Elon University *and* SEIU Workers United Southern Region. Case 10–RC–231745

February 19, 2021

DECISION ON REVIEW

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, EMANUEL, AND RING

The issue presented in this case is whether the Employer's nontenure-track faculty members, who are eligible to participate in some of the university faculty groups vested with decision-making authority, are managerial employees under the Act. The Acting Regional Director, applying the "subgroup majority status rule" set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014) (*Pacific Lutheran*), found that the nontenure-track faculty members do not possess the requisite managerial control because they do not constitute a majority subgroup within any of those faculty groups.

Following the Acting Regional Director's initial decision in this matter, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *University of Southern California v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019) (*USC*). In *USC*, the court rejected the "subgroup majority status rule" set forth in *Pacific Lutheran*, finding that the rule conflicted with *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), where the Supreme Court identified factors relevant in determining the managerial status of college or university faculty. With this case now before us on review, we agree with the D.C. Circuit that the "subgroup majority status rule" cannot be reconciled with *Yeshiva*.

Accordingly, we have decided to modify *Pacific Lutheran* in relevant part and to adopt the alternative framework articulated by the D.C. Circuit in *USC*. Under this framework, the determination of the managerial status of a subgroup of faculty members, based on their participation in a collegial faculty body, involves two distinct inquiries: first, "whether a faculty body exercises effective control" over areas of decision-making discussed herein, and second, "whether, based on the faculty's structure and operations, the petitioning subgroup is included in that managerial faculty body." 918 F.3d at 139. If both inquiries are satisfied, then the faculty members in the subgroup at issue constitute managerial employees, regardless of whether they exert majority control within specific faculty bodies. Applying this framework here, we find that the Employer has not met its burden to prove that the petitioned-for nontenure-track faculty members are structurally included in the Employer's faculty bodies. We therefore affirm the Acting Regional Director and find that the petitioned-for faculty members are not managerial employees.

I. PROCEDURAL HISTORY

On November 29, 2018, SEIU Workers United Southern Region (the Petitioner) filed a petition to represent a unit of all nontenure-track faculty members, including all visiting faculty, limited-term faculty, and adjunct faculty teaching at least one credit-bearing undergraduate course at the Employer's College of Arts and Science, School of Communications, School of Education, or the Martha & Spencer Love School of Business. On February 5, 2019, the Acting Regional Director issued a Decision and Direction of Election in which he found that the petitioned-for faculty members are not managerial and that the petitioned-for unit constitutes an appropriate unit under the Board's community-of-interest test.

The Region then conducted a mail-ballot election, commencing on March 12, 2019, in which the Petitioner prevailed. The Employer filed objections, and the Acting Regional Director subsequently issued a Decision and Certification of Representative on September 3, 2019, overruling the Employer's objections and certifying the unit. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of both the Acting Regional Director's Decision and Direction of Election and his Decision and Certification of Representative. The Petitioner filed an opposition to the request.

On April 13, 2020, the Board granted the Employer's Request for Review solely with respect to the managerial status of the petitioned-for employees, as it raised a substantial issue "with respect to the continued application of the Board's 'majority status rule' as articulated in *Pacific Lutheran*."[1] Thereafter, the Employer and Petitioner filed briefs on review.

II. FACTS

The Employer operates a private, nonprofit university in Elon, North Carolina, and it employs about 577 faculty employees. The Petitioner is seeking to represent a subgroup of those employees: all nontenure-track faculty employees teaching at least one credit-bearing undergraduate course in one of the university's four undergraduate schools. The nontenure-track classifications in the petitioned-for unit include visiting faculty, limited-term faculty, and adjunct faculty (collectively, the petitioned-for

[1] The request for review was denied in all other respects.

nontenure-track faculty) and exclude tenured faculty, tenure-track faculty, continuing-track faculty, and lecture-track faculty (collectively, the excluded faculty). Of the approximately 181 petitioned-for faculty members, about 134 are adjunct faculty members, about 42 are limited-term faculty members, and only 2 are visiting faculty members.

In comparison to the excluded faculty, the petitioned-for nontenure-track faculty have substantially less expectation of continued employment. Adjunct faculty have contracts that are renewed on a semester-to-semester basis. Limited-term faculty have their contracts reevaluated on a yearly basis and are barred from serving for more than 4 years. Similarly, visiting faculty have their contracts renewed on a yearly basis, usually for a term of up to 3 years, with a potential extension up to 6 years. At any point during the contract renewal process, visiting faculty may be converted to a tenure-track or lecture-track position, should the university wish to keep them on permanently; limited-term and adjunct faculty cannot be converted in the same manner. While adjunct faculty have no minimum number of hours they are expected to teach per year, visiting and limited-term faculty teach full course loads of 24 credit hours per year. Finally, visiting, limited-term, and adjunct faculty do not have the same scholarly and service duties as do the excluded faculty classifications. Unlike the excluded faculty, who go through rigorous evaluations with respect to their teaching, scholarly, and service duties, the petitioned-for faculty are evaluated based solely on their student evaluations and the department chair's observation of their teaching. Further, although the excluded faculty may be promoted based on positive evaluations, the petitioned-for faculty are not eligible for promotions based on their performance.

Under the Employer's "shared governance" system, as described in the faculty handbook, members of the faculty may sit on committees that determine courses of study, requirements for admission, and standards of performance; determine and recommend to the Board of Trustees standards for selection, promotion, and tenure of faculty members; and define ethical and professional standards for members of the faculty, among other functions. These powers are granted to the faculty by the university's president and are reviewed and approved by the Board of Trustees. The president and Board of Trustees always retain the right to review and approve the decisions made by the shared governance committees.

Dr. Steven House, who served as the Employer's Provost/executive vice president at the time of the hearing, testified that, although the university's curriculum is primarily dictated by the faculty, "strategic planning and budget are primarily the role of the administration." Two tenured faculty members sit on the budget committee, along with four administrators. The budget committee is responsible for matters such as tuition rates, salaries, and distributing revenue to the different schools and programs. The university operates in accordance with a 10-year strategic plan, consisting of several concrete goals, and this plan is generated by the strategic planning committee. In addition, a long-range planning committee, which consists of administration officials (including Provost House) and experienced full-time faculty, is responsible for ensuring that the strategic plan is fulfilled, assessed, and reported. No faculty members from the petitioned-for classifications sit on the long-range planning committee, strategic planning committee, or budget committee.

