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

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

–Voltaire, *A Philosophical Dictionary (1764)*[1]

Introduction

The National Labor Relations Act (NLRA or Act)[2] and the National Labor Relations Board (NLRB or Board) 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).[3] However, the Board's jurisdiction in four controversial areas has produced many questions and few clear answers for employees, employers, unions, and labor lawyers.

© 2020 Philip A. Miscimarra. All Rights Reserved. Philip A. Miscimarra is the former Chairman of the National Labor Relations Board, and he served on the Board from August 2013 to December 2017 as Chairman, Acting Chairman, and/or Board Member. He is currently a partner in the labor and employment practice of Morgan Lewis & Bockius LLP, resident in Washington DC and Chicago; and he is a Senior Fellow in the Center for Human Resources at the University of Pennsylvania's Wharton School. The opinions expressed in this article are solely those of the author, which should not be attributed to the National Labor Relations Board, Morgan Lewis, The Wharton School, the University of Pennsylvania, or any other person or entity. This article reflects views expressed in a paper presented at the midwinter meeting on March 4, 2020, of the American Bar Association's Committee on Practice and Procedure Under the National Labor Relations Act.

1. Tobias Smollett, The Works of Voltaire 222 (E.R. DuMont ed., Willima F. Fleming trans., 1901) (1764).

2. 29 U.S.C. §§ 151–169.

3. See the Act's definition of "employer" and "employee," respectively, in NLRA sections 2(2)–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 Servs.-W., Inc. v. NLRB, 849 F.3d 1137, 1142 (D.C. Cir. 2017); *see also* Molly Gabel & Sam Rubinstein, *Return to Decades of Precedent, at Least for Now: Derivative Carriers Under the RLA and NLRB Deference to the NMB*, 36 A.B.A. J. Lab. & Emp. L. 89, 89–91 (2022).

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

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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 on this issue, the Board decided that university student assistants were employees in *Columbia University*,[4] and *Yale University*.[5] Although the NLRB issued a Proposed Rule in September 2019 that would exclude college and university student assistants from section 2(3)'s "employee" definition, the Board published a notice on March 15, 2021,[6] withdrawing this Proposed Rule, and NLRB General Counsel Jennifer Abruzzo has more recently reaffirmed her agreement with *Columbia University*.[7]

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.[8]

Third, the Board and the courts have grappled with the question of whether a *charter school* should be treated as a "[s]tate or political subdivision"—which NLRA section 2(2) excludes from the definition of "employer"—and, in *Kipp Academy Charter School*,[9] 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.[10]

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).[11] 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, and, in one pending case,[12] the Board is reevaluating what standard should govern this issue.[13]

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

4. Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1081 (2016).
5. Yale Univ., 365 N.L.R.B. No. 40, at 1 (Feb. 22, 2017).
6. 86 Fed. Reg. 14,297 (March 15, 2021).
7. *See infra* Part I.
8. *See infra* Part II.
9. Kipp Acad. Charter Sch., 369 N.L.R.B. No. 48, at 1 (Mar. 25, 2020).
10. *See infra* Part III.
11. 29 U.S.C. § 152(3) (emphasis added).
12. Atlanta Opera, Inc., 371 N.L.R.B. No. 45 (Dec. 27, 2021).
13. *See infra* Part IV. The treatment of independent contractors is also addressed in Susan Davis & Daniel M. Nesbitt, *A New Dawn at the NLRB: Promoting Collective Bargaining in the Workplace*, 36 A.B.A. J. Lab. & Emp. L. 75 (2022).

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.

I. Student Assistants

A. *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*, in which the Board declined to assert jurisdiction over a petitioned-for unit of university clerical library employees.[14] 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."[15]

In *Cornell University*, 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.[16] 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."[17] The Board overruled *Columbia University*, based in part on evidence that universities were "enlarging

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14. Trs. of Columbia Univ., 97 N.L.R.B. 424, 427 (1951).

15. *Id.* (emphasis and footnote omitted) (quoting H.R. Rep. No. 80-510, at 32 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 536 (1947)). 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. No. 80-101, 61 Stat. 136 (1947).

16. Cornell Univ., 183 N.L.R.B. 329, 329 (1970).

17. *Id.* at 331. Section 14(c) of the Act states: "(1) The Board, in its discretion, may . . . 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 . . . ." 29 U.S.C. § 164(c)(1).

both their facilities and their economic activities to meet the needs of mounting numbers of students" which produced a "surge of organizational activity taking place among employees on college campuses."[18]

In *Adelphi University*, the Board held that graduate student assistants were primarily students that should be excluded from a unit of regular faculty.[19] Similarly, in *Leland Stanford*, the Board held that graduate research assistants (RA's) "are not employees within the meaning of Section 2(3) of the Act."[20] 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 [are] 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.[21]

In *NLRB v. Yeshiva University*, the Supreme Court rejected the NLRB's approval of a bargaining unit consisting of Yeshiva University's full-time faculty members.[22] The Supreme 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."[23] 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 forty 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*

18. *Cornell Univ*., 183 N.L.R.B. at 333.
19. Adelphi Univ., 195 N.L.R.B. 639, 640 (1972).
20. Leland Stanford Junior Univ., 214 N.L.R.B. 621, 623 (1974).
21. *Id.*
22. NLRB v. Yeshiva Univ., 444 U.S. 672, 679 (1980).
23. *Id.* (footnotes omitted).

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> *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. . . . 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).[24]

In *Boston Medical Center*, a divided five-member Board held that medical interns and residents were statutory employees.[25] 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.[26]

Board Members Hurtgen and Brame authored separate dissenting opinions in *Boston Medical Center*.[27] 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."[28] 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."[29] 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. . . ."[30]

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24. *Id.* at 679–81 (citing NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 504–05 (1979) (emphasis added; footnotes omitted; selected other citations modified or omitted).
25. Bos. Med. Ctr. Corp., 330 N.L.R.B. 152, 152 (1999).
26. *Id.* at 160.
27. *Id.* at 168–70 (Hurtgen, Member, dissenting); *id.* at 170–83 (Brame, Member, dissenting).
28. *Id.* at 169 (Hurtgen, Member, dissenting).
29. *Id.* at 176 (Brame, Member, dissenting).
30. *Id.* at 179–80.

