Hospitals, God, and the NLRB

*By Rachel S. Casper**

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Abstract

Religiously affiliated hospitals occupy a growing segment of American healthcare. Consequently, they account for a growing proportion of American healthcare employers. Healthcare workers have long been central to the U.S. labor movement. While workers at religiously affiliated hospitals have unionized, fought for dignity and respect, and championed safe and healthful environments alongside their counterparts at secular institutions, unique challenges remain in the context of religiously affiliated hospitals. What does the growing number of religiously affiliated hospitals mean for healthcare workers organizing? How can, and how should, workers at religiously affiliated hospitals build worker power?

This Article considers the options available to such workers and argues that organizing outside the confines of the National Labor Relations Board ("NLRB") is the most auspicious choice. To do this, this Article reviews the history of labor organizing at religiously affiliated hospitals, analyzes the constitutional implications of NLRB jurisdiction over workers at religiously affiliated hospitals, and presents a potential path forward. While the NLRB can constitutionally exercise jurisdiction over workers at religiously affiliated hospitals, these workers should not rely on the Board, or the courts, to effectuate their rights. The institutionalization of religious freedom under the modern Supreme Court as well as the anti-union bent of the federal bench creates a less-than-hospitable forum for these workers' claims. Fortunately, in the wake of the COVID-19 pandemic, workers at religiously affiliated hospitals have the drive, the community support, and the economic power to organize outside the confines of the NLRB. Workers have constitutional access to the Board, but they need not use it. Workers at religiously affiliated hospitals—and healthcare workers in general—can lead the charge for robust rights, power, and respect for workers, with or without NLRB jurisdiction.

Introduction

As of 2016, one in six hospital beds in the United States is in a Catholic hospital.[1] From 2001 to 2016, that number grew 22%[2] and in some regions, the reach of Catholic hospitals is greater still. In ten U.S. states, Catholic hospitals account for more than 30% of hospital beds;[3] in Washington State, "more than 40[%] of all hospital beds are in a Catholic hospital."[4] There are forty-six geographic regions in the country for which the "sole community provider of short-term acute hospital care" is a Catholic hospital.[5] The Catholic Health Association reports that, as of March 2021, Catholic healthcare institutions employ more than 730,000 employees.[6]

Catholic hospitals are the most numerous, but not the only religiously affiliated hospitals in the United States. As of 2016, 18.5% of U.S. hospitals were affiliated with some religious group.[7] Stated otherwise, nearly one out of every five U.S. hospitals is religiously affiliated.

The healthcare industry is one of the "largest and fastest-growing sectors in the United States," accounting for 14% of all U.S. workers.[8] As the healthcare industry grows, so too do the number of

1 Julia Kaye et al., Health Care Denied: Patients and Physicians Speak Out About Catholic Hospitals and the Threat to Women's Health and Lives, 6 (2016), https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf.

2 Paige Minemyer, *Number of Catholic hospitals in US has grown 22% since 2001*, Fierce Healthcare (May 5, 2016), https://www.fiercehealthcare.com/healthcare/number-catholic-hospitals-us-has-grown-22-since-2001.

3 *Id.*; *see also* Elizabeth Sepper, *Zombie Religious Institutions*, 112 Nw. U. L. Rev. 929, 970–71 (2018).

4 Kaye, *supra* note 1.

5 Minemyer, *supra* note 2; *see also* Maryam Guiahi et al., *Patient Views on Religious Institutional Health Care*, JAMA Network Open 1, 2 (Dec. 27, 2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2757998.

6 Cath. Health Ass'n of the U.S., *U.S. Catholic Health Care* (2023), https://www.chausa.org/docs/default-source/default-document-library/2021-the-strategic-profile-_sb_final.pdf?sfvrsn=8939f6f2_2.

7 Guiahi et al., *supra* note 5.

8 Lynda Laughlin et al., *22 Million Employed in Health Care Fight Against COVID-19*, U.S. Census Bureau (Apr. 5, 2021), https://www.census.gov/library/stories/2021/04/who-are-our-health-care-workers.html#:~:text=About%20two%2Dthirds%20were%20non,year%2Dround%20health%20care%20workers (stating women account for more than three-quarters of full-time healthcare workers); *id*; *see also* Hye Jin Rho et al., A Basic Demographic Profile of Workers in Frontline Industries 1, 7 (Apr. 2020), https://www.eeoc.gov/sites/default/files/2021-04/4-28-21%20Meeting%20-%2005%20Ramirez%20-%20

religiously affiliated healthcare institutions,[9] as will the number of workers employed in these hospitals.