As mentioned above, the Employer's faculty committees are largely responsible for determinations regarding academic and faculty matters. For example, the Employer's Academic Council is a 19-member committee that makes recommendations to the Board of Trustees regarding the Employer's overall educational program. Generally speaking, the Academic Council advises the president; coordinates faculty activities; runs faculty meetings, along with the president and provost; maintains the faculty handbook and bylaws; and writes and enforces the university's statement of professional standards. The Academic Council has been involved in changes to the Employer's bylaws, revisions to the Employer's mid-semester grading policy (which is part of the faculty handbook), and the creation of various majors and minors, such as the engineering major. The Academic Council includes one staff person (who is not a member of either the petitioned-for or excluded faculty classifications); three at-large members, who are voted in via a faculty meeting vote; around 15 rotating members from the different schools and colleges; one seat reserved for limited-term or adjunct faculty; and the dean, the provost, and the president, who sit on the Academic Council as non-voting members. Aside from the one seat reserved for limited-term or adjunct faculty and the three at-large seats, only tenure, tenure-track, continuing-track, lecture-track, and visiting faculty are eligible to serve on the Academic Council, due to restrictions on certain seats.[2]

[2] In this regard, the faculty handbook states that "[d]ivisional and school representatives must hold the rank of Senior Lecturer, Associate Professor, or above; at-large members must hold the rank of Lecturer, Assistant Professor, or above." The handbook further clarifies that, to serve as a voting member on the Academic Council in any seat, a faculty member must have served for at least 2 years at the university and have voting privileges at faculty meetings, which requires teaching at least 18 credit hours per year. As discussed below, the majority of adjunct faculty, and over half of the petitioned-for unit, are ineligible to serve on the

The record identifies only two individuals in the petitioned-for classifications who have ever served on the Academic Council: adjunct faculty member Billy Summers, who began serving as the adjunct and limited-term faculty representative when the seat was created in 2011 and is the current representative, and adjunct faculty member Leigh Ann Whittle, who held that same seat for a brief period in 2016 and 2017. Whittle did not complete her full 2-year term on the Academic Council because she left for another university. In this regard, Provost House acknowledged that, because limited-term and adjunct faculty do not have the same year-to-year expectation of employment as other faculty, it presents a "practical hurdle" to serving on committees such as the Academic Council.

The Employer has 14 standing committees that review and recommend changes to specific academic areas: the Academic Standing Committee, Academic Technology and Computing Committee, Admissions Committee, Athletic Committee, Curriculum Committee, Core Curriculum Committee, Faculty Research and Development Committee, Global Education Curriculum Committee, Graduate Council, Library Committee, Post-Probationary Faculty Development Review Committee, Promotion and Tenure Committee, Religious and Spiritual Life Committee, and Student Life Committee. With respect to membership on the standing committees, the Employer's bylaws create a distinction between "teaching faculty" and "faculty." A seat reserved for "teaching faculty" employees may only be filled by a faculty employee that the Employer considers "permanent," such as a tenure-track, lecture-track, or visiting faculty member; "faculty" seats, which exist on five of fourteen standing committees (Academic Technology and Computing, Admissions, Athletics, Religious and Spiritual Life, and Student Life), may be filled by any faculty member, including limited-term and adjunct faculty members.

Although the by-laws provide that a faculty member in the petitioned-for faculty classifications may serve on a standing committee, the record does not establish that any such member ever has. Provost House, who testified that "[v]ery few part-time [faculty] get appointed to these types of committees, but it is possible," was unable to identify any adjunct or limited-term faculty member who had served on a standing committee. With respect to visiting faculty, House testified that one of the two visiting faculty members had served on faculty committees "when she was a staff member" (and before she became a visiting faculty member), but he did not identify the specific committees; he further acknowledged that she had not served on any committees since becoming a visiting faculty member, which had occurred only a few months before the hearing. Provost House was not aware if the other visiting faculty member had ever served, or currently served, on any standing committee.

The Employer's individual schools or departments may also have their own committees and subcommittees. For example, the university's engineering, public health, astronomy, and music production and recording arts majors all originated in the curriculum committee for a particular school before moving through a broader approval process.[3] Marna Winters, a department chair in the School of Education, testified that she volunteered for departmental committees when she was an adjunct faculty member between 2008 and 2011. These committees included the "curriculum resource advisory committee," which oversaw how allotted funding was spent for the School of Education library, and a "core design team," established in connection with a new early childhood education major and minor. Winters testified that the core design team included two other adjuncts and three full-time faculty members, but she did not identify any of those individuals. In fact, the record does not identify any specific visiting, limited-term, or adjunct faculty member who currently serves, or has ever served, on a school or departmental committee. To the contrary, assistant professor Dr. Catherine Bush, who served as an adjunct faculty member from 2012 to 2018 and became a limited-term faculty member in 2018, testified that she has never served on any committee, departmental or otherwise. Adjunct faculty member Sharon Eisner, who works in the School of Communications, similarly stated that, while she tried to attend departmental meetings, she was "not a part of the voting process." She further testified that, when she tried to join departmental committees, she was told that they were "not for adjuncts."

In addition, the Employer also has a variety of task forces, working groups, and advisory committees set up to address discrete issues, such as a task force for black students, staff, and faculty; a working group on high quality teaching; the experiential education advisory committee; the teaching fellow advisory committee; and the university environmental advisory council. The Employer provided no evidence that any members of the petitioned-for

Academic Council at all because they do not have voting privileges at faculty meetings.

[3] This broader approval process includes, but is not necessarily limited to, approval from the Academic Council and Board of Trustees, as well as passing a faculty vote.

faculty classifications currently serve or have served on these working groups or advisory committees.[4]

Besides committees and working groups, the Employer holds about three faculty meetings a semester at which faculty members may vote on specific agenda items, such as curriculum changes or changes to the faculty handbook/bylaws. For example, the full faculty voted on (and passed) a change to the faculty handbook's mid-semester grading policy after it was approved by the Academic Council. Similarly, the faculty has approved changes, proposed by the Post-Probationary Faculty Development Review Committee, designed to provide enhanced opportunities for sabbaticals for post-probationary (e.g., tenure-track) faculty, to streamline the sabbatical process, and to create eight new permanent faculty positions. The faculty has also voted on the creation of new majors and minors, such as the engineering major. Proposals from the budget committee do not go to a faculty vote; rather, they are approved solely by the president and the Board of Trustees.

Although all faculty members may attend faculty meetings, only faculty members who teach more than 18 credit hours per year are eligible to vote. This includes all of the visiting-track and limited-term faculty, but only a portion of the adjunct faculty (30–40 of approximately 134 adjuncts). As a result, only 74–84 of 181 faculty members in the petitioned-for unit are eligible to vote at faculty meetings. Additionally, faculty members may only vote if they physically attend the meeting. A measure automatically passes, without a vote, if no faculty member raises a question relating to the measure. Limited-term professor Dr. Catherine Bush testified that she has attended only one faculty meeting in almost 7 years, predominantly because she felt that people were "very surprised" to see her there and concluded that there was "no point" in attending future meetings. Similarly, adjunct faculty member Sharon Eisner testified that she attended one faculty meeting in the last 11 years.