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The treatment of college and university student assistants changed in *New York University* (*NYU*), where a three-member Board (consisting of Chairman Truesdale and Members Liebman and Hurtgen) held that most of the university's student graduate assistants were statutory employees.[31] Chairman Truesdale and Member Liebman applied *Boston Medical Center*, and reasoned:

> 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.
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> 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. 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.[32]

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).[33] In this regard, Member Hurtgen reasoned that "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."[34]

In *Brown University*, 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.[35] 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), RAs, and proctors was not appropriate for purposes of collective bargaining, based on the majority's conclusion that "graduate

31. N.Y. Univ., 332 N.L.R.B. 1205, 1205 (2000).

32. *Id.* at 1205 (citing NLRB v. Town & Country, 516 U.S. 85, 91–92; Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891–92 (1984); Hendricks Cnty. Rural Elec. Membership Corp., 454 U.S. 170, 189–90; Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185–86 (1941)).

33. *Id.* at 1209 (Hurtgen, Member, concurring).

34. *Id.*

35. Brown Univ., 342 N.L.R.B. 483, 483 (2004).

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student assistants, including those at Brown, are primarily students and have a primarily educational, not economic, relationship with their university."[36]

> The Board majority in *Brown University* relied on the Board's rationale in *St. Clare's Hospital*, 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."[37] 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."[38]

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."[39] They continued:

> Today's decision is woefully out of touch with contemporary academic reality . . . . 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.[40]

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."[41]

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36. *Id.* at 487.

37. *Id.* (quoting St. Clare's Hosp., 229 N.L.R.B. 1000, 1002 (1977)). 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 N.L.R.B. 251 (1976).

38. *Brown Univ.*, 342 N.L.R.B. at 490 (footnotes omitted).

39. *Id.* at 493 (Liebman & Walsh, Members, dissenting).

40. *Id.* at 493–94.

41. *Id.* at 496.

B. 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.

1. Northwestern University

In *Northwestern University*, 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."[42] The Board declined to reach or decide the question of whether these student-athletes were statutory employees.[43]

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).[44] The Board found that, even if the scholarship student-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 it "would not promote stability in labor relations"[45] and "would not effectuate the policies of the Act. . . ."[46]

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42. Northwestern Univ., 362 N.L.R.B. 1350, 1350 (2015).

43. *Id.* ("[W]e 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 ("[W]e 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, at 16–23 (2017), https://apps.nlrb.gov/link/document.aspx/09031d4582342bfc [https://perma.cc/DM77-HGAM]. However, GC Memorandum 17-01 was rescinded on December 1, 2017, by General Counsel Peter B. Robb. *See* NLRB GC Memorandum 18-02, at 4–5 (2017), https://apps.nlrb.gov/link/document.aspx/09031d4582342bfc [https://perma.cc/H4Z5-F7V8].

44. *Northwestern Univ.*, 362 N.L.R.B. at 1354.

45. *Id.*

46. *Id.* at 1355.

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2. Columbia University

In *Columbia University*, a divided four-member Board (consisting of Chairman Pearce and myself, 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.[47]

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. . . ."[48] 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.[49]

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").[50] 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 dictates, that Congress means to incorporate the established meaning'" of the term, with reference to "'common-law agency doctrine.'"[51]

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."[52] Thus, the Board majority in *Columbia University* reasoned:

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47. Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1081 (2016).

48. *Id.* at 1081 n.1. For ease of reference below, I refer to all of the students encompassed by this bargaining unit description as "student assistants."

49. *Id.* at 1081.

50. *Id.* at 1081–83.

51. *Id*. at 1083.

52. *Id*. at 1084.

> 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.[53]

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 infringe upon academic freedom within colleges or universities to a degree that raised serious constitutional questions under the First Amendment.[54]

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."[55] 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."[56]

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,"[57] 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

53. *Id.* at 1084–85.
54. *Id.* at 1085–87.
55. *Id.* at 1102 (Miscimarra, Member, dissenting).
56. *Id.* at 1101, 1104.
57. *Id.* at 1101.

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> 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. . . . 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.[58]

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.[59] 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.[60]

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

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58. *Id.* at 1101–02 (footnotes omitted). 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: "[C]ollege 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.* at 1104 (quoting Peter Cappelli, Will College Pay Off? 8, 26, 48 (2015)) (emphasis omitted).

59. *Id.* at 1105–06 (citing So. 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").

60. *Id.* at 1102.

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stated that "one cannot assume that all or most negotiations involving student assistants at universities would result in strikes, slowdowns, lockouts, and/or litigation."[61] However, I explained that

> [t]he 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 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. . . .

61. *Id.* at 1106–07.

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- *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.[62]

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) "[c]ollective 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. . . ."[63] 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."[64]

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62. *Id.* at 1106, 1108.
63. *Id.* at 1102.
64. *Id.* 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

3. 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*,[65] 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.[66]

I dissented in *Yale University* based in part on my dissenting opinion in *Columbia University*.[67] However, I also disagreed with the Board majority's denial of review, which 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,[68] 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."[69]

4. 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. . . ."[70]

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

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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 id.* at 1109–10.

65. *See* text accompanying note 46, *supra*.

66. Yale Univ., 365 N.L.R.B. No. 40, at 1 (Feb. 22, 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.* at 1 (Miscimarra, Acting Chairman, dissenting).

67. *See id.* 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 Board did not pass on this issue prior to the election. *Id.* at 2.

68. *Trs. of Columbia Univ.*, 364 N.L.R.B. at 1101 (Miscimarra, Member, dissenting) (emphasis added). For a description of the bargaining unit that was approved in *Columbia University*, see text accompanying note 46, *supra*.

69. *Yale Univ.*, 365 N.L.R.B. No. 40, at 1 (Miscimarra, Acting Chairman, dissenting).

70. 84 Fed. Reg. 49,691, 49,699 (Sept. 23, 2019) (to be codified at 29 C.F.R. § 103).

