [192] the Board stated that "both right of control and other factors, as set out in the Restatement, are to be used to evaluate claims that hired individuals are independent contractors."[193] The Board in *St. Joseph News-Press* – with Member Liebman dissenting – refused to adopt "economic

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[185] 390 U.S. at 258 (emphasis added; footnote omitted).

[186] *Id.*

[187] 230 NLRB 967, 968 (1977).

[188] 326 NLRB 842, 850 (1998).

[189] 261 NLRB 183 (1982).

[190] *Id*. at 184.

[191] 326 NLRB 884 (1998).

[192] 345 NLRB 474 (2005).

[193] *Id.* at 478.

dependence" as a relevant factor when evaluating independent contractor status.[194] This has also become yet another area in which the Board and the courts of appeals (especially the D.C. Circuit) have disagreed.

In *FedEx Home Delivery*,[195] the Board denied a request for review of a Regional Director decision that the FedEx drivers in Wilmington, Massachusetts were employees and not independent contractors. However, Chairman Battista dissented from the denial of the request for review, based on his disagreement with the Board's refusal to permit FedEx "to introduce system-wide evidence concerning the number of route sales and the amount of profit," which Chairman Battista believed was relevant to a determination of every driver's "entrepreneurial interest in their position."[196]

In *FedEx Home Delivery v. NLRB ("FedEx I")*,[197] after the Board found that the subsequent refusal by FedEx to bargain violated Section 8(a)(5), the Court of Appeals for the D.C. Circuit rejected the Board's determination that the FedEx drivers were employees, and denied enforcement of the Board's finding that FedEx's refusal to bargain violated Section 8(a)(5) of the Act. The court majority – with Circuit Judge Garland dissenting in part – reviewed the uneven path taken by cases applying common law agency principles, and observed that "[f]or a time, when applying this common law test, we spoke in terms of an employer's *right to exercise control*, making the extent of actual supervision of the means and manner of the worker's performance a key consideration in the totality of the circumstances assessment."[198] However, the court observed that, in *Corporate Express Delivery Systems v. NLRB*,[199] both "this court and the Board, while retaining all of the common law factors, 'shift[ed the] emphasis' away from the unwieldy control inquiry in favor of a more accurate proxy: *whether the 'putative independent contractors have 'significant entrepreneurial opportunity for gain or loss*.'"[200] The court concluded: "Thus, while all the considerations at common law remain in play, *an important animating principle* by which to evaluate those factors in cases where some factors cut one way and some the other is *whether the position presents the opportunities and risks inherent in entrepreneurialism*."[201]

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[194] *Id.* at 482-83. *Compare id.* at 483-487 (Member Liebman, dissenting).

[195] Case 1–RC–22034, 22035 (Nov. 8, 2006).

[196] *Id.* The Board's 2006 decision in the *FedEx* representation case is unpublished, but the quoted passage from Chairman Battista's dissent appears in *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009).

[197] 563 F.3d 492 (D.C. Cir. 2009).

[198] *Id.* at 496 (emphasis added).

[199] 292 F.3d 777 (D.C. Cir. 2002).

[200] 563 F.3d at 497 (emphasis added), quoting *Corporate Express Delivery Systems*, 292 F.3d at 780 (other citation omitted; inside quotations modified).

[201] 563 F.3d at 497 (emphasis added; citation and footnote omitted).

In *FedEx I*, the court discounted the fact that the FedEx contractors "perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages," and that "few have seized any of the alleged entrepreneurial opportunities."[202] Regarding these issues, the court explained:

> While the essential nature of a worker's role is a legitimate consideration, it is not determinative in the face of more compelling countervailing factors, . . . otherwise companies like FedEx could never hire delivery drivers who *are* independent contractors, a consequence contrary to precedent. . . . And both the Board and this court have found the failure to take advantage of an opportunity is beside the point. . . . Instead, "it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor."[203]

Ultimately, the court in *FedEx I* concluded that the FedEx drivers were independent contractors, which divested the Board of jurisdiction. The court reasoned:

> We have considered all the common law factors, and, on balance, are compelled to conclude they favor independent contractor status. The ability to operate multiple routes, hire additional drivers (including drivers who substitute for the contractor) and helpers, and to sell routes without permission, as well as the parties' intent expressed in the contract, augurs strongly in favor of independent contractor status. Because the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views. Though evidence can be marshaled and debater's points scored on both sides, the evidence supporting independent contractor status is more compelling under our precedent. The evidence might have been stronger still had not the Regional Director erroneously excluded the national data. But even as the record stands, the Board's determination was legally erroneous.[204]

Subsequently, in *FedEx Home Delivery ("FedEx II")*,[205] a divided Board – and the Court of Appeals for the D.C. Circuit – considered the independent contractor status of FedEx drivers at a different location (Hartford, Connecticut). Responding to the employer's arguments that the D.C. Circuit decision in *FedEx I* involved "virtually identical" facts, the Board majority (consisting of Chairman Pearce and Members Hirozawa and Schiffer) recognized that the D.C. Circuit's decision "cannot be squared" with a finding that the FedEx drivers in Hartford were

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[202] *Id.* at 502.

[203] *Id.* (emphasis in original; citations and footnote omitted).

[204] *Id.* at 504.

[205] 361 NLRB 610 (2014), *enforcement denied*, 849 F.3d 1123 (D.C. Cir. 2017).

independent contractors.[206] Nonetheless, the Board majority stated that "after careful consideration, we decline to adopt the court's interpretation of the Act."[207]

Specifically, the Board majority in *FedEx II* found that the FedEx drivers were employees, not independent contractors, and rejected the D.C. Circuit's treatment of "significant entrepreneurial opportunity" as an "important animating principle"[208] when applying the common law agency principles governing independent contractor status.[209] In part, the Board majority reasoned as follows:

> As we understand the court's decision, it treats the existence of "significant entrepreneurial opportunity" as the overriding consideration in all but the clearest cases posing the independent-contractor issue under the Act. Whether or not the Supreme Court's decision in *United Insurance* . . . permits this approach, we do not believe that the decision compels it. *United Insurance* does not reflect the use of a single-animating principle in the inquiry or identify entrepreneurial opportunity as that principle. To the contrary, as explained, *United Insurance* (and subsequent Supreme Court decisions) emphasized that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." . . . The Supreme Court's decisions look to the Restatement (Second) of Agency as capturing the common-law standard, and the Restatement teaches that the factors enumerated there are "*all* considered in determining the question [of employee status]." . . . The Restatement makes no mention at all of entrepreneurial opportunity or any similar concept. That silence does not rule out consideration of such a principle, but it cannot fairly be described as requiring it.[210]

The Board majority concluded that "[a]ctual entrepreneurial opportunity for gain or loss . . . remains a relevant consideration in the Board's independent-contractor inquiry," but the Board majority clarified "that entrepreneurial opportunity represents one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*."[211]

Former Board Member Johnson dissented in *FedEx II*, based on his view that the Board majority's reformulation "fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of

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[206] 361 NLRB at 617.

[207] *Id.*

[208] *See* text accompanying notes 200 and 201, *supra*.

[209] 361 NLRB at 617-618.

[210] *Id*. at 617-618 (emphasis in original; citations and footnote omitted).

[211] *Id.* at 620 (emphasis in original).

'right to control' factors relevant to perceived economic dependency."[212] Among other things, Member Johnson reasoned:

> In my view, the *FedEx* court supplied us with both the correct definition of actual entrepreneurial opportunity from a route sale, if the analysis is reduced to a basic theory of proof, and the weight to be assigned evidence of this opportunity in proper application of the required common-law test. *The fact that someone actually took an entrepreneurial opportunity is proof positive that the opportunity existed in the first place*. If the Board cannot or does not deploy a more accurate econometric analysis due to the state of a factual record, that should suffice to carry the employer's burden. What the Board cannot do, and exactly what the majority has done here, is declare that the actual taking of the entrepreneurial opportunity (here, at least one sale) amounts to nothing, because "not enough people in the proposed unit" took the opportunity and, in any event, those who take the opportunity remove themselves from the unit, making evidence of the sale of minimal relevance to the remainder. Specifically, my colleagues maintain that the facts relied upon by the D.C. Circuit show that FedEx drivers have only a theoretical entrepreneurial opportunity and that the court gave "little weight" to countervailing considerations. In both respects, I believe the opposite is true. The facts in the FedEx case before us and the one decided by the D.C. Circuit, which all agree are not meaningfully distinguishable, provide sufficient evidence of entrepreneurial opportunity, and my colleagues give far too little weight to them, particularly as to the evidence of route sales, in balancing all of the traditional common-law test factors.[213]

Unsurprisingly, the employer in *FedEx II* appealed the Board's decision to the Court of Appeals for the D.C. Circuit, which reversed the Board majority's rejection of the D.C. Circuit's prior decision in *FedEx I*.[214] Preliminarily, the court acknowledged that "on matters to which courts accord administrative deference, agencies may change their interpretation and implementation of the law if doing so is reasonable, within the scope of the statutory delegation, and the departure from past precedent is sensibly explained."[215] However, the court noted that the Supreme Court in *United Insurance* stated that independent contractor determinations involved a question of "pure" common-law agency principles "involv[ing] no special administrative expertise that a court does not possess," which prompted the court in

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[212] *Id.* at 629 (Member Johnson, dissenting). I did not participate in *FedEx II*, but subsequently expressed my agreement with Member Johnson's *FedEx II* dissenting views. See *Browning-Ferris Industries*, 362 NLRB 1599, 1624 n. 24 (2015) (Members Miscimarra and Johnson, dissenting), *enforcement denied*, 911 F.3d 195 (2018); *Pennsylvania Interscholastic Athletic Association*, 365 NLRB No. 107 (2017), slip op. at 13 n. 4 (Chairman Miscimarra, dissenting).

[213] *Id*. at 635 (Member Johnson, dissenting).

[214] *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017).

[215] *Id.* at 1127-1128 (citation omitted).

FedEx II to conclude that "this particular question under the Act is not one to which we grant the Board *Chevron* deference. . . ."[216]

On the merits, the D.C. Circuit in *FedEx II* rejected the Board majority's factual findings and legal analysis. Addressing both sets of issues, the court of appeals stated:

> In *[FedEx I]* . . . this court held that single-route FedEx drivers working out of Wilmington, Massachusetts are independent contractors, not employees, as the latter term is defined in the National Labor Relations Act. . . . In this case, the National Labor Relations Board held, on a materially indistinguishable factual record, that single-route FedEx drivers are statutorily protected employees, not independent contractors, when located in Hartford, Connecticut. Both cannot be right. Having already answered this same legal question involving the same parties and functionally the same factual record in *FedEx I*, we give the same answer here. The Hartford single-route FedEx drivers are independent contractors to whom the National Labor Relations Act's protections for collective action do not apply. . . .
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> It is as clear as clear can be that "the *same issue* presented in a *later case* in the *same court* should lead to the *same result*." . . . Doubly so when the parties are the *same*. This case is the poster child for our law-of-the-circuit doctrine, which ensures stability, consistency, and evenhandedness in circuit law. . . . Having chosen not to seek Supreme Court review in *FedEx I*, the Board cannot effectively nullify this court's decision in *FedEx I* by asking a second panel of this court to apply the same law to the same material facts but give a different answer.[217]

In *SuperShuttle DFW, Inc.*,[218] a divided Board upheld a Regional Director's decision that franchisee-operators of shared-ride vans in Dallas-Fort Worth were independent contractors under Section 2(3) of the Act, and the Board extended its consideration of the issues presented in *FedEx I* and *FedEx II*. The Board majority (consisting of Chairman Ring and Members Kaplan and Emanuel) expressed agreement with the court decisions in *FedEx I* and *FedEx II*, and overruled the Board majority's decision in *FedEx II*.[219] In part, the Board majority reasoned as follows:

> Contrary to the *FedEx* Board majority's and our dissenting colleague's claim that entrepreneurial opportunity was the *FedEx I* court's "overriding consideration," the court noted that an emphasis on entrepreneurial opportunity "does not make applying

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[216] *Id.* (citations omitted). The Supreme Court's *Chevron* decision articulates the basic standards governing court deference to administrative agency decisions. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),

[217] 849 F.3d at 1124, 1127 (emphasis in original; citations and footnotes omitted).