The issue of union organizing at religiously affiliated hospitals is no small question. It affects millions of workers and millions of patients at religious hospitals across the country.[10] For decades, healthcare workers, including workers at religiously affiliated hospitals, have banded together to fight for better working conditions, dignity, and respect. Nurses' unions were a central part of organized labor's fight in early twentieth century America.[11] Since at least the 1950s, healthcare workers at religiously affiliated hospitals have unionized and collectively bargained.[12] And for decades, the courts and the National Labor Relations Board ("NLRB") have respected these workers' choices.

Longstanding consensus has held that workers at religiously affiliated hospitals are covered by the National Labor Relations Act ("NLRA"), and that such coverage and protection is consistent with the Religion Clauses of the First Amendment.[13] Despite this consistent consensus, the labor law and Religion Clause landscape has changed dramatically in the past several years, and anti-union litigation has been increasingly successful.[14] At the same time, the eagerness with

Supporting%20Materials.pdf (stating 17% of healthcare workers are Black and 12% of healthcare workers are Hispanic); *see also id.* 16% of healthcare workers were born outside the United States. *Id.* at 4. Looking at specific roles within the field, women make up 88% of registered nurses, 88% of nursing assistants, 91% of medical assistants, and 37% of physicians. *Id.* at 10. Workers of color account for 29% of registered nurses, 56% of nursing assistants, 50% of medical assistants, and 35% of physicians. *Id.* at 3–4. Missing from these figures are the workers working in healthcare facilities but not necessarily in traditional healthcare roles. Workers like janitorial staff and building maintenance, for example, ensure safe and healthful environments, thus keeping healthcare facilities running and allowing for patient care and healing. 62.5% of "Janitors and Building Cleaners" are people of color, 40.7% were born outside the United States, and 47.3% live below 200% the federal poverty line. Christopher DeFrancesco, *Keeping It Clean for Patient, Staff Safety*, UConn Today (Sept. 9, 2022), https://today.uconn.edu/2022/09/keeping-it-clean-for-patient-staff-safety/; *Cf.* Rho Et al., *supra.*

9 Sepper, *supra* note 3, at 970.

10 *See, e.g.*, Cath. Health Ass'n of the U.S., *supra* note 6. Catholic hospitals had nearly 5 million admissions during a one-year period.

11 *See About SEIU*, Serv. Emps. Int'l Union, https://www.seiu.org/about (last visited July 18, 2022).

12 *See, e.g.*, *NUHHCE History*, Nat'l Union of Hosp. and Health Care Emps., https://nuhhce.org/our-history/ (last visited July 18, 2022) (discussing the 1958 organizing of Montefiore Hospital and the 1962 organizing of Beth El Hospital).

13 *See generally National Labor Relations Act infra*, Section I.C., subsection 2.

14 *See generally Constitutional Limitations infra*, *Section II; See also Building Power Among Workers infra*, *Section III.*

which the current Supreme Court reads an institutionalized religious freedom into the First Amendment has led to mounting success for religious institutions' First Amendment claims.[15] While long accepted that workers at religiously affiliated hospitals could unionize and benefit from the protection of the NLRA, this jurisprudence of a burgeoning institutionalized religious freedom, and constricted rights of organized labor, threaten this protection.[16] Labor needs a new plan.

This Article considers the options available to workers at religiously affiliated hospitals. Can these workers rely on the protection of the National Labor Relations Act? Not only can they, but *should* workers at religiously affiliated hospitals rely on NLRB jurisdiction? Beyond simply answering these questions, this Article reviews the history of labor organizing at religiously affiliated hospitals, analyzes the constitutional implications of NLRB jurisdiction over workers at religiously affiliated hospitals, and suggests a potential path forward. Workers have options: organize and utilize NLRB jurisdiction or organize outside the NLRB framework. This Article argues that while both options are constitutionally available, working outside the NLRB framework offers far greater opportunities for success.

The argument proceeds in three parts. Part I looks to the history of labor organizing in (1) hospitals, (2) religious organizations, and finally (3) religiously affiliated hospitals. Part I addresses both labor organizing on the ground as well as the evolution of the NLRB approach to these organizations. Part II turns to the constitutional question: Can the NLRB exercise jurisdiction over religiously affiliated hospitals? Relying on the statutory limitations on the NLRB's role and scope of power, this Part argues that NLRB jurisdiction over religiously affiliated hospitals is constitutionally permissible. To buttress that claim, Part II addresses specific tension points within the NLRB's interaction with religiously affiliated hospital employers—specifically NLRB investigations of unfair labor practices, strikes, mandatory subjects of bargaining, as well as the Board's effect on managerial prerogatives and the employment relationship.