III. THE ACTING REGIONAL DIRECTOR'S DECISION

In determining that the petitioned-for non-tenure-track faculty classifications are not managerial employees, the Acting Regional Director applied the test set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014). Under *Pacific Lutheran*, in determining whether university faculty are managerial employees, the Board considers the faculty's participation in five areas of decision-making: academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions. Id. at 1417. The Board gives greater weight to the first three "primary" areas of consideration "as they affect the [u]niversity as a whole," and less weight to the "secondary, i.e., less important" areas. Id. at 1417, 1420. The Board conducts this examination "in the context of the university's [decision-making] structure and administrative hierarchy, as well as the nature of the employment relationship of the faculty in issue." Id. at 1417. Finally, the party asserting managerial status "must demonstrate that faculty actually exercise control or make effective recommendations" over these primary and secondary areas of consideration. Id. at 1421.

Here, the Acting Regional Director's analysis began and ended with what the D.C. Circuit termed the *Pacific Lutheran* "subgroup majority status rule," which holds that a particular faculty subgroup cannot exercise effective or actual control over an area of consideration if it does not hold the majority of seats on the committees that govern that area of consideration. *USC*, 918 F.3d at 135; *Pacific Lutheran*, supra at 1421 fn. 36. The Acting Regional Director found that the Employer failed to prove that the petitioned-for faculty constitute a "controlling majority" on any of its shared governance committees, including at faculty meetings, and noted that they were categorically barred from serving on a number of the Employer's committees. He accordingly concluded that "[s]ince the Employer has failed to prove that the petitioned-for faculty employees exert majority control at any level, there is no danger that their loyalty will be divided between Petitioner and the Employer," and, therefore, it was "unnecessary for [him] to evaluate the Employer's Academic Council or university and school-specific committees under *Pacific Lutheran*'s five-factor test."

[4] In this regard, both the Employer and Petitioner attempted to provide lists of the Employer's current committees, including the Academic Council, standing committees, school and departmental committees, and advisory committees and working groups. While these lists identified the individual members of each committee by name, title, and position, they did not identify the members by classifications. Because faculty members have titles and positions that can encompass several different classifications, these lists do not provide meaningful information about the composition of the relevant committees, at least in terms of faculty classifications. And although the Employer suggests that the "descriptions of position" included on the lists indicate that a fair number of spots on these committees are, at least theoretically, open to "faculty" (including the petitioned-for classifications) instead of "teaching faculty," the descriptions in the lists are inconsistent with the testimony elicited at the hearing and with the faculty handbook. For example, the list of Academic Council members includes 17 individuals with a "description of position" stating "faculty member" (as opposed to "teaching faculty"), even for seats that are not open to limited-term and adjunct faculty members. Similarly, the membership lists for several standing committees identify certain members only as "faculty" when, according to the handbook, these committees are reserved for "teaching faculty" only.

IV. ANALYSIS

A. Why the "Subgroup Majority Status Rule" of Pacific Lutheran Must Be Reconsidered

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court found that full-time faculty members at Yeshiva University constituted managerial employees. As the Supreme Court observed, managerial employees are those who "'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" Id. at 682 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974)). "[N]ormally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." Id. at 683. The Court determined that the faculty members at Yeshiva "exercise[d] authority which in any other context unquestionably would be managerial" by deciding what courses would be offered, when they would be taught, and who would be teaching them; which students would be admitted, retained, and graduated; and what teaching standards would be applied. Id. at 686. By virtue of these activities, the faculty "determine[d] within each school the product to be produced, the terms upon which it [would] be offered, and the customers who [would] be served." Id. Accordingly, the Court reasoned that finding the faculty members to be managerial would "ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union." Id. at 687–688.

"The problem of divided loyalty is particularly acute for a university like Yeshiva," the Court explained, "which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals." Id. at 689. In this regard, the Court took great pains to emphasize the system of "shared authority" at Yeshiva and similarly structured colleges and universities. As the Court observed, this "shared authority" does not fit squarely with the Act, which "was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry." Id. at 680. In contrast to industrial decision-making, this shared authority system "is divided between a central administration and one or more collegial bodies." Id. This model works in the academic world because the faculty and institution ultimately share the same interest: the "policy" of "academic excellence and institutional distinction." Id. at 688. Academic excellence benefits the university as an institution because "[t]he 'business' of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions"; simultaneously, the faculty can "enhance their own standing and fulfill their professional mission by ensuring that the university's objectives are met." Id. Thus, a shared authority system naturally aligns the interests of the faculty with the interests of management. And, since "traditional systems of collegiality and tenure insulate the professor from some of the sanctions applied to an industrial manager who fails to adhere to company policy," "[t]he large measure of independence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent." Id. at 689–690.

The Supreme Court cautioned, however, that it was "not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress's expressed intent to protect them," and that "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." Id. at 690. For example, "[i]t is plain . . . that professors may not be excluded [from the protections of the Act] merely because they determine the content of their own courses, evaluate their own students, and supervise their own research." Id. at 690 fn. 31. The Court further commented that "it may be" that rational lines can be drawn between faculty groups (such as tenured and untenured faculty members) "depending upon how a faculty is structured and operates," although it did not express an opinion on such questions because the petitioned-for unit in *Yeshiva* was too broad to implicate them. Id.

After several decades of applying *Yeshiva* on a case-by-case basis, the Board in *Pacific Lutheran* set forth its current framework for analyzing whether faculty members at a college or university are managerial.[5] As discussed above, faculty will be found to be managerial employees under the *Pacific Lutheran* standard if they exercise actual control over or make effective recommendations regarding the primary and secondary areas of consideration. 361 NLRB at 1421. The Board clarified that a finding of actual control or effective recommendation requires "specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision-making area, and the subsequent review of those decisions or recommendations, if any, by the

[5] The Board's decision in *Pacific Lutheran* also set forth another test, addressing whether the Board may exercise jurisdiction over religious institutions of higher education. In *Bethany College*, 369 NLRB No. 98 (2020), the Board recently overruled *Pacific Lutheran*'s test for religious jurisdiction by adopting the jurisdictional test announced by the United States Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed." Id. Thus, effective recommendations are those that "must almost always be followed by the administration," such that they "routinely become operative without independent review by the administration." Id. Moreover, the Board observed that its inquiry into actual control and effective recommendation must consider "both the structure of university decision-making and where the faculty at issue fit within that structure, including the nature of the employment relationship held by such faculty (e.g., tenured vs. tenure eligible vs. nontenure eligible; regular vs. contingent)." Id. at 1421–1422.