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> 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.[71]

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 mechanism for resolving economic disputes that arise in that relationship." *Brevard Achievement Center*, 342 NLRB 982, 984-985 (2004).[72]

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. . . ."[73] The Board majority also relied on observations that (1) "students spend a limited amount of time performing these additional duties because their principal time commitment is focused on their coursework and studies,"[74] (2) 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,'"[75] (3) "the goal of faculty in advancing their students' education differs from the interests of employers and employees engaged in collective bargaining,"[76] and (4) 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."[77]

In addition to soliciting comments generally, the NPRM invited comments on "whether the rule should also apply to exclude from

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71. *Id.*
72. *Id.* at 49,693.
73. *Id.* at 49,694 (citation omitted).
74. *Id.* (citation omitted).
75. *Id.* (citation omitted).
76. *Id.* (citation omitted).
77. *Id.* (citation omitted).

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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.'"[78]

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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> * * *
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> 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.[79]

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."[80] 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."[81]

5. General Counsel Abruzzo's View on College Athletes (GC Memo 21-08)

On September 9, 2021, General Counsel Jennifer Abruzzo issued a General Counsel's Memorandum (GC Memo), which expressed the position—in line with *Boston Medical Center* and *Columbia*

78. *Id.* (quoting S.F. Art Inst., 226 N.L.R.B. 1251, 1252 (1976)).
79. *Id.* at 49,695–96 (footnotes omitted) (Dissenting View of Member McFerran).
80. *Id.* at 49,697.
81. *Id.* at 49,698 (footnote omitted) (Dissenting View of Member McFerran).

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University—that the term "employee" in Section 2(3) of the Act is "broadly defined," with "only a few, enumerated exceptions," which "do not include university employees, football players, or students."[82] This Memo expressed General Counsel Abruzzo's "prosecutorial position that certain Players at Academic Institutions are employees under the Act," and indicating that "where appropriate, I will allege that misclassifying such employees as mere 'student-athletes', and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the Act."[83] General Counsel Abruzzo's position that "misclassification" may constitute an unfair labor practice appears contrary to the Board majority decision in *Velox Express, Inc.*,[84] which may itself be reconsidered by the current Board.[85]

II. 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*, 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?"[86]

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"

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82. NLRB GC Memorandum 21-08, at 2-3 (2021), https://apps.nlrb.gov/link/document.aspx/09031d458356ec26 (footnotes omitted); *see also* NLRB GC Memorandum 17-01, *supra* note 43.

83. NLRB GC Memorandum 21-08, *supra* note 82, at 1.

84. Velox Express, Inc. 368 N.L.R.B. No. 61 (Aug. 29, 2019). The Board's decision in *Velox Express* is discussed in the text accompanying notes 239–46, *infra*.

85. As indicated in NLRB GC Memorandum 21-08, *supra* note 82, at 4, General Counsel Abruzzo in an earlier GC Memo had requested that all cases involving applicability of *Velox Express* be submitted to the Board's Division of Advice, which often reflects the General Counsel's interest in arguing that the Board should reevaluate the legal issues raised in such cases. *See* NLRB GC Memorandum 21-04, at 6 (2021), https://apps.nlrb.gov/link/document.aspx/09031d4583506e0c.

86. NLRB v. Cath. Bishops of Chi., 440 U.S. 490, 491 (1979).

supported a conclusion that the Act did not support the Board's exercise of jurisdiction over a church-operated school's teachers.[87] 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.[88] (As noted above, the Board overruled *Columbia University* when the Board in 1970 decided *Cornell University*.[89]) 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 held "that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."[90]

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."[91] 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:

> 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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> * * *
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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

87. *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).

88. *Id*. at 497 (citing Trs. of Columbia Univ., 97 N.L.R.B. 424 (1951) and Cornell Univ., 183 N.L.R.B. 329 (1970)).

89. Cornell Univ., 183 N.L.R.B. 329, 334 (1970).

90. *Cath. Bishops of Chi.*, 440 U.S. at 500 (citing Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)) (other citations omitted).

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

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> and the consequent serious First Amendment questions that would follow.[92]

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,"[93] 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' intent to bring teachers in church-operated schools within the jurisdiction of the Board."[94] As to these issues, the Court stated:

> Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools.
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> * * *
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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.[95]

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.[96] In *Universidad Central de Bayamón*,[97] 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."[98] An evenly divided 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

92. *Id.* at 501–02, 504 (emphasis added) (quoting Meek v. Pittenger, 421 U.S. 349, 370, (1975); Wolman v. Walter, 433 U.S. 229, 244 (1977)).

93. *Id.* at 504.

94. *Id.* at 507.

95. *Id*. at 504–05, 506.

96. *See, e.g.*, Jewish Day Sch. of Greater Wash., 283 N.L.R.B. 757, 761–62 (1987) (declining jurisdiction); Livingstone Coll., 286 N.L.R.B. 1308, 1310 (1987) (granting jurisdiction).

97. Univ. Cent. de Bayamón, 273 N.L.R.B. 1110 (1984), *enforcement denied*, Univ. Cent. de Bayamón v. NLRB, 793 F.2d 383, 399–403 (1st Cir. 1985) (en banc).

98. *Id*. at 1110.

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unsupportable" and, therefore, lacked substantial evidence in the record.[99]

In *University of Great Falls*,[100] 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."[101] 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."[102] 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*.[103] 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.
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> 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 University teaches gospel values, and to respond to doubts that it was legitimately "Catholic." He was asked, "What good is a Catholic

99. *Univ. Cent. de Bayamón*, 793 F.2d at 399.

100. Univ. of Great Falls, 331 N.L.R.B. 1663, 1666 (2000), *enforcement denied*, Univ. of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002).

101. *Id.* at 1664.

102. *Univ. of Great Falls*, 278 F.3d at 1340.

103. *Id.* at 1347–48.