15 *See, e.g.*, Sepper, *supra* note 3, at 980–81 (citing Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 Duke L.J. 769, 776 (2015)) (discussing the 'Establishment Clause Creep"); Zoë Robinson, *The First Amendment Religion Clauses in the United States Supreme Court*, *in* The Cambridge Companion to the First Amendment and Religious Liberty 219, 244 (Michael D. Breidenbach & Owen Anderson, eds., 2020) (noting that "contemporary constitutional religious liberty is marked by the rise of religious institutionalism and the amplification of religion clause protections for religious institutions.").

16 *See generally National Labor Relations Act infra*, Section I.B.

Part III looks to the future. Although NLRB jurisdiction is constitutionally permissible, recent trends in Religion Clause jurisprudence and the anti-union bent of the federal courts counsel a cautious approach away from NLRB jurisdiction. That law is on the side of labor does not mean labor will win in the courts or in front of the Board. Fortunately, in the wake of the COVID-19 pandemic, workers at religiously affiliated hospitals—and all healthcare workers—are armed with the tools to succeed and build worker solidarity outside the confines of the NLRB. Healthcare workers at religiously affiliated hospitals have the drive, the community support, and the bargaining power to effectuate a successful comprehensive campaign for voluntary recognition outside the confines of NLRB jurisdiction; workers at religiously affiliated hospitals need not utilize their tenuous access to NLRB jurisdiction to build worker solidarity and power and effectuate their goals.

This matters. It affects all of us, not just workers at religiously affiliated hospitals—of which there are millions—but potential patients—which we all are. How to organize workers at religiously affiliated hospitals also affects the broader labor movement. With an inhospitable Court, likely for years to come, where can workers look moving forward? This Article offers one possible path for workers at religiously affiliated hospitals, and for us all.

I. History of Labor Organizing in Hospitals, Religious Organizations, and Religiously Affiliated Hospitals

The history of organizing religiously affiliated hospitals is complicated by both parts of that phrase: (1) the religious aspect and (2) their status as hospitals. To understand the status of religiously affiliated hospitals, this Part considers both the history of organizing religious organizations and the history of organizing hospitals, along with the changing labor law landscape. To do this, this Part first reviews the National Labor Relations Act's approach towards hospitals. It then turns to religious organizations generally, and finally religiously affiliated hospitals in particular. This Part intends to set the groundwork of what labor organizing in religiously affiliated hospitals has looked like—both legally and socially—over the past several decades.

A. The National Labor Relations Act

In 1935, Congress passed the Wagner Act, or the National

Labor Relations Act ("NLRA").[17] In passing the Act, Congress "declared [it] to be the policy of the United States" to protect the "free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . ."[18] The Act granted employees who fell within its jurisdiction "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[19] The purpose of the Act is three-fold: (1) to improve working conditions and raise wages, (2) to promote labor peace, and (3) to allow for worker voice via collective bargaining.[20] Labor peace and preventing "industrial strife" is commonly held up as the central purpose of the Act.[21] The Act explicitly excludes certain employers from its coverage, but neither religious organizations nor nonprofit hospitals are mentioned in the Act.[22]

In addition to setting forth protections for workers, the NLRA established the National Labor Relations Board ("NLRB").[23] According to the NLRB itself, it is "vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative."[24] The Board also acts to "prevent and remedy unfair labor practices committed by private sector employers and unions."[25] Specifically, the NLRB conducts union elections, investigates charges, facilitates settlements, enforces orders in federal courts, and develops rules.[26] The Supreme Court has long held that Congress, in passing the NLRA, "intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the

17 29 U.S.C. § 151.

18 *Id.*; *see also* Christopher M. Gaul, *Catholic Bishop Revisited: Resolving the Problem of Labor Board Jurisdiction over Religious Schools*, 2007 U. Ill. L. Rev. 1505, 1520 (2007) (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937)).

19 29 U.S.C. § 157.

20 *See* Charlotte Garden, *Religious Employers and Labor Law: Bargaining in Good Faith?*, 96 B.U. L. Rev. 109, 151–52 (2016).

21 *See* 29 U.S.C. § 151; *see, e.g.*, Gaul, *supra* note 18, at 1518.

22 29 U.S.C. §§ 151–69.

23 29 U.S.C. § 153.