Most significantly for purposes of the present dispute, the *Pacific Lutheran* decision included a footnote stating that "[i]n those instances where a committee controls or effectively recommends action in a particular decision-making area, the party asserting that the faculty are managers must prove that a majority of the committee or assembly is faculty. If faculty members do not exert majority control, we will not attribute the committee's conduct to the faculty." Id. at 1421 fn. 36. In drawing this bright-line rule, the Board cited prior cases in which the Board had found that petitioned-for faculty members were not managerial, in part because faculty members as a whole (as opposed to one particular subgroup) did not constitute a majority of members on the employer's committees, which were dominated by administrative officials.[6]

The Board, however, later extended its application of the "majority status rule" in *University of Southern California*, 365 NLRB No. 11, slip op. at 18 (2016), where the Board denied review of the Regional Director's determination that petitioned-for non-tenure-track faculty were not managerial employees. As in the present dispute, the Regional Director applied the "majority status rule" to a subgroup of certain faculty classifications, as opposed to the faculty as a whole. In doing so, the Regional Director found that, even assuming the employer's collegial bodies exercised actual control or effective recommendation over the *Pacific Lutheran* areas of consideration,[7] such control or recommendation could not be attributed to the faculty subgroup at issue because "[d]espite the fact that nontenure track faculty constitute a majority of the faculty body, they are consistently in the minority on the dozens of faculty committees that comprise USC's shared governance system."[8] Id., slip op. at 18. Accordingly, by denying review, the Board majority sanctioned a view of the "majority status rule" under which a petitioned-for faculty subgroup will be found non-managerial simply because the members of that subgroup do not constitute a majority of the members on the university's committees, even if the committees at issue are exclusively composed of faculty members.[9]

After the Board denied review in *University of Southern California*, the employer refused to bargain with the union, resulting in an unfair labor practice finding. See *University of Southern California*, 365 NLRB No. 89 (2017). The employer petitioned the United States Court of Appeals for the District of Columbia Circuit for review, arguing that the Board had incorrectly resolved the managerial-status issue, and the Board cross-applied for enforcement. As mentioned above, the D.C. Circuit denied enforcement of the Board's order in *University of Southern California*, concluding that the "subgroup majority status rule" was inconsistent with the Supreme Court's *Yeshiva* decision. *USC*, 918 F.3d at 127, 136–140. The court reiterated *Yeshiva*'s sharp distinction between the "pyramidal view" of decision-making that occurs in the industrial sector and the "collegial" mode of decision-making that occurs in bodies like university faculty, as well as its warning that the principles developed in the industrial setting

[6] See *University of Great Falls*, 325 NLRB 83, 95 (1997) ("While there are several committees on which faculty comprise a minority, it is with the influence of these faculty-dominated committees that I am primarily concerned in resolving the issue of faculty's managerial status. Decisions or recommendations made by committees only a minority of whose members consist of faculty representatives cannot be said to be faculty decisions or recommendations."); see also *Elmira College*, 309 NLRB 842, 849 (1992) (concluding that "the nature of faculty involvement with respect to academic matters conclusively establishes their status as managerial employees" where "the faculty committees [] which deal with [academic] matters are comprised predominantly, and, in some cases, exclusively, of faculty representatives"); *Cooper Union of Science & Art*, 273 NLRB 1768, 1775 (1985) (declining to find managerial status where "full-time faculty . . . members constitute a numerical minority on most of the governance committees and constitute something less than a voting majority on about half of them"), enfd. 783 F.2d 29 (2d Cir. 1986), cert. denied 479 U.S. 815 (1986).

[7] The Regional Director further found that the relevant committees did not, in fact, exercise actual control or make effective recommendations.

[8] The Regional Director also cited additional considerations, including that the petitioned-for faculty were often unaware of the committees available to them; did not receive "feedback or guidance about their role or responsibilities, support for their other academic or artistic endeavors, or, in the case of part-time faculty members who work less than 50 percent of full-time, benefits such as health insurance"; and, with respect to the part-time nontenure faculty, were likely ineligible to serve on committees requiring multiyear terms because of their semester-to-semester or year-to-year appointments. Id., slip op. at 18.

[9] Then-Member Miscimarra dissented from the majority's denial of review, observing that, under *Yeshiva*, "a faculty member may possess managerial authority even though he or she cannot individually establish policy separate from the committees on which he or she serves," and suggested that the "majority status rule" could improperly preclude the Board from finding managerial status where it would otherwise be found. Id., slip op. at 3.

"cannot be imposed blindly on the academic world." Id. at 136 (internal quotation marks omitted). According to the court, the Supreme Court's "collegial" view of decision-making that prompted its decision in *Yeshiva* "turned not on an aggregation of the power delegated to a series of individuals or a mosaic of subgroups—the focus of the Board's subgroup majority status rule—but rather on the role played by the faculty as a body." Id. at 137. In this regard, the court held that the subgroup majority status rule "ignores the possibility that faculty subgroups, despite holding different status within the university, may share common interests and therefore effectively participate together as a body on some or all of the issues relevant to managerial status," and improperly assumes "that minority subgroups can never work out their differences with the majority." Id. "Taken together," the court explained, "these two themes of *Yeshiva*—a focus on the faculty as a body and an emphasis on collegiality—demonstrate that the question the Board must ask is not whether a particular subgroup can force policies through based on crude headcounts, but rather whether that subgroup is structurally included within a collegial faculty body to which the university has delegated managerial authority." Id.[10]

Although the court rejected the "subgroup majority status rule," it found that other elements of the *Pacific Lutheran* framework—specifically, its standard for "effective recommendation" and the division between "primary and secondary" areas of consideration—did not contradict *Yeshiva*. Id. at 140–142.[11] It follows, therefore, that, under the test set forth in *USC*, if a minority subgroup is "structurally included" within a collegial faculty body, then the employees must be found to be managerial if, and only if, that faculty body exercises "effective control" over the primary and secondary areas of consideration. See id. at 137–139.[12]

Moreover, the court allowed that the question of majority membership in a collegial faculty body can be relevant to a particular subgroup's "structural inclusion" in that body, even without the bright-line "subgroup majority status rule." Referencing the Supreme Court's acknowledgement in *Yeshiva* that the Board might reasonably draw lines between faculty subgroups based on how those subgroups operate, the court explained that "determining whether a subgroup holds a decisive bloc of committee seats may be necessary where a subgroup's interests fundamentally diverge from those of the majority," as "there may well be issues on which the interests of the subgroup and the faculty as a whole differ so significantly that they cannot be reconciled even through collegial compromise." Id. at 138. Under these circumstances, an examination of how a particular faculty group "actually functions" may support a finding that the group "cannot exercise effective control unless it constitutes a majority of the relevant committees." Id. Similarly, the court observed that "if a subgroup that the university expects to participate in a committee nonetheless fails to do so, this may signal the presence of structural barriers to that group's participation." Id. Although the court acknowledged that *Pacific Lutheran* considers these factors, it concluded that *Pacific Lutheran* "runs afoul of *Yeshiva* by using these factors as part of a determination focused on whether the petitioning subgroup alone exercises effective control," as opposed to considering them as part of a separate inquiry into whether the subgroup at issue is structurally included in a particular faculty body. Id. at 139.