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> 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.[104]

The court in *Great Falls* stated that *Catholic Bishop* required a "different approach,"[105] and the court adopted a three-part "bright-line test"[106]—derived from *Universidad Central de Bayamón v. NLRB*[107]—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."[108] 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.[109]

Following the D.C. Circuit's decision in *Great Falls*, the Board did not adopt the court's test, but in some cases assumed without deciding that the *Great Falls* standard governed questions regarding the Board's jurisdiction.[110] However, in *Carroll College. v. NLRB*, 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."[111]

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104. *Id.* at 1342–43 (citations omitted).
105. *Id.* at 1343.
106. *Id.* at 1345.
107. Univ. Cent. de Bayamón v. NLRB, 793 F.2d 383, 399–400 (1st Cir. 1985) (Breyer, J.) (en banc).
108. *Univ. of Great Falls*, 278 F.3d at 1345.
109. *Id.* at 1343–44 (citations omitted).
110. *See, e.g.*, Salvation Army, 345 N.L.R.B. 550, 550 (2005); Cath. Soc. Servs., 355 N.L.R.B. 329, 329 (2010).
111. Carroll Coll. v. NLRB, 558 F.3d 568, 574 (D.C. Cir. 2009).

In *Pacific Lutheran University*,[112] a divided five-member Board reevaluated this area[113] after granting review of a Regional Director's decision and direction of an election, and after 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."[114]

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.[115] The new standard—including the "teacher religious role" element—was described by the *Pacific Lutheran* majority as follows:

112. Pac. Lutheran Univ., 361 N.L.R.B. 1404, 1404 (2014).

113. 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 Id.* at 1404–05, 1417–28. 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 1429–30 (Miscimarra, Member, concurring in part and dissenting in part). Member Johnson had similar criticisms. *Id.* at 1441–44 (Johnson, Member, dissenting).

In *University of Southern California*, 365 N.L.R.B. No. 11 (Dec. 30, 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.* at 1 n.1. 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.* at 3–4 (Miscimarra, Member, 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—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 139–40.

114. *Pac. Lutheran*, 361 N.L.R.B. at 1408–09.

115. *Id.* at 1409.

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> [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*.[116]

Former Member Harry I. Johnson III and I authored separate dissenting opinions in *Pacific Lutheran*.[117] In contrast with the Board majority's rejection of the court of appeals' three-part *Great Falls* standard,[118] 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 scrutiny into "religiousness" that the Supreme Court rejected in *Catholic Bishop*.[119]

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."[120]

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 (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*

116. *Id.* (emphasis added).

117. *Id.* at 1428–30 (Miscimarra, Member, concurring in part and dissenting in part); *id.* at 1430–45 (Johnson, Member, dissenting).

118. *Id.* at 1438 (Johnson, Member, dissenting).

119. *Id.* at 1435–36.

120. *Id.* at 1429 (Miscimarra, Member, concurring in part and dissenting in part).

> *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.[121]

My prediction that the *Pacific Lutheran* majority's disagreement with the D.C. Circuit appeared "pre-destined to futility"[122] proved to be prescient, because the Board's subsequent decision in *Duquesne University*[123] 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.[124]

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,[125] 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.[126]

I dissented in *Duquesne University*, based on my conclusion that a substantial issue existed regarding the Board's potential lack of jurisdiction over the entire petitioned-for unit.[127] 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

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121. *Id*. (citing NLRA § 160(f), 29 U.S.C. § 160(f)) (emphasis added).

122. *Id.*

123. Duquesne Univ. of the Holy Spirit, Case 06-RC-080933 (Apr. 10, 2017), http://apps.nlrb.gov/link/document.aspx/09031d45823f7bd3 [https://perma.cc/HRB7-Y2PS] (Board majority decision denying review in part from Regional Director's decision overruling election objections and issuing certification, with Acting Chairman Miscimarra dissenting).

124. Duquesne Univ. of the Holy Spirit v. NLRB, 947 F.3d 824, 926 (D.C. Cir. 2020).

125. Seattle Univ., 364 N.L.R.B. No. 84 (Aug. 23, 2016); Saint Xavier Univ., 364 N.L.R.B. No. 85 (Aug. 23, 2016). I dissented in both of these cases for reasons similar to those I expressed in *Pacific Lutheran*. *See Seattle Univ.*, 364 N.L.R.B. No. 84, at 3–5 (Miscimarra, Member, dissenting); *Saint Xavier Univ.*, 364 N.L.R.B. No. 85, at 3–5 (Miscimarra, Member, dissenting).

126. *Duquesne University*, Case 06-RC-080933, at 1–2.

127. 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 behalf of a unit consisting of adjunct faculty. *Id.* at 1. Therefore, one of the standards governing the Board's disposition was whether a "substantial issue" warranted granting the request for review.

> 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.[128]

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.[129]

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*.[130] The court noted that former Member Johnson and I "vigorously dissented" in *Pacific Lutheran*,[131] and the court majority stated that "[t]his case begins and ends with our decisions in *Great Falls* and *Carroll College*."[132] The court held that the *Pacific Lutheran* test "impermissibly intrudes into religious matters."[133] 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 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

128. *Id.* at 3 (Miscimarra, Acting Chairman, dissenting) (quoting NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 502 (1979)).

129. *Id.*

130. Duquesne Univ. of the Holy Spirit v. NLRB, 947 F.3d 824, 837 (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.* at 826.

131. *Id.* at 831–32.

132. *Id.* at 832.

133. *Id.* at 834.

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'*sufficiently* religious,' . . . the Board may not determine whether various faculty members play sufficiently religious roles."[134]

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,"[135] 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." . . .
>
> 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 "second-guess" or "minimize the legitimacy of the beliefs expressed by a religious entity" in this way. . . .[136]

Circuit Judge Pillard dissented in the *Duquesne University* appeal, based in part on his view that, when evaluating Board jurisdiction

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134. *Id.* at 834–35 (emphasis in original) (quoting Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1343 (D.C. Cir. 2002)).

135. *Id.* at 835 (quoting NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 502 (1979), and Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1341 (D.C. Cir. 2002)).

136. *Id.* at 835–36 (citations omitted).