24 *What We Do*, Nat'l Lab. Rels. Board, https://www.nlrb.gov/about-nlrb/what-we-do (last visited July 18, 2022).

25 *Id.*

26 *Id.*

Commerce Clause."[27]

In 1947, Congress enacted the Labor Management Relations Act, commonly known as the Taft-Hartley Act.[28] The Taft-Hartley Act introduced major changes to American labor law. In addition to the existing unfair labor practices ("ULPs") listed in the Wagner Act, the Taft-Hartley Act amended the Wagner Act to add six additional ULPs.[29] These new ULPs were intended to "protect employees' rights from . . . unfair practices by unions."[30] The Taft-Hartley Act also imposed on unions the obligation to bargain in good faith—an obligation that the Wagner Act already placed on employers.[31] Taft-Hartley prohibited previously permissible conduct like secondary boycotts, outlawed closed shops, excluded supervisors from the Act's definition of employees, and introduced new types of elections, among other changes.[32]

Significant is the Taft-Hartley Act's amended definition of "employer."[33] The NLRA regulates relationships between "employers" and "employees," so if an organization is outside the definition of employer for the purpose of the NLRA, that organization falls outside its coverage.[34] The Taft-Hartley Act amended the definition of employer to exclude nonprofit hospitals.[35] The new definition of "employer" excluded "any corporation or association operating a hospital, if no part of the net earning inures to the benefit of any private shareholder or individual."[36] In explaining the exclusion of nonprofit hospitals from NLRB jurisdiction, Senator Tydings stated:

> This amendment is designed merely to help a great number of hospitals which are having very difficult times. They are eleemosynary institutions, no profit is involved in their operations, and I understand from the hospital association

27 NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963).

28 Sar A. Levitan, *Labor Under the Taft-Hartley Act*, 37 Current History 160, 160 (1959), https://www.jstor.org/stable/45313701.

29 *See* 29 U.S.C. § 158(b); *1947 Taft-Hartley Substantive Provisions*, Nat'l Lab. Rels. Board, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions (last visited July 18, 2022).

30 *1947 Taft-Hartley Substantive Provisions*, *supra* note 29.

31 *Id.*

32 *See id.*

33 29 U.S.C. § 152(2) (1947).

34 *Id.; see also The Nonprofit Hospital Exemption of the National Labor Relations Act: Application to the University-Operated Hospital in Duke University*, 1972 Duke L.J. 627, 641–42 (1972) [hereinafter *The Nonprofit Hospital Exemption*].

35 *See* NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 505 (1979) (citing 29 U.S.C. § 152(2) (1970)).

36 29 U.S.C. § 152(2) (1947).

> that this amendment would be very helpful in their efforts to serve those who have not the means to pay for hospital service.[37]

The Taft-Hartley Act did not exclude religious organizations from the definition of employer. While the Act failed to mention religious organizations whatsoever, the legislative history and debate around these 1947 amendments is worth noting. The bill that was originally passed by the House—before being rejected by the Senate—changed the definition of "employer" to exclude "any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes."[38] At the Senate Committee on Labor and Public Welfare hearings, the American Red Cross lobbied for this House version of the bill which would exclude it "from the definition of jurisdictional employer on the basis of [its] charitable nature."[39] The American Red Cross argued, unsuccessfully, that an exclusion was necessary for it to "pursue its work without danger of interruption by labor strife." [40] In rejecting the House's exclusion of charitable and religious organizations from NLRB jurisdiction, the Senate Committee noted that "the Board had rarely taken jurisdiction over nonprofit organizations, and then only when their activities were commercial in nature."[41] The enacted 1947 Act excluded nonprofit hospitals, but not other nonprofit, charitable, or religious organizations.[42]

Finally, in 1974 Congress amended the NLRA once again. The 1974 "Health Care Amendments" extended the coverage of the NLRA to include private, nonprofit hospitals.[43] These amendments established a

37 93 Cong. Rec. 4979, 4997 (1947) (statement of Sen. Tydings).

38 *NLRB Jurisdiction over Church-Operated Schools*, 93 Harv. L. Rev. 254, 257–58 (1979) (quoting H.R. 3020, 80th Cong. (1947)).

39 *The Nonprofit Hospital Exemption*, *supra* note 34, at 630 (citing *Hearings on Labor Relations Program Before the S. Comm. on Lab. and Pub. Welfare*, 80th Cong. 2057–58 (1947)).

40 *Id.*

41 *The Nonprofit Hospital Exemption*, *supra* note 34, at 631 (citing H. Conf. Rep. No. 80-510, at 32 (1947)).