[218] 367 NLRB No. 75 (2019).

[219] *Id.*, slip op. at 1, 7-12.

> the test mechanical." . . . Indeed, the court applied and considered all of the relevant common-law factors, including whether the parties believe they are creating a master/servant relationship, the extent of the employer's control over details of the work, the extent of employer supervision, and who supplies the instrumentalities for doing the work, before concluding that, "on balance, . . . they favor independent contractor status." . . . See also *FedEx II*, 849 F.3d at 1128 (rejecting Board majority's contention that the *FedEx I* court did not consider and weigh all common-law factors).
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> In sum, we do not find that the *FedEx I* court's decision departed in any significant way from the Board's traditional independent-contractor analysis, and we therefore find that the FedEx Board's fundamental change to the common-law test in reaction to the court's decision was unwarranted. The court acknowledged that "the ten factor test is not amenable to any sort of bright-line rule" and that "'there is no shorthand formula or magic phrase that can be applied to find the answer, but all the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" . . . The court followed that guidance. The court further noted that the Board's and the court's evolving emphasis on entrepreneurial opportunity was a "subtle refinement . . . done at the Board's urging," and it reiterated that "all the considerations at common law remain in play." . . .
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> Properly understood, entrepreneurial opportunity is not an independent common-law factor, let alone a "superfactor" as our dissenting colleague claims we and the D.C. Circuit treat it. Nor is it an "overriding consideration," a "shorthand formula," or a "trump card" in the independent-contractor analysis. Rather, . . . entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain. Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa. Moreover, we do not hold that the Board must mechanically apply the entrepreneurial opportunity principle to each common-law factor in every case. Instead, consistent with Board precedent as discussed below, the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate.[220]

Board Member McFerran dissented in *SuperShuttle*, based on her view that the Regional Director incorrectly concluded that the franchisee-operators were independent contractors.[221] Member McFerran – though noting that she did not participate in the Board decision in *FedEx II*[222] – expressed agreement with the Board majority's *FedEx II* decision and she expressed

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[220] *Id.*, slip op. at 8, 9 (footnotes and citations omitted).

[221] *Id.*, slip op. at 15-29 (Member McFerran, dissenting).

[222] *Id.*, slip op. at 18-19 (Member McFerran, dissenting).

disagreement with the *SuperShuttle* Board majority's endorsement of the D.C. Circuit opinions in *FedEx I* and *FedEx II*. In part, Member McFerran reasoned:

> [W]hile I did not participate in *[FedEx II]* (which issued before I joined the Board), I am persuaded that the Board's decision was sound and defensible, and I see no good reason to abandon it—in particular, not for the confused approach adopted by the majority today, which cannot be reconciled with common-law principles or Supreme Court authority.
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> There is no principled way to reconcile the District of Columbia Circuit's approach, now adopted by the majority, with Board precedent. With respect to the independent- contractor analysis, the court treated "entrepreneurial opportunity" as a "more accurate proxy" than the "unwieldy control inquiry." In supposedly replacing "control" with "entrepreneurial opportunity," then, the court began with an incorrect premise (that one principle guides the analysis) and ended with a conclusion that fundamentally departed from Board doctrine.
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> . . . The majority echoes the Circuit in asserting that "entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." But this is simply not how the Board has ever before approached independent-contractor determinations applying the common-law agency test.[223]

Although the role played by "entrepreneurial opportunity" obviously can be important in many cases involving "independent contractor" determinations, Board and court cases – before and after *SuperShuttle* – appear to make clear that this factor, standing alone, is not controlling. Thus, in *Pennsylvania Interscholastic Athletic Association*, [224] a Board majority (consisting of Members Pearce and McFerran) held that high school lacrosse officials were employees and not independent contractors; I dissented based in part on my view that the common law agency factors, when properly applied, warranted a finding that the lacrosse officials were independent contractors.[225]

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[223] *Id.* (Member McFerran, dissenting).