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."[137] 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,[138] 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.[139]

On June 10, 2020, in *Bethany College*,[140] a three-member Board (consisting of Chairman Ring and Members Kaplan and Emanuel) resolved the tug-of-war with the D.C. Circuit, and the Board adopted the three-part test articulated by the D.C. Circuit in *Great Falls*.[141] The Board reviewed the divided NLRB opinions in *Pacific Lutheran*, and the D.C. Circuit's rejection of the Board majority's position in *Duquesne University*, and concluded:

> Because the Supreme Court has clearly decided this matter, and because we find the rationale set forth in *Catholic Bishop* and in the circuit court decisions interpreting that seminal case to be persuasive, we now hold that the Board does not have jurisdiction over matters concerning teachers or faculty at *bona fide* religious educational institutions. We further hold that the test set forth in the D.C.

137. *Id.* at 837 (Pillard, J., dissenting) (quoting NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 501 (1979)).
138. *Id.* at 842.
139. *Id.* at 838, 849.
140. Bethany Coll., 369 N.L.R.B. No. 98 (June 10, 2020).
141. *See* Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1345 (D.C. Cir. 2002).

> Circuit's *Great Falls* case is the appropriate test to use when determining whether it is proper for the Board to exercise its jurisdiction in these cases. Under this bright-line test, the Board will leave the determination of what constitutes religious activity versus secular activity precisely where it has always belonged: with the religiously affiliated institutions themselves, as well as their affiliated churches and, where applicable, the relevant religious community. Applying the *Great Falls* test will remove any subjective judgments about the nature of the institutions' activities or those of its faculty members and limit the Board to making jurisdictional determinations based on objective evidence. It will prevent the type of intrusive inquiries that the Supreme Court prohibited in *Catholic Bishop* and has found problematic in other contexts. Finally, and importantly, it will provide the Board with a mechanism for determining when self-identified religious schools are not, in fact, *bona fide* religious institutions, therefore protecting the rights of employees working for those institutions.
>
> For all these reasons, we find that the *Pacific Lutheran* test cannot be squared with Supreme Court precedent and, accordingly, we reject it and adopt the *Great Falls* test in its place.[142]

The standard governing religiously affiliated academic institutions may get more attention from the Board. NLRB General Counsel Jennifer Abruzzo has directed the Agency's Regional Officers to submit to the Division of Advice all cases "involving the applicability of *Bethany College,* 369 NLRB No. 98 (2020) (overruling *Pacific Lutheran University,* 361 NLRB 1404 (2014) in determining whether to assert jurisdiction over religious educational institutions)."[143] This gives rise to the possibility that General Counsel Abruzzo will advocate a return to the Board standard in *Pacific Lutheran* or some other change from *Bethany College*, so the Board's work in this area is not necessarily finished.

III. 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."[144] The question of what constitutes a "State or political subdivision thereof" 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).

142. *Bethany Coll.*, 369 N.L.R.B. No. 98, at 5.
143. NLRB GC Memorandum 21-04, *supra* note 85, at 5.
144. 29 U.S.C. § 152(2).

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The leading case in this area originated before the NLRB in *Natural Gas Utility District of Hawkins County, Tennessee*.[145] 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) that, 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."[146] The Board held that, although the Supreme Court of Tennessee held that utility districts were "arms or instrumentalities" of the State of Tennessee,[147] the Board indicated that "while such State law declarations and interpretations are given careful consideration by the Board, they are not necessarily controlling."[148]

The Board concluded that the gas utility district was an "employer" within the meaning of section 2(2) of the Act in the light of the "economic realities and statutory purposes." The utility district subsequently refused to bargain, which the Board concluded was a violation of section 8(a)(5) of the Act.[149] The Court of Appeals for the Sixth Circuit denied enforcement of the Board's order, based on the court's conclusion that the utility district was a "political subdivision" of the State of Tennessee,[150] and the Supreme Court affirmed the court's decision.[151]

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),[152] 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.[153] 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:

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145. Nat. Gas Util. Dist. of Hawkins Cnty., 167 N.L.R.B. 691, 691 (1967).

146. NLRB v. Nat. Gas Util. Dist. of Hawkins Cnty., 402 U.S. 600, 605–06 (1971).

147. *Nat. Gas Util. Dist of Hawkins Cnty*., 167 N.L.R.B. at 691 (quoting First Suburban Water Util. Dist. v. McCanless, 146 S.W.2d 948, 950 (Tenn. 1941).

148. *Id.* (footnote omitted).

149. Nat. Gas Util. Dist. of Hawkins Cnty., 170 N.L.R.B. 1409, 1411 (1968), *enforcement denied*, NLRB v. Nat. Gas Util. Dist. of Hawkins Cnty., 427 F.2d 312 (6th Cir. 1970), *aff'd*, 402 U.S. 600 (1971).

150. Nat. Gas Util. Dist. of Hawkins Cnty., 427 F.2d 312, 315 (6th Cir. 1970), *aff'd*, 402 U.S. 600 (1971).

151. *Hawkins Cnty*., 402 U.S. at 609.

152. *Id.* at 602–03 (citations omitted).

153. *Id.* at 605–09.

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> 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*."
>
> 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 venture, with insufficient identity with or relationship to the State of Tennessee," . . . has no "warrant in the record" and no "reasonable basis in law."[154]

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)*,[155] and *Pennsylvania Virtual Charter School (Pennsylvania Virtual)*.[156]

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).[157] 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

154. *Id.* at 604–05 (citing NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60, 62 (1965); quoting NLRB v. Hearst Publ'ns, 322 U.S. 111, 131 (1944)) (other citations and footnote omitted) (emphasis added and in original).

155. Hyde Leadership Charter Sch., 364 N.L.R.B. 1137 (2016).

156. Pa. Virtual Charter Sch., 364 N.L.R.B. 1118 (Aug. 24, 2016).

157. *Hyde Leadership*, 364 N.L.R.B. at 1137.

(NY PEFEA).[158] In 2011, the New York Public Employment Relations Board (PERB) decided that it had jurisdiction over New York charter schools.[159] 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.[160] 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."[161] In 2014, however, the Supreme Court's *Noel Canning* decision resulted in the invalidation of the NLRB's decision in *Chicago Mathematics*.[162]

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 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.[163] 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).[164]

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).[165] 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

158. N.Y. Civ. Serv. §§ 200–14 (McKinney 2015); *see also* New York Charter Schools Act of 1998, as amended, N.Y. Educ. § 2854(3)(a) (McKinney 2015). Some of these facts were recited in my *Hyde Leadership* dissenting opinion. *See* 364 N.L.R.B. No. 88, at 15 (Miscimarra, Member, dissenting).