B. The Modified Standard to Be Applied

We agree with the D.C. Circuit that the "subgroup majority status rule" does not comport with *Yeshiva* and poses practical problems that unnecessarily muddle the Board's inquiry into the managerial status of faculty subgroups at colleges and universities. As we explained above, there is little support in Board precedent, including in *Pacific Lutheran* itself, for the expanded reading of the "majority status rule" articulated in *University of Southern California*. Although the Board has historically considered whether a particular committee is composed primarily of faculty or administrative officials, the expanded version of the majority status rule does something entirely different: it breaks down the faculty into subgroups and mathematically weighs them against each other, imposing

[10] Aside from these key themes, the D.C. Circuit also relied on "two additional considerations." First, it noted that the "majority status rule" was inconsistent with Board precedent, cited in *Yeshiva*, excluding minority employee shareholders from bargaining units because they "owned enough stock to give them, as a group, a substantial voice in the employer's affairs to exercise effective control, even absent majority control." Id. at 138 (quoting *Yeshiva*, 444 U.S. at 685 fn. 21). Second, it pointed to the practical problems of applying the majority status rule, given that the faculty subgroup that holds a majority on a committee could change from year to year, and that otherwise undisputedly managerial individuals might be found to be employees should they fall into the minority. Id.

[11] Concerning the *Pacific Lutheran* requirement that effective recommendations are those that "must almost always be followed by the administration," such that they "routinely become operative without independent review by the administration," the D.C. Circuit clarified that although demanding, this standard "leaves room for some administrative review" and cautioned the Board to apply it "with sensitivity to the notion of collegial managerial authority," as recognized in *Yeshiva*. Id. at 140-141.

[12] Otherwise stated, the court explained that "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.

a bright-line rule that can completely preclude the Board from finding that a particular subgroup has managerial status based solely (as the court put it) on "crude headcounts." See *USC*, 918 F.3d at 137.

Under certain circumstances, this bright-line approach could lead to unpredictable, or even manifestly incorrect, results. As the court observed, changes to committee composition from year to year could lead to inconsistent or fluctuating determinations with respect to which subgroups constitute managerial employees, and the "subgroup majority status rule" could incentivize the "strategic division of faculties" to influence determinations of faculty managerial status. See id. at 138. And even where a committee's membership remains relatively stable, a subgroup of otherwise undisputedly managerial employees could nevertheless be found to be statutory employees based solely on their minority status within the relevant decisional body or bodies. For example, fully tenured faculty often constitute a minority of a university's total faculty complement, and may not make up a mathematical majority on most committees; however, they also represent the faculty with the most experience in formulating academic policy, have their professional interests tied most closely to the success of the university, and enjoy the greatest degree of protection and independence from the college administration—all factors that the Supreme Court highlighted in *Yeshiva* as supporting a finding that the faculty members there were managerial. See 444 U.S. at 688-690. Nevertheless, the "subgroup majority status rule" could easily deem a unit of fully tenured faculty members statutory employees even though their minority status at the university is due, in part, to the very factors that render them managerial. Nor is it difficult to conceive of a situation in which committees are exclusively composed of multiple faculty subgroups with no one subgroup holding a majority. As then-Member Miscimarra noted in *University of Southern California*, "even faculty who indisputably exercise managerial authority on a university-wide basis could be treated as nonmanagerial if organized in separate departmental units, each of which was a minority on any given governance body." 365 NLRB No. 11, slip op. at 4 fn. 7.

We further agree with the court that the "majority status rule," as expanded in *University of Southern California*, incorporates an overly rigid view of the decision-making authority of particular faculty subgroups, largely for the reasons set forth by the court in *USC*. In *Yeshiva*, the Supreme Court found that faculty members can be deemed managerial via membership in a university's collegial bodies, even though each individual faculty member constitutes only one vote. Theoretically speaking, any single faculty member serving on a committee can be outvoted on a given issue, but this does not, under *Yeshiva*, render that faculty member nonmanagerial because the collegial nature of the decision-making body gives that individual an opportunity to shape policy on equal footing with the other members of the committee. Such a rationale parallels the Board's precedent with respect to employee stockholders, who are excluded from bargaining units where "their stockholding interest gives them an effective voice in the formulation and determination of corporate policy." See *Red and White Airway Cab Co.*, 123 NLRB 83, 85 (1959).

The question, therefore, is not whether a particular faculty subgroup at a university has a mathematical majority in some relevant part of the university's decision-making apparatus, but rather whether the subgroup has an "effective voice in the formulation and determination of [the university's] policy"—i.e., whether it is structurally included in a collegial, managerial body. Necessarily then, the appropriate analysis has "two distinct inquiries: whether a faculty body exercises effective control and, if so, whether, based on the faculty's structure and operations, the petitioning subgroup is included in that managerial faculty body." *USC*, 918 F.3d at 139. Only where both inquiries are answered in the affirmative can the faculty members at issue be deemed managerial. As the D.C. Circuit recognized, factors such as the majority status of a particular faculty subgroup, the structure of the relevant bodies, and the nature of the employment relationship are more relevant to whether particular faculty classifications are structurally included in a particular collegial body than to whether the collegial body itself is managerial—a distinction that the original *Pacific Lutheran* framework failed to draw, even though it recognized that the Board should consider these factors.[13] Id. The court further recognized that making majority status the sole determinative factor when it comes to structural inclusion unnecessarily restricts the Board's inquiry and precludes a more holistic consideration of whether the faculty classification at issue

[13] Indeed, *Pacific Lutheran* itself seems to endorse a more holistic view than the majority status rule permits, given its statement that "an evaluation of whether faculty actually exercise control or make effective recommendations requires our inquiry into both the structure of university decision-making and where the faculty at issue fit within that structure, including the nature of the employment relationship held by such faculty (e.g., tenured vs. tenure eligible vs. nontenure eligible; regular vs. contingent)." 361 NLRB at 1421–1422. These factors are implicitly aimed at the very same issue that the D.C. Circuit emphasized: whether the petitioned-for employees are structurally included in the managerial bodies of the university. However, the *Pacific Lutheran* framework subsumes them under the question of actual control or effective recommendation, without recognizing that they speak to the issue of structural inclusion.

is structurally included in a faculty body that "exercises effective control" over a university's managerial prerogatives. See id. at 136–139 ("The [*Yeshiva*] Court's analysis turned not on an aggregation of the power delegated to a series of individuals or a mosaic of subgroups—the focus of the Board's subgroup majority status rule—but rather on the role played by the faculty as a body.").