[224] 365 NLRB No. 107 (2017).

[225] *Id*., slip op. at 13-20 (Chairman Miscimarra, dissenting). Before the Board, the *Pennsylvania Interscholastic Athletic Association* case also involved whether the Pennsylvania Interscholastic Athletic Association constituted an "employer" or a "political subdivision" under Section 2(2) of the Act. However, when relevant issues were addressed by the D.C. Circuit in *Pennsylvania Interscholastic Athletic Association v. NLRB*, 926 F.3d 837 (D.C. Cir. 2019), the court found that the lacrosse officials were independent contractors under Section 2(3) of the Act, and rejected the Board majority's determination that the officials were statutory employees, and found it was not necessary to reach the Section 2(2) issue. 926 F.3d at 844.

After the Board subsequently found that the Association's refusal to bargain violated Section 8(a)(5), the Court of Appeals for the D.C. Circuit concluded – in *Pennsylvania Interscholastic Athletic Association v. NLRB*[226] – that the lacrosse officials were independent contractors, not employees.[227] The court's analysis reflected an evaluation of common law agency principles, which prompted the court to find that the lacrosse officials were independent contractors, even though the court observed that the officials had only limited "entrepreneurial opportunity," which was one of the few factors supporting employee status. [228]

In *Velox Express, Inc.*,[229] a divided Board addressed whether an employer's misclassification of statutory employees as independent contractors constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1), which makes it an unfair labor practice for an employer to "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[230]

The Board in *Velox Express* unanimously upheld the finding of the Administrative Law Judge ("ALJ") that the employer's drivers were employees, and not independent contractors, under Section 2(3) of the Act.[231] However, the Board majority in *Velox Express* (consisting of Chairman Ring and Members Kaplan and Emanuel) concluded that the employer's misclassification did not constituted an independent violation of Section 8(a)(1). The Board majority summarized its holding as follows:

> An employer's mere communication to its workers that they are classified as independent contractors does not expressly invoke the Act. It does not prohibit the workers from engaging in Section 7 activity. It does not threaten them with adverse consequences for doing so, or promise them benefits if they refrain from doing so. Employees may well disagree with their employer, take the position that they are employees, and engage in union or other protected concerted activities. If the employer responds with threats, promises, interrogations, and so forth, *then* it will have violated Section 8(a)(1), but not before.[232]

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[226] 926 F.3d 837 (D.C. Cir. 2019).

[227] *Id*.

[228] *Id.* at 842.

[229] 368 NLRB No. 61 (2019).

[230] 29 U.S.C. § 158(a)(1).

[231] 368 NLRB No. 61, slip op. at 2-4. *See also id*., slip op. at 13 (Member McFerran, concurring in part and dissenting in part).

[232] *Id.*, slip op. at 6 (emphasis in original). The Board majority – though finding that a misclassification alone, or communicating a misclassification decision, did not violate Section 8(a)(1) – the Board in other contexts has found that employers have violated the Act where misclassifications occurred in a context where the employer prohibited employees from engaging in Section 7 activity, indicated that protected activities would be futile, or reclassified employees in order to interfere with union activities.