159. Brooklyn Excelsior Charter Sch., 44 NY PERB ¶ 3001, at 1, 45 (2011).

160. *See* Chi. Math. & Sci. Acad. Charter Sch., 359 N.L.R.B. 455, 466 (2012). The Board's decision in *Chicago Mathematics* was invalidated by the Supreme Court decision in *NLRB v. Noel Canning*, 573 U.S. 513, 557 (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 in part from the majority decision in *Chicago Mathematics.* 359 N.L.R.B. at 466 (Hayes, Member, concurring in part and dissenting in part).

161. Buffalo United Charter Sch. v. N.Y. State Pub. Emp. Rels. Bd., 965 N.Y.S.2d 905, 906 (N.Y. App. Div. 2013).

162. *See* discussion, *supra* note 160.

163. Hyde Leadership Charter Sch., 364 N.L.R.B. 1137, 1137 (2016).

164. *Id.* at 1140.

165. *Id.* at 1141–43.

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."[166] 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."[167] 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."[168]

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 administrative arms of the government,"[169] 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.
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> 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

166. *Id*. at 1141.
167. *Id*. at 1143.
168. *Id.* at 1143–45. For the full text of NLRA section 14(c)(1), 29 U.S.C. § 164(c)(1), see *supra* note 15.
169. *Hyde Leadership Charter Sch.*, 364 N.L.R.B. at 1145 (Miscimarra, Member, dissenting) (citing NLRB v. Nat. Gas Util. of Hawkins County, 402 U.S. 600, 604–05 (1971)).

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> "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.[170]

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."[171] 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.[172]

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."[173] 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."[174] 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

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170. *Id.* at 1148.
171. *Id.* at 1149 (citing *Hawkins County*, 402 U.S. at 604–05).
172. *Id.* at 1149–50.
173. *Id.* at 1150 (quoting Hialeah Race Course, Inc., 125 N.L.R.B. 388, 391 (1959) and 38 Fed. Reg. 9537, 9537 (1973)).
174. *Id.*

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.

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 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

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> 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*.[175]

In *Pennsylvania Virtual*, 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.[176] 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.[177] The Board majority was also unpersuaded that the Board should decline to exercise jurisdiction consistent with the discretion afforded to the Board under section 14(c)(1) of the Act.[178]

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.[179] 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."[180] 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

175. *Id.* at 1150–51 (emphasis added) (quoting Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 362–63 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); NLRB v. Appleton Elec. Co., 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations."); Northwestern Univ., 362 N.L.R.B. 1350, 1350 (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)).

176. Pa. Virtual Charter Sch., 364 N.L.R.B. 1118, 1118 (2016); *id.* at 1128 (Miscimarra, Member, dissenting).

177. *Id*. at 1124–26 (majority opinion).

178. *Id*. at 1126–28.

179. *Id.* at 1129 (Miscimarra, Member, dissenting).

180. *Id*. at 1130–31 (quoting Hialeah Race Course, 125 N.L.R.B. 388, 391 (1959) and 38 Fed. Reg. 9537, 9537 (1973)).

prevented anyone from having certainty regarding whether or when NLRB jurisdiction would actually exist in a particular situation.[181]

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,[182] and to place those employees in a "jurisdictional no-man's land." As in *Hyde Ledership*, 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."[183] The resulting chaos would result in "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."[184]

The latest NLRB case involving charter schools—*Kipp Academy Charter School (Kipp Academy)*[185]—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.[186]

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181. *Id.* at 1133–34. 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. at 1134.

182. *Id.* at 1133. 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.* at 1131. 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*. at 1133 (citing San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)).

183. *Id.* at 1135.

184. *Id.* For the history of *Chicago Mathematics* and the Supreme Court's *Noel Canning* decision, which rendered it invalid, see *supra* note 153.

185. Decision and Direction of Election, Kipp Acad., Case No. 02-RD-191760 (Aug. 24, 2018) (DDE), http://apps.nlrb.gov/link/document.aspx/09031d45828e88ef.

186. *Id.* at 3.

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.[187] In this regard, the New York PERB had previously asserted its jurisdiction over Kipp Academy in *Matter of Corcoran (KIPP Academy Charter School)*,[188] 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.[189] After the Board asserted jurisdiction over the charter school in *Hyde Leadership*, two represented Kipp Academy employees filed a union decertification petition with the NLRB.[190] 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.[191] 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).[192]

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.[193]

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*

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187. *Id.* at 1.
188. Matter of Corcoran (Kipp Acad. Charter Sch.), 45 P.E.R.B. ¶ 3013 (N.Y. 2012)
189. Decision and Direction of Election*, supra* note 185, at 20 (footnote omitted).
190. *Id*. at 1.
191. *Id*. at 1–2.
192. *Id*. at 2.
193. Order Granting Review In Part and Invitation to File Briefs (Order) at 1 n.1, Kipp Acad., Case No. 02-RD-191760 (Feb. 4, 2019) http://apps.nlrb.gov/link/document.aspx/09031d4582ac6cb2.

School-Brooklyn . . . and *Pennsylvania Virtual Charter School* . . . ."[194] 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."[195]

On March 25, 2020, a three-member Board in *Kipp Academy*[196] (consisting of Chairman Ring and Members Kaplan and Emanuel) resolved the issue as to which the Board previously granted review, and without engaging in more extensive analysis, the Board stated:

> Having carefully considered the entire record in this proceeding, including the briefs on review and those filed by amici, the Board has determined not to exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) at this time. We accordingly affirm the Regional Director's Decision and Direction of Election.[197]

IV. Independent Contractor Status

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.