42 While the meaning of choosing one definition over another can, and has, been debated at length, *see, e.g.*, *NLRB Jurisdiction over Church-Operated Schools*, *supra* note 38, at 258 , for the purpose of this Article it is sufficient to note the consideration and rejection of this version of the bill. *See also* David B. Schwartz, *The NLRA's Religious Exemption in a Post-Hobby Lobby World: Current Status, Future Difficulties, and a Proposed Solution*, 30 ABA J. Lab. & Emp. L. 227, 235–36 (2015).

43 *See* 29 U.S.C. § 183 (1947); *See also* Edmund R. Becker et al., *Union Activity in Hospitals: Past, Present, and Future*, 3 Health Care Fin. Rev. 1 (1982).

new category of covered employers: "health care institutions."[44] Health care institutions were defined to include "any hospital, . . . health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, and for an aged person(s)."[45] The Health Care Amendments were intended to provide a national statutory framework for labor relations in healthcare, with the "aim of reducing labor strife at hospitals."[46] These labor protections covered both professional and nonprofessional healthcare employees.[47] During the debates over the 1974 Health Care Amendments, the Senate "expressly rejected an amendment . . . to exempt nonprofit hospitals operated by religious groups."[48]

In addition to extending NLRA coverage, the Health Care Amendments also implemented new, healthcare-specific rules for collective bargaining. All employers and unions covered by the Act are subject to a general notice period set forth in NLRA § 8(d)(1), which requires a party to give sixty-day notice prior to a proposed termination or modification of an agreement.[49] Under NLRA § 8(d)(4)(A), however, health care institutions and related unions are required to give at least 90-day notice of intent to renew or modify a contract.[50] The Health Care Amendments also hold that a union in the healthcare industry must

44 29 U.S.C. § 152(14) (1947). *See also Health Care Law Under the NLRA*, American Bar Association 1, https://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/nlra/health_care.authcheckdam.pdf (last visited July 18, 2022) [hereinafter *Health Care Law Under the NLRA*].

45 *Id.*

46 Hilary Jewett, *Professionals in the Health Care Industry: A Reconsideration of NLRA Coverage of Housestaff*, 19 Cardozo L. Rev. 1125, 1125 (1997) (citing 120 Cong. Rec. 12,934 (1974)). *See also id.* at 1130 ("Deciding that hospitals had now become 'big business,' and responding to labor unrest that had erupted at hospitals in the early 1970s, Congress voted to remove the hospital exclusion from the Act and to add a series of special provisions regarding labor law practice at health care institutions.").

47 Jewett, *supra* note 46.

48 NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 515 (1978) (Brennan, J., dissenting) (citing 120 Cong. Rec. 12950, 12968 (1974), 1974 Leg. Hist. 119, 141) ("Senator Cranston, floor manager of the Senate Committee bill and primary opponent of the proposed religious exception, explained: "[S]uch an exception for religiously affiliated hospitals would seriously erode the existing national policy which holds religiously affiliated institutions generally such as proprietary nursing homes, residential communities, and educational facilities to the same standards as their nonsectarian counterparts.") (citations omitted).

49 29 U.S.C. § 158(d)(1) (1947). *See also Health Care Law Under the NLRA*, *supra* note 44, at 1.

50 29 U.S.C. § 158(d)(4)(A) (1947).

provide ten days written notice before it can strike or picket a healthcare institution.[51] This notice of a strike requirement applies only to labor organizations in the healthcare industry, not individual employees or informal groups of employees.[52]

B. Hospitals

Workers at nonprofit hospitals have organized for decades; as the law, politics, and organizing approaches have changed, so too has the NLRB's approach to such organizing.[53] Healthcare workers have been crucial actors in the labor movement for over a century.[54] Since the late nineteenth century, hospital workers—nurses, in particular—have organized to "promote the interests of their profession and its members."[55] While early organizing efforts—as early as the late nineteenth century[56]—often took the form of professional associations, union organizing later also took hold.[57] In 1934, for example, following

51 29 U.S.C. § 158(g) (1947). See also *Health Care Law Under the NLRA*, *supra* note 44, at 1.

52 *See Health Care Law Under the NLRA*, *supra* note 44, at 1–2.