The Board majority also based its conclusion – that misclassifying employees as independent contractors or communicating the classification decision to employees is not, by themselves, an unfair labor practice – based on the difficulty of making "independent contractor" determinations, and other legal requirements applicable to such determinations. Thus, the Board majority stated that "important legal and policy concerns weigh against finding a stand-alone misclassification violation,"[233] which the Board majority explained as follows:

> First, to form a legal opinion as to its workers' status under the Act, an employer has the unenviable task of applying the common-law agency test. The conclusion to be drawn from the application of that test may be far from self-evident. As the Supreme Court has stated, "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." *United Insurance*, 390 U.S. at 258. An employer must consider all 10 of the common law factors found in the Restatement (Second) of Agency § 220, with no one factor being decisive. Further complicating matters, the Board's independent-contractor analysis is dependent on the particular factual circumstances presented, and employers cannot necessarily rely on Board precedent that may appear to present similar circumstances on the surface, as "the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. " *Austin Tupler Trucking, Inc.*, 261 NLRB 183, 184 (1982). Moreover, reasonable minds can, and often do, disagree about independent-contractor status when presented with the same factual circumstances. For example, Board members regularly reach different conclusions when faced with questions concerning independent contractor status, and reviewing courts often disagree with the Board's application of the common-law agency test and deny enforcement of Board decisions finding employee status.
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> Independent-contractor determinations are difficult and complicated enough when only considering the Act, but the Act is not the only relevant law. An employer must consider numerous Federal, State, and local laws and regulations that apply a number of different standards for determining independent-contractor status. Unsurprisingly, employers struggle to navigate this legal maze. Further, in classifying its workers as independent contractors, an employer may be correct under certain other laws but wrong under the Act – which is all the more reason why it would be unfair to hold that merely communicating that classification is unlawful.
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> Moreover, once a classification determination is made by the employer, it *must* be communicated to its workers. An employer must first inform its workers of their classification status before it can intelligently discuss other facets of their business

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Id., slip op. at 7, *citing Sisters' Camelot*, 363 NLRB No. 13 (2015); *Wal-Mart Stores*, 340 NLRB 220 (2003); *United Dairy Farmers Cooperative Ass'n*, 242 NLRB 1026 (1979); *Houston Chronicle Publishing Co*., 202 NLRB 1208 (1952), *enforcement denied*, 211 F.2d 848 (5th Cir. 1954).

[233] 368 NLRB No. 61, slip op. at 8.

> relationship. Further, as discussed above, the common-law test includes consideration of whether the parties believed that they were entering into an independent-contractor relationship. An employer must communicate its belief that its workers are independent contractors to satisfy that factor. If the Board were to establish a stand-alone misclassification violation, it would penalize employers for taking this step whenever the employer's belief turns out to be mistaken.[234]

Member McFerran dissented in *Velox Express*, in part based on her view that the relevant issue

> turns on whether the misclassification reasonably tends to chill employees from acting on their statutory rights – such a chilling effect occurs whenever employees reasonably would believe that exercising their rights would be futile or would lead to adverse employer action. That standard is satisfied where (as here) an employer tells its employees that it has classified them as independent contractors, sending a clear message that (in the employer's view) they have no rights under the Act. And it is certainly satisfied where (as here again) an employer makes its employees sign an independent-contractor agreement accepting the employer's classification decision. In that situation, employees reasonably would believe that they risk being fired if they act inconsistently with the agreement—such as by asserting statutory rights that belong only to protected employees (and not to independent contractors).[235]

E. Concluding Remarks

It might be surprising that so many fundamental questions about NLRB jurisdiction arise in cases being decided more than 80 years after the NLRA's adoption. Further complicating these areas is the need to apply challenging standards which, in the case of common law agency principles, involves a non-exhaustive array of ten factors, none of which is necessarily controlling in a given case.

The additional challenge confronting the Board is the fact that the courts so often have their own opinions about these important issues. In all of the above areas – regarding the application of the Act to colleges and universities, to religiously affiliated schools, to government-chartered schools and other entities, and to independent contractors – conflicting views have arisen between the Board, the courts of appeals, and in many instances, the Supreme Court. More definitive answers to these questions about the scope of the Board's jurisdiction will hopefully emerge in future cases.

[3/27C/2020]

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[234] *Id.* (emphasis in original).

[235] *Id.*, slip op. at 13-14 (Member McFerran, concurring in part and dissenting in part).