The Supreme Court addressed the Board's evaluation of "independent contractor" status in *NLRB v. United Insurance Co. of America*, 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."[198] 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:
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> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

194. *Id.*
195. *Id.* at 2–3 (McFerran, Member, dissenting).
196. Kipp Acad. Charter Sch., 369 N.L.R.B. No. 48 (Mar. 25, 2020).
197. *Id*. at 1.
198. NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1960) (footnote omitted).

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> (b) whether or not the one employed is engaged in a distinct occupation or business;
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> (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;
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> (d) the skill required in the particular occupation;
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> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
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> (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
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> (j) whether the principal is or is not in business.[199]

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 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*.[200]

Predictably, the "independent contractor" standard produced by *United Insurance* has, in practice, caused extensive unpredictability. Throughout the past fifty 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

199. Restatement (Second) of Agency § 220(2) (Am. L. Inst. 1958).
200. *United Ins. Co. of Am.*, 390 U.S. at 258 (emphasis added; footnote omitted).

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."[201]

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*. and *Roadway Package System*, 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.[202] In *Austin Tupler Trucking*, 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.[203]

Conversely, in *Dial-A Mattress Operating Corp*., 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.[204] In *St. Joseph News-Press*, 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."[205] The Board in *St. Joseph News-Press*—with Member Liebman dissenting—refused to adopt "economic dependence" as a relevant factor when evaluating independent contractor status.[206] 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*, 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.[207] 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

201. *Id.*

202. Standard Oil Co., 230 N.L.R.B. 967, 968 (1977); Roadway Pkg. Sys., 326 N.L.R.B. 842, 850 (1998).

203. Austin Tupler Trucking, 261 N.L.R.B. 183, 184 (1982).

204. Dial-A-Mattress Operating Corp., 326 N.L.R.B. 884, 893–94 (1998).

205. St. Joseph News-Press, 345 N.L.R.B. 474, 478 (2005).

206. *Id.* at 482–83. *But see id.* at 483–87 (Liebman, Member, dissenting).

207. FedEx Home Delivery v. NLRB, 563 F.3d 492, 495 (D.C. Cir. 2009) (citing FedEx Home Delivery, Case Nos. 1–RC–22034, 22035 (Nov. 8, 2006)).

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believed was relevant to a determination of every driver's "entrepreneurial interest in their position."[208]

In *FedEx Home Delivery v. NLRB (FedEx I)*, 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.[209] 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."[210] However, the court observed that, in *Corporate Express Delivery Systems v. NLRB*, 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*.'"[211] 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*."[212]

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."[213] 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."[214]

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208. *Id.*
209. *Id.*
210. *Id.* at 496 (emphasis added).
211. *Id.* at 497 (quoting Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002)) (emphasis added; other citation omitted; inside quotations modified).
212. *Id.* (emphasis added; citation and footnote omitted).
213. *Id.* at 502.
214. *Id.* (emphasis in original; citations and footnote omitted).

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Ultimately, the court in *FedEx I* concluded that the FedEx drivers were independent contractors, which divested the Board of jurisdiction.[215]

Subsequently, in *FedEx Home Delivery (FedEx II)*, 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).[216] 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 independent contractors.[217] Nonetheless, the Board majority stated that "after careful consideration, we decline to adopt the court's interpretation of the Act."[218]

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" when applying the common law agency principles governing independent contractor status.[219] 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.[220]

The Board majority concluded that "[a]ctual entrepreneurial opportunity for gain or loss . . . remains a relevant consideration in

215. *Id.* at 504.

216. FedEx Home Delivery, 361 N.L.R.B. 610, 610 (2014), *enforcement denied*, 849 F.3d 1123 (D.C. Cir. 2017).

217. *Id.* at 617.

218. *Id.*

219. *Id.* at 617–18.

220. *Id*. (emphasis in original; citations and footnote omitted).

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*."[221]

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 'right to control' factors relevant to perceived economic dependency."[222] 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.[223]

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

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221. *Id.* at 620 (emphasis in original).

222. *Id.* at 629 (Johnson, Member dissenting). I did not participate in *FedEx II*, but subsequently expressed my agreement with Member Johnson's *FedEx II* dissenting views. *See* Browning-Ferris Indus., 362 N.L.R.B. 1599, 1624 n.24 (2015) (Miscimarra Johnson, Members, dissenting), *enforcement denied*, 911 F.3d 195 (D.C. Cir. 2018); Pa. Interscholastic Athletic Ass'n, 365 N.L.R.B. No. 107, at 13 n.4 (July 11, 2017) (Miscimarra, Chairman, dissenting).

223. *FedEx Home Delivery*, 361 N.L.R.B. at 635 (Johnson, Member, dissenting).

FedEx I.[224] 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."[225] 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 *FedEx II* to conclude that "this particular question under the Act is not one to which we grant the Board *Chevron* deference. . . ."[226]

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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> * * *
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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.[227]

In *SuperShuttle DFW, Inc.*, 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

224. FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1124 (D.C. Cir. 2017).

225. *Id.* at 1127–28 (citation omitted).

226. *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. Nat. Res. Def. Council, Inc., 467 U.S. 837, 924–25 (1984).

227. *FedEx Home Delivery*, 849 F.3d at 1124, 1127 (emphasis in original; citations and footnotes omitted).

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the Act, and the Board extended its consideration of the issues presented in *FedEx I* and *FedEx II*.[228] 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*.[229] 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 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).
>
> 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." . . .[230]

The Board defended its use of entrepreneurial opportunities as follows:

> 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

228. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at 1 (Jan. 25, 2019).
229. *Id*. at 1, 7–12.
230. *Id.* at 8.