We therefore adopt the D.C. Circuit's proposed framework for evaluating whether a faculty classification at a college or university is managerial, including its rejection of the "subgroup majority status rule." This framework represents a commonsense restructuring of *Pacific Lutheran,* retaining and refining *Pacific Lutheran*'s substantive elements while more clearly adhering to the Supreme Court's rationale in *Yeshiva.* Under this test, the Board will analyze "whether a faculty body exercises effective control" over the *Pacific Lutheran* areas of consideration, and, "if so, whether . . . the petitioning subgroup is included in that managerial faculty body." See 918 F.3d at 139. If both prongs of the test are met, then the faculty subgroup at issue is managerial. As discussed above, this second "structural inclusion" prong naturally incorporates a number of the *Pacific Lutheran* factors, including "the structure of university decision-making and where the faculty at issue fit within that structure, including the nature of the employment relationship held by such faculty (e.g., tenured vs. tenure eligible vs. nontenure eligible; regular vs. contingent)." *Pacific Lutheran*, supra at 1421-1422; see also *USC*, supra at 138-139 (acknowledging that the Board may consider the number of seats a particular subgroup holds on a committee, the potentially divergent interests of that subgroup, and the nature of their employment). Accordingly, under the modified standard, the Board may continue to consider whether the petitioned-for faculty subgroup holds a majority of seats on the university's collegial faculty bodies, especially where the interests of the petitioned-for group "fundamentally diverge from those of the majority." The fact that the petitioned-for subgroup does not constitute a majority of a given faculty body, however, will not preclude finding that the members of the subgroup are managerial employees. *USC*, supra at 138–139.

C. Application of This Standard to the Present Dispute

Applying the *Pacific Lutheran* standard, as modified by *USC,* to the present dispute, we find that the managerial status of the petitioned-for nontenure-track faculty can be resolved solely on the basis of the structural inclusion prong.[14] As the court acknowledged in *USC*, "it may be unnecessary for the Board to consider whether a managerial faculty body exists because, even assuming one did, the petitioning subgroup is so clearly not included in it—because, for example, university rules prohibit its participation in committees." 918 F.3d at 139.

In this matter, the Employer has failed to meet its burden to establish that the petitioned-for faculty members serve on any of the Employer's committees that oversee the five areas of consideration under *Pacific Lutheran.* Limited-term and adjunct faculty, who constitute 176 of the approximately 181 petitioned-for faculty members, are categorically barred from serving on 9 of the Employer's 14 standing committees. Although limited-term and adjunct faculty are technically permitted to serve on the remaining five standing committees, and the two visiting faculty members are technically permitted to serve on all 14 of the standing committees, the Employer has failed to show that any members of the petitioned-for faculty currently serve—indeed, have ever served—on any of the Employer's standing committees. And, although the Employer's 19-seat Academic Council would appear to play an important role in the *Pacific Lutheran* areas of consideration, only one seat on the Academic Council may be filled by a member of the petitioned-for unit.

More specifically, with respect to academic programs, limited-term and adjunct faculty cannot serve on any of the relevant standing committees: the Academic Standing Committee, Curriculum Committee, Core Curriculum Committee, and Global Education Curriculum Committee. While there are departmental committees that address curriculum—notably, committees that propose new majors and minors—the Employer provided evidence of only a single adjunct faculty member, now a department chair, who has ever served on a departmental curriculum committee and who last served in that capacity in 2011. With respect to enrollment management policies, all of the petitioned-for faculty are eligible to serve on the standing Admissions Committee, although Provost House conceded that no petitioned-for faculty members currently do so, and he did not identify any individuals in the petitioned-for faculty classifications who have served on that committee in the past. The Employer provided no evidence that the petitioned-for classifications play any other role in the admissions process. Turning to finances, Provost House testified that the matters of strategic planning and budget are "primarily the role of the administration." Only full-time, and presumably tenured, faculty members have seats on these committees, and in the case of the budget committee they serve as a clear minority in

[14] For this reason, we do not address *Pacific Lutheran*'s effective recommendation standard or the areas of consideration here. We observe, however, that these topics have been the subject of some debate, see, e.g., *Pacific Lutheran*, supra at 1430, 1441–1444 (Members Miscimarra and Johnson, concurring in part and dissenting in part). We may consider whether to adhere to these standards in a future appropriate proceeding.

comparison to administrative officials. Moreover, the petitioned-for adjunct and limited-term faculty are categorically barred from serving on the standing committees that would appear to deal with personnel policies and decisions, including the Faculty Research and Development Committee, Post-Probationary Faculty Development Review Committee, and Promotion and Tenure Committee. Indeed, Billy Summers appears to be the only current petitioned-for faculty member who has played a role concerning any of the *Pacific Lutheran* areas of consideration, and only via his *singular* seat on the Academic Council.

In *Pacific Lutheran*, the Board relied on almost identical factors to find that the employer there did not meet its burden to prove managerial status—a result in which the full Board, including the partial dissenters, concurred. There, the Board observed that the employer did not demonstrate that the petitioned-for faculty had ever voted on academic proposals originating in departments or subcommittees, and that even if they did, the proposals were forwarded to standing committees on which the petitioned-for faculty could not serve; that the petitioned-for faculty were eligible to serve on the university committee responsible for enrollment management policies, but there was no evidence of them doing so or that they otherwise had the right to vote on such policies; and that there was no evidence that they were involved in decisions affecting the university's finances (budget, tuition, financial aid, and related fiscal matters). 361 NLRB at 1427. Moreover, the Board noted that petitioned-for faculty played "a limited role in deciding personnel policy and related matters (e.g., hiring, promotion, tenure and leave)," as they were ineligible to serve on the relevant standing committee and did not vote on specific personnel decisions, although personnel policies in the faculty handbook would go through a vote at the faculty assembly. Id. With respect to departmental or divisional committees, the Board observed that the employer "failed to present any evidence that full-time contingent faculty vote on matters pending before their division, school, or department." Id. at 1428.

We find that similar factors warrant a finding that the petitioned-for non-tenure-track faculty are not structurally included in the Employer's managerial bodies. In its brief, the Employer primarily suggests that the petitioned-for faculty should be deemed managerial because of their eligibility to serve on certain committees and the role of Billy Summers as a representative on the Academic Council, and because most of the petitioned-for faculty can vote at faculty meetings. In this regard, the Employer largely ignores whether the petitioned-for classifications themselves are structurally included in the specific managerial bodies that the Employer highlights, focusing instead on the faculty as a whole and broadly asserting that the petitioned-for subgroups are "eligible" for representation on committees in general. This does not, however, meet the Employer's burden to prove structural inclusion, considering that the Employer has identified only one individual in the petitioned-for classifications who actually serves on *any* of the Employer's many committees.[15] Moreover, the Employer fails to acknowledge that almost all of the petitioned-for faculty are expressly prohibited from serving on any committee reserved for "teaching faculty," including several of the standing committees that oversee academic programs, academic policies, and personnel policies and decisions. Thus, the Employer's lack of evidence here presents a problem similar to the concerns highlighted by Member Johnson in his *Pacific Lutheran* concurring opinion: the Employer has simply failed to present more than "paper authority" suggesting that the petitioned-for classifications play any role in its shared governance committees.[16]

Similarly, we do not think that the eligibility of some of the petitioned-for faculty classifications to vote at faculty meetings is sufficient to render them structurally included in the Employer's collegial faculty bodies. The *Pacific Lutheran* Board rejected the idea that the contingent faculty in that case were managerial based on their ability to vote at the faculty assembly, noting that "the record indicates that only about 20 percent of those faculty who actually attend any particular faculty assembly meeting are contingent faculty," and that "PLU has not even established that any full-time contingent faculty member ever has cast a vote, or even spoken, in the faculty assembly."