53 This Article focuses on nonprofit hospitals in particular. Government and for-profit hospitals have unique, complicated histories of their own. *See, e.g.*, Becker et al., *supra* note 43. Nonetheless, it is relevant to note that the arguments posited about the inclusion of nonprofit religiously affiliated hospitals apply to for-profit religiously affiliated hospitals, too. For-profit hospitals were included within NLRB jurisdiction prior to nonprofit inclusion. *See* Ira M. Shepard, *Health Care Institution Amendments to the National Labor Relations Act: An Analysis*, 1 Am. J. L. & Med. 41, 41 n.1 (1975); *see also* Butte Medical Properties, 168 N.L.R.B. 266 (1967). As such, arguments about nonprofit hospitals are applicable and even stronger when applied to for-profit hospitals. There are many for-profit religiously affiliated hospitals today. *See generally* Sepper, *supra* note 3.

54 *See generally* Ester C. Apesoa-Varano & Charles S. Varano, *Nurses and Labor Activism in the United States: The Role of Class, Gender, and Ideology*, 31 Soc. Just., 2004, at 77 (2004).

55 Paul F. Clark & Darlene A. Clark, *Challenges Facing Nurses' Associations and Unions: A Global Perspective*, 142 Int'l Lab. Rev. 29, 31 (2003).

56 The American Nurses Association, a preeminent professional association, was founded in 1897. *Id. See also* Apesoa-Varano & Varano, *supra* note 54, at 80 (discussing the California Nurses Association, which was founded in 1903).

57 Clark & Clark, *supra* note 55. *See, e.g.*, National Union of Healthcare Workers, *Our History*, https://nuhw.org/about/history/ (last visited July 18, 2022) (discussing the Hospital & Institutional Workers Union, founded in 1934, which was "launched by service workers at San Francisco General Hospital . . . to fight for better wages."); Nat'l Union of Hosp. and Health Care Empls., *NUHHCE History*, https://nuhhce.org/our-union/nuhhce-history/ (last visited July 18, 2022) (discussing the National Union of Hospital and Health Care Employees, whose predecessor, the Pharmacists Union of Greater New York, was founded in 1932).

the General Strike in San Francisco, the Hospital & Institutional Worker Union, which would later become the National Union of Healthcare Workers, was formed by workers at San Francisco General Hospital.[58] That early union fought for better wages, a six-day work week, and more.[59] During that same period, the Pharmacists Union of Greater New York, which would later morph to become the National Union of Hospital and Health Care Employees, formed, organized strikes, and won worker benefits.[60] Although there were some wins, prior to the passage of the NLRA, organized labor and workers had no federal labor law protection and union organizing at hospitals was infrequent.[61]

After the passage of the NLRA and before the Taft-Harley Act amendments—from 1935 to 1947—all hospitals and health care institutions were covered by the Act.[62] Only one case related to unionization of a nonprofit hospital was reported during this period.[63] In that case, the Board and Court of Appeals held that nonprofit hospitals were covered by the NLRA; as such, nonprofit hospital workers could unionize under the protection of federal labor law.[64]

Although protected by the NLRA, there was significant conflict among nurses over unionization during this period.[65] Nurses began using collective bargaining to improve wages and working conditions

58 Nat'l Union of Healthcare Workers, *supra* note 57.

59 *Id.*

60 Nat'l Union of Hosp. & Health Care Empls., *supra* note 57.

61 *See* Eugene J. Schulte, *Union Organization in Catholic Hospitals*, 21 Cath. Law. 332, 332 (1975) (discussing the period prior to World War II, Shulte noted that "[b]ecause of the many divergent job categories existent in a hospital, because of the social dedication of so many of its employees, and because the product of health care delivery was so very different from that provided by other industries, the healthcare industry had never been subjected, except in a few isolated areas of the Northeast and northern California, to very intense unionization pressure."). *But see* Stephami M. Hildebrandt, *Physicians, Nurses & Housestaff: The Continuing Struggle for Collective Bargaining Rights*, 33 Suffolk U. L. Rev. 107, 108–09 (1999) [hereinafter *Physicians, Nurses & Housestaff*] ("[P]hysicians have been organizing since the early 1900s.").

62 *See* James B. Dworkin et al., *Unionism in Hospitals, or What's Happened Since PL 93-360?*, 5 no. 4 Health Care Mgmt. Rev., 75, 75–76 (1980).

63 *Id.* at 76 (citing Central Dispensary & Emergency Hosps., 44 N.L.R.B. 533 (1942)) (citations omitted).