> 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.[231]

Board Member McFerran dissented in *SuperShuttle*, based on her view that the Regional Director incorrectly concluded that the franchisee-operators were independent contractors.[232] Member McFerran—though noting that she did not participate in the Board decision in *FedEx II*– expressed agreement with the Board majority's *FedEx II* decision and she expressed disagreement with the *SuperShuttle* Board majority's endorsement of the D.C. Circuit opinions in *FedEx I* and *FedEx II*.[233] In part, Member McFerran reasoned:

> 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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> * * *
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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.[234]

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*, a Board majority (consisting of Members Pearce and McFerran) held that high school lacrosse officials were employees and not independent contractors.[235] 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.[236]

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231. *Id*. at 9 (footnotes and citations omitted).
232. *Id*. at 15–29 (McFerran, Member, dissenting).
233. *Id.* at 18–19.
234. *Id.* at 19.
235. Pa. Interscholastic Athletic Ass'n, 365 N.L.R.B. No. 107, at 1 (July 11, 2017).
236. *Id*. at 13–14 (Miscimarra, Chairman, dissenting). Before the Board, the *Pennsylvania Interscholastic Athletic Association* case also involved whether the Pennsylvania

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*—that the lacrosse officials were independent contractors, not employees.[237] 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. [238]

In *Velox Express, Inc.*, 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),[239] 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."[240]

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.[241] 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.[242]

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 Ass'n 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, 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.

237. 926 F.3d at 840.

238. *Id.* at 842.

239. Velox Express, Inc. 368 N.L.R.B. No. 61, at 1 (Aug. 29, 2019).

240. 29 U.S.C. § 158(a)(1).

241. *Velox Express, Inc.*, 368 N.L.R.B. No. 61, at 2–4; *see also id.* at 13 (McFerran, Member, concurring in part and dissenting in part).

242. *Id.* at 6 (majority opinion) (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

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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. The complicated multi-factor common law test, combined with the "numerous Federal, State, and local laws and regulations that apply a number of different standards for determining independent-contractor status," make it difficult for an company to resolve this question with certainty.[243] In addition, management must make its determination for all of its groups of workers and must communicate that decision to workers in order to explain the legal regimes in place with regard to the relationship. As the majority reasoned, "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."[244] Thus, the Board majority stated that "important legal and policy concerns weigh against finding a stand-alone misclassification violation."[245]

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).[246]

It appears that the Board may not yet have written its final chapter regarding the appropriate treatment of independent contractor issues, and whether an employer violates section 8(a)(1) of the Act by

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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. *Id*. at 7 (citing Sisters' Camelot, 363 N.L.R.B. 162, 167–68 (2015); Wal-Mart Stores, 340 N.L.R.B. 220, 225 (2003); United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1049–51 (1979); Houston Chron. Publ'g Co., 202 N.L.R.B. 1208, 1211–15 (1952), *enforcement denied*, 211 F.2d 848 (5th Cir. 1954)).

243. *Id.* at 8.

244. *Id.* (emphasis in original).

245. *Id.*

246. *Id.* at 13–14 (McFerran, Member, concurring in part and dissenting in part).

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incorrectly classifying certain individuals as independent contractors who are subsequently found (by the Board or the courts) to be statutory employees. In *The Atlanta Opera, Inc.*,[247] the Acting Regional Director found that "makeup artists, wig artists, and hairstylists" were employees rather than independent contractors, and the Board majority—consisting of Chairman McFerran and Members Wilcox and Prouty—on December 27, 2021 solicited briefs "to aid in the consideration" of the following issues:

> 1. Should the Board adhere to the independent- contractor standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)?
>
> 2. If not, what standard should replace it? Should the Board return to the standard in *FedEx Home Delivery*, 361 NLRB 610, 611 (2014), either in its entirety or with modifications?[248]

Board Members Kaplan and Ring dissented from the notice and invitation for briefs, in part because reconsideration of *SuperShuttle* and the Board's potential return to *FedEx II* "will invariably put the Board at odds with the D.C. Circuit, a forum with national jurisdiction to hear appeals from parties adversely affected by Board decisions."[249] Members Kaplan and Ring also pointed out that General Counsel Abruzzo had directed the referral to the Board's Division of Advice all cases involving "applicability of *Velox Express*,"[250] which prompted Members Kaplan and Ring to observe that, if the Board eventually overruled *Velox* and found that misclassifying employees as independent contractors constituted a per se violation of the Act, "even employers who in good faith *correctly* classified individuals as independent contractors under the *SuperShuttle* test could be found to have committed an unfair labor practice."[251]

Conclusion

It might be surprising that so many fundamental questions about NLRB jurisdiction arise in cases being decided more than eighty 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, and with the Board's application of these factors often receiving no deference.

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247. Atl. Opera, Inc., 371 N.L.R.B. No. 45 (Dec. 27, 2021).

248. *Id.* at 1.

249. *Id.* at 3 (Kaplan & Ring, Members, dissenting).

250. As noted above, General Counsel Abruzzo on August 12, 2021, directed the Board's Regional Offices to refer to the Agency's Division of Advice all "misclassification" cases involving applicability of *Velox Express*. *See* NLRB GC MEMORANDUM 21-04, *supra* note 85, at 6.

251. *Atl. Opera, Inc.*, 371 N.L.R.B. No. 45, at 3 (Kaplan & Ring, Members, dissenting) (emphasis in original, footnote omitted).

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 and the courts of appeals, and these differences have continued even after some issues were addressed by the Supreme Court.[252] The unfortunate outcome has been substantial uncertainty and burdens for employees, employers and unions alike, especially in disputes that have resulted in protracted Board and court litigation. More definitive answers to these important questions about the scope of the Board's jurisdiction will hopefully emerge in future cases.

252. As indicated previously, the Supreme Court addressed the Board's treatment of independent contractor status in NLRB v. *United Insurance Co. of America*, 390 U.S. 254, 256 (1960), following which the Board and the Court of Appeals for the D.C. Circuit had conflicting views in *FedEx Home Delivery v. NLRB (FedEx I)*, 563 F.3d 492, 495 (D.C. Cir. 2009), and *FedEx Home Delivery v. NLRB (FedEx II)*, 849 F.3d 1123, 1124 (D.C. Cir. 2017). See the text accompanying notes 207–27, *supra*. Likewise, the Supreme Court addressed the Board's exercise of jurisdiction over religiously affiliated academic institutions under the Act in *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490, 507 (1979), following which the Board and the Court of Appeals for the D.C. Circuit had conflicting views in *Duquesne University of the Holy Spirit v. NLRB*, 947 F.3d 824, 926 (D.C. Cir. 2020). See the text accompanying notes 123–39, *supra*.

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