[15] While we acknowledge that the Academic Council is a high-ranking body that oversees four of the five areas of consideration, we ultimately conclude that the lack of evidence pointing to any other representation on the Employer's collegial bodies—especially where most of the petitioned-for faculty are categorically barred from serving on a number of these committees—ultimately precludes finding structural inclusion on these facts.

[16] 361 NLRB at 1444. In agreeing that the petitioned-for faculty were not managerial, Member Johnson relied on the Employer's failure to meet its factual burden, observing:

> Significantly, the University [PLU] has not shown any meaningful participation by the petitioned-for contingent faculty at any level of administration. Although they may participate at the department level on various curriculum matters, PLU failed to explain exactly what that participation involves, i.e., how participants decide and vote on matters and to what extent the petitioned-for faculty are allowed to participate in that process. . . . Contingent faculty are also expressly barred from the faculty standing committees, which recommend policy on a variety of primary and secondary areas of decision-making. Furthermore, PLU presented no evidence that any of the contingent faculty serve on a University committee, despite the fact that such "paper" authority has existed since 2013. Finally, although contingent faculty have the right to vote in the faculty assembly, PLU did not provide specific evidence showing that any of those faculty members has actually ever voted or even spoken in the faculty assembly.
>
> Id.

Id. at 1428. Here, there is a similar problem, as the Employer has not provided any evidence that any other petitioned-for employee, besides Billy Summers, regularly attends or votes at a faculty meeting. To the contrary, limited-term professor Dr. Catherine Bush testified that when she attended her one and only faculty meeting, she felt that people were "very surprised" to see her there, and that this discouraged her from attending again. And, in any event, the fact that only 74–84 of 181 petitioned-for faculty members are even eligible to vote at faculty meetings is a further impediment to finding structural inclusion here.

Finally, the nature of the petitioned-for faculty's employment weighs against a finding that they are structurally included in the Employer's collegial bodies. Provost House acknowledged that the short-term nature of employment for limited-term and adjunct faculty presents a "practical hurdle" that makes it difficult for them to serve for the longer terms required for the standing committees and Academic Council, stating that "[v]ery few part-time [faculty] get appointed to these types of [standing] committees, but it is possible." The adjunct and limited-term faculty who testified stated that they had no involvement in departmental committees or any other groups, with adjunct professor Sharon Eisner confirming that she was told that such committees are "not for adjuncts." We further observe that, while the excluded classifications are evaluated with respect to their service to the university, which likely includes their service on the Employer's many committees, the petitioned-for faculty (including the visiting faculty) are evaluated almost exclusively with respect to their teaching, suggesting that the Employer holds no expectation that they will serve in any meaningful role in the Employer's shared governance system.

Taken together, the nature of the petitioned-for faculty's employment and their categorial exclusion from several of the collegial bodies that oversee the *Pacific Lutheran* areas of consideration, along with the Employer's failure to identify more than one petitioned-for faculty member serving on any of the Employer's committees, warrant a finding that the petitioned-for classifications are not structurally included in the Employer's collegial bodies.[17] Accordingly, they are not managerial, and we need not consider whether the Employer's collegial bodies exercise actual control or effective recommendation with respect to the *Pacific Lutheran* areas of consideration. We emphasize, however, that the determining factor in this case is not that the petitioned-for faculty constitute a *minority* on the Employer's shared governance bodies; rather, it is that, based on the evidence as a whole, the Employer has failed to demonstrate that they are structurally included in these bodies.

V. CONCLUSION

For the foregoing reasons, we find that the petitioned-for non-tenure-track faculty are not managerial employees, and we therefore affirm the Acting Regional Director. Accordingly, we remand the case to the Acting Regional Director for further appropriate action.

Dated, Washington, D.C. February 19, 2021

Marvin E. Kaplan, Member

William J. Emanuel Member

John F. Ring Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, concurring in the result.

I agree with my colleagues that the Employer's nontenure-track faculty members are not managerial employees under the National Labor Relations Act. The Acting Regional Director reached that conclusion under the Board's decision in *Pacific Lutheran University*, 361 NLRB 1404 (2014), applying the "majority status" rule with respect to university committees adopted there. But the United States Court of Appeals for the District of Columbia Circuit has since rejected that rule's extension to cases of a petitioned-for faculty subgroup.[1] The court concluded that the "subgroup majority status" rule was inconsistent with the Supreme Court's *Yeshiva* decision, which effectively establishes the standard for determining whether

[17] Because we rely on these particular considerations in concluding that the petitioned-for employees are not structurally included in the Employer's collegial bodies, we find it unnecessary to remand the present dispute to the Acting Regional Director for further hearings, as the Employer proposes. The Employer had ample opportunity to, and did, in fact, litigate these factors in the prior proceedings. Moreover, while we have restructured the *Pacific Lutheran* standard, we have not substantively changed the factors to be considered under the Board's analysis. Accordingly, we see no reason for the Employer to have a "second bite at the apple" with respect to litigating factors that it has already litigated.

[1] See *University of Southern California v. NLRB*, 918 F.3d 126 (D.C. 2019). The court pointed out that "the Board [in *Pacific Lutheran*] left uncertain" the question of whether the rule required that a petitioned-for faculty subgroup constitute a majority on managerial committees, or whether it required only that the faculty as a whole have majority status. The court addressed only the extension of the rule to subgroups. Id. at 131.

university faculty members are managerial employees.[2] Today, the majority adopts and applies the District of Columbia Circuit's analytical framework, reaching the same result as the Acting Regional Director. I concur in that result, which is correct under *Pacific Lutheran* as well as under the District of Columbia Circuit's framework. I write separately to point out that the new framework permits—indeed, requires—the Board to be sensitive to the actual situation of contingent faculty members. Unlike the faculty members in *Yeshiva*, who were found central to running the university, these academic workers are typically excluded from the kind of real power typically associated with managerial authority.

I.

In *University of Southern California*, supra, the District of Columbia Circuit considered the Board's application of the *Pacific Lutheran University* standard for determining whether university faculty members are managerial employees. In many respects, the court endorsed the Board's approach in *Pacific Lutheran* and its application in the case before it. Rejecting in large part the University of Southern California's contention that *Pacific Lutheran* "conflicts with the Supreme Court's decision in *Yeshiva*," the court declared that *Pacific Lutheran* was "an admirable effort by the Board to tame a thicket of case law that touches on numerous interrelated features of the faculty experience at universities. . . . [a]nd [an effort that] for the most part, . . . succeeds." 918 F.3d at 135 (internal quotations omitted).