64 Central Dispensary & Emergency Hosps., 44 N.L.R.B. 533 (1942).

65 *See* Christina Higgins, *Nursing Education: Unions and Their Place in the Curriculum*, St. Catherine U. May 2016, at 1, 4 ("Two of the reasons that are frequently cited in the literature as to why nurses forming unions were perceived as negative include, one, that Nursing is a profession and professionals were typically not members of unions at that time, and two, many nurses felt that union tactics such as strikes we not compatible with their professional values and ethics.") (citations omitted).

around World War II.[66] At the time, professional organizations, primarily the American Nurses Association, conducted the collective bargaining, often with a deliberate goal of preventing nurses from turning to labor unions.[67]

Following the 1947 Taft-Hartley Act's explicit exclusion of nonprofit hospitals, "hospital labor organization was haphazard at best and nearly impotent at worst."[68] Healthcare workers organized under state labor laws, when available, or without the protection of any labor law whatsoever,[69] and "hospital administrators and boards of trustees [were sharply resistant] to unions."[70] While some hospital labor did organize,[71] only twelve states enacted labor laws to regulate unions at hospitals; workers in all other states lacked both state and federal protection.[72] In 1955, an American Hospital Association report indicated that only 15,000 hospital employees across the country were covered by collective bargaining agreements.[73]

Hospital unionization gained increased public attention in 1959 and 1960 following a "series of long strikes against hospitals—46 days in New York, 84 days in Seattle, and over four months in Chicago" as well as "increased strike threats and union organizing" in other major cities.[74] Despite the "legal vacuum created by the Taft-Hartley Act" and the lack of state-level protection in the majority of states, in the 1960s, private nonprofit hospitals saw "steady growth in union penetration."[75] In 1960, 4.6% of private, nonprofit hospitals had collective bargaining agreements, and by 1970, that number grew to 13.2%.[76]

66 *See id.* at 6.

67 *See id.*

68 Schulte, *supra* note 61, at 332.

69 *See* Hildebrandt, *supra* note 61, at 111.

70 David R. Kochery & George Strauss, *The Nonprofit Hospital and the Union*, 9 No. 2 Buff. L. Rev. 255, 271 (1960).

71 *See, e.g.*, Schulte, *supra* note 61, at 333 (noting that New York, Connecticut, and Massachusetts had robust hospital labor organizations, "especially among blue collar nonprofessionals").

72 Becker et al., *supra* note 43. The states with labor laws protecting hospital workers were Minnesota, New York, Pennsylvania, Wisconsin, Massachusetts, Utah, Colorado, Michigan, Connecticut, Oregon, Montana, and Hawaii. *Id.*

73 Kochery & Strauss, *supra* note 70, at 271.

74 *Id.* at 255 (noting the increased union organizing in Baltimore, Kansas City, Philadelphia, Miami, Rochester and Buffalo).

75 Becker et al., *supra* note 43, at 2–3. These statistics do not reveal the extent of unionization within hospitals nor which employees were unionized. *Id.* at 3. These numbers merely reflect whether "one or more union contracts existed" within the hospital. *Id.*

76 *Id.* at 2.

The Health Care Amendments to the NLRA, enacted in 1974, "granted over 1.5 million hospital workers NLRA protection in their organizing and bargaining activities."[77] Following their passage, unions in healthcare institutions were "poised to seek recognition immediately,"[78] and there was a "short-lived spurt" in both hospital election activity and union victory rates.[79] In 1975, the NLRB first recognized bargaining units in healthcare institutions, recognizing three units at Mercy Hospital of Sacramento, a religiously affiliated hospital.[80] From August 1974 through December 1979, "16.2[%] of nongovernmental hospitals had [union] elections . . . and unions won 48.6[%] of these elections."[81] During that period, "religious and nonreligious nonprofit hospitals were equally likely to have union elections, but elections were much rarer in for-profit hospitals."[82] Union victory rate was highest at for-profit hospitals and lowest at religious ones.[83]

Publishing a substantive administrative rule for the first time in its history, the NLRB issued a notice of proposed rulemaking on "Collective-Bargaining Units in the Health Care Industry" in July 1987.[84] The Board held hearings and heard from commentators and witnesses on the topic of appropriate bargaining units in hospitals before issuing its Rule in 1989.[85] The finalized Rule defined eight possible bargaining

77 *Id.*

78 Jewett, *supra* note 46, at 1134.

79 Becker et al., *supra* note 43, at 9.

80 *See* Jewett, *supra* note 46, at 1134 (citing Mercy Hosp. of Sacramento, Inc., 217 N.L.R.B. 765 (1975)).