In this regard, the court agreed with the Board that, in order to be found to possess managerial decision-making authority, the faculty members must be part of a managerial body whose recommendations are "almost always followed and routinely adopted without independent review." The court further found such an approach "comports with *Yeshiva*, and . . . agree[d] with the Board that setting a high bar for effective control is necessary to avoid interpreting the managerial exception so broadly that it chips away at the NLRA's protections." Id. at 140 (internal quotations omitted). In addition, the court held, as to the Board's delineation in *Pacific Lutheran* of what areas of decision-making authority must be examined to determine whether a faculty body has managerial authority, that "the Board's categorization falls well within its discretion under the NLRA." Id. at 141.

The District of Columbia Circuit also addressed the inclusion of a petitioned-for faculty subgroup in faculty bodies (which, as noted above, must themselves possess relevant decision-making authority). Rejecting the Board's application of *Pacific Lutheran* on this issue, the court held that *Yeshiva*, with its emphasis on the absence of hierarchies in academic governance and the collegiality of faculty bodies, did not permit the Board to hold that a faculty subgroup lacked managerial authority simply because members constituted a minority on university governing committees. Such a requirement, the court reasoned, "ignores the possibility that faculty subgroups, despite holding different status within the university, may share common interests [with the faculty who constitute a majority] and therefore effectively participate together as a body on some or all of the issues relevant to managerial status." Id. at 137. The court held that the Board must broadly consider the nature of the participation of a faculty subgroup in the context of its distinct features and its relationship to other faculty, and determine whether the subgroup is "structurally included" within university bodies. Id. at 137–138.

The court further observed that in determining "structural inclusion," the lack of majority status of a faculty subgroup may shed light on whether a subgroup has a meaningful voice in a governing body. For example, "where a subgroup's interests fundamentally diverge from those of the majority," this might preclude "reconcil[ing] [such interests] even through collegial compromise," and "the Board might appropriately conclude that the subgroup cannot exercise effective control unless it constitutes a majority of the relevant committees." Id. at 138. Further, a subgroup's minority status "may signal the presence of structural barriers to that group's participation. . . . that effectively silences any managerial voice." Id. at 139 (internal quotations omitted).

II.

The majority now adopts and applies the District of Columbia Circuit's framework, correctly finding that the nontenure-track faculty here are *not* "structurally included" in university committees – and so are not managerial employees. As my colleagues observe, most of the

[2] *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). The National Labor Relations Act does not explicitly exclude managerial employees, in contrast to supervisors, for example. See Act, Sec. 2(3), 29 U.S.C. §152(3). In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), however, the Supreme Court held that Congress intended to include managerial employees from the coverage of the Act. The Act does not specifically address the employee-status of university faculty members either. The *Yeshiva* Court, rejecting the Board's view, held that the university faculty members involved there were managerial employees, because that university faculty, as a group, exercised managerial authority. 444 U.S. at 686. The Court observed that "[t]o the extent the industrial analogy applies, the faculty determines within each school [of the university] the product to be produced, the terms upon which it will be offered, and the customers who will be served." Id. at 686 (footnote omitted). Post-*Yeshiva*, Congress has not addressed the employee status of university faculty members.

petitioned-for faculty members are explicitly barred from serving on many committees. To the extent that those faculty members are eligible to serve on committees, only one person actually does. Rightly, the majority concludes that the exclusion of the petitioned-for faculty members from some committees, coupled with hurdles to participation and the virtually complete absence of non-tenure-track faculty from committees where they are nominally eligible to serve, establish that this faculty group is not structurally included within any governing bodies.[3]

As today's decision illustrates, the "structural inclusion" analysis focuses on whether there is meaningful participation by the petitioned-for faculty subgroup in university committees—and the number of participants from the subgroup remains relevant, even if a bright-line, majority-status rule does not apply. The District of Columbia Circuit recognized, and this case shows, that a low number of actual participants can demonstrate barriers to participation that prevent a faculty subgroup from having a meaningful voice in university governance. Here, very few nontenure-track faculty members participated in university committees—and when they did, the record shows their appearance was met with surprise and skepticism from tenured faculty. The non-tenure-track faculty were on the margins of power at best, not at the center.

This will often be the case—and, of course, it tends to explain why such faculty members are seeking union representation. Contingent faculty members are a growing segment of the faculty workforce.[4] But they have been unable to establish a voice for their workplace concerns through institutional mechanisms.[5] Indeed, contingent faculty face unique barriers to participation on committees and other faculty bodies. Often, they must juggle multiple teaching jobs, they must endure job insecurity and high turnover, they are denied respect from colleagues, and they are poorly integrated into university structures and communities.[6] Thus, in the case of contingent faculty—correctly identified in *Pacific Lutheran* as having a "tenuous employment relationship" with their university, 361 NLRB at 1422—the Board must be alert to low participation by members of a faculty subgroup in university committees. It may well betray their marginalized role within the university and their lack of a meaningful voice in university governance, as it did here.

The District of Columbia Circuit also noted that a faculty subgroup's minority status may be relevant where the subgroup's interests diverge from the majority.[7] The interests of contingent faculty members are often unique—and, indeed, they may be directly contrary to the interests of tenured and tenure-track faculty. For example, the teaching duties of contingent faculty may be what permits tenured faculty to focus on the research and teaching that aligns with their own professional goals. The issue of workload and work assignments thus can pose a clash of interests between the two groups.[8] Here, too, the Board must sensitive to the reality of the particular situation. Not all faculty members conform to the *Yeshiva* ideal, especially in contemporary universities.

III.

In short, adopting the District of Columbia Circuit's analytical framework, eliminates a bright-line rule, but it does not fundamentally change the focus of the Board's inquiry. Here, application of the new framework leads to the same result as applying the old rule—the petitioned-for non-tenure-track faculty members are not managerial employees—and that result is correct. Accordingly, I concur.

Dated, Washington, D.C. February 19, 2021

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[3] The majority thus does not address the other prong of the test for managerial status: whether the university committees themselves possess sufficient managerial authority.

[4] See AAUP, Background Facts on Contingent Faculty Positions, available at https://www.aaup.org/issues/contingency/background-facts (noting rise in prevalence of contingent faculty, including adjuncts, non-tenure-track faculty, and graduate students, from 55 percent to 70 percent of instructional staff appointments, in the period from 1975 to 2015).

[5] See, e.g., U.S. Government Accountability Office, Report to Congressional Requesters, Contingent Workforce: Size, Characteristics, Compensation, and Work Experiences of Adjunct and Other Non-Tenure-Track Faculty (Publ. No. GAO-18-49, Oct. 2017), available at https://www.gao.gov/assets/690/687871.pdf.

[6] See, e.g., Danielle Douglas-Gabriel, *'It keeps you nice and disposable': The plight of adjunct professors*, Washington Post (Feb. 15, 2019).

[7] See 918 F.3d at 138 (interests may potentially "differ so significantly that they cannot be reconciled even through collegial compromise," in which case numerical disadvantage on committee may be dispositive).

[8] See Musa al-Gharbi, *Universities Run on Disposable Scholars*, Chronicle of Higher Education (May 1, 2020).