81 Becker et al., *supra* note 43, at 5.

82 *Id.*

83 *Id.* (citing John T. Delaney, *Patterns of Unions' Successes in Hospital Elections*, 61 Hosp. Progress 36 (1980)) (reflecting on why this might be, the author notes that "election rate differences may reflect bed size differences among hospital ownership classes. The for-profit hospitals tend to be relatively small and election rates increase monotonically with bed size. For reasons stated above, larger hospitals present a more attractive target for union organizing efforts than smaller ones. The lower victory rate for religious hospitals is consistent with past evidence. Employees in religious hospitals appear to have greater loyalty to the hospital than employees in other types of hospitals. In many cases they may actually be members of the religious denomination with which the hospital is affiliated. Although the high victory rate of for-profit hospitals is also consistent with other studies, reasons for this pattern are not clear.") (citations omitted).

84 *1974 Health Care Amendments*, Nat'l Lab. Rels. Board, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1974-health-care-amendments (last visited July 18, 2022).

85 *See id.*

units in the healthcare industry.[86] While the Rule applied only to "acute care hospitals,"[87] the NLRB closely followed the same standards for non-acute care facilities.[88] After the American Hospital Association challenged the Rule, the Supreme Court upheld the NLRB's use of its rulemaking power to define appropriate bargaining units in the healthcare industry and upheld the Rule in 1991.[89]

Today, hospitals and other healthcare institutions, including medical offices and nursing homes, are under NLRB jurisdiction, pursuant to a minimum gross annual volume requirement.[90] According to the Bureau of Labor Statistics, in 2021, 13.5% of "healthcare practitioners and technical occupations" are represented by unions.[91] The percentage of nurses, in particular, who are represented by a union is far greater.[92] Some studies show that nursing has more than "three times the union membership to that of other private industries."[93] Data from 2021 shows that about "17[%] of nurses . . . are covered by a union . . . and rates of union coverage have remained largely unchanged during the pandemic."[94]

86 Jewett, *supra* note 46, at 1132–33 (citing 29 C.F.R. § 103.30 (1996)). The eights bargaining units are: (1) all registered nurses; (2) all physicians; (3) all professionals except for registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees; (6) all business office clerical employees; (7) all guards; and (8) all non-professional employees except for technical employees, skilled maintenance employees, business office clerical employees and guards. 29 C.F.R. § 103.30 (1996).

87 *Health Care Law Under the NLRA*, *supra* note 44, at 5 (citing 29 C.F.R. § 103.30 (1996)) ("Pursuant to its 1989 rulemaking, the Board defined the term 'acute care hospital' as: either a short term care hospital in which the average length of a patient stay is less than thirty days, or a short term hospital in which over fifty percent of all patients are admitted to units where the average length of a patient's stay is less than thirty days . . . The term acute care hospital shall include those hospitals operating as acute care facilities even if those hospitals provide such services as for example, long term care, outpatient care, psychiatric care or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals or primarily rehabilitation hospitals.").

88 *Id.* (citing Park Manor Care Ctr., 305 N.L.R.B. 872 (1991)).

89 Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991).

90 *Jurisdictional Standards*, Nat'l Lab. Rels. Board, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-standards (last visited July 18, 2022).

91 Union Members – 2022, Bureau of Labor Statistics, https://www.bls.gov/news.release/pdf/union2.pdf (last visited July 18, 2022).

92 Higgins, *supra* note 65, at 4.

93 *Id.*

94 Ian Prasad Philbrick & Reed Abelson, *Health Care Unions Find a Voice in the Pandemic*, N.Y. Times (Jan. 28, 2021), https://www.nytimes.com/2021/01/28/health/

C. Religious Organizations

The NLRA does not exempt—or even define—religious organizations.[95] This Article, like the NLRB and the courts, will use religious organizations as a broad, encompassing term.[96] While the NLRA itself has never addressed religious organizations, the National Labor Relations Board and the courts have applied the Act to religious organizations to varying degrees and in different settings for decades. This section looks to examples of workers at religious organizations organizing under the NLRA and the Board and courts' approach to such efforts.[97]

1. In General

Union organizing at religiously affiliated hospitals does not exist in a vacuum. Instead, such organizing—and the NLRB's approach to it—exists in conversation with organizing among workers of non-healthcare-related religious organizations. The following considers the history of organizing non-healthcare-related religious organizations in order to contextualize organizing of religiously affiliated hospitals. The Board's approach to non-healthcare-related religious organizations reveals the factors it considers dispositive, its changing views over time, and its (dis) comfort dealing with religiously affiliated organizations. Lessons from the non-healthcare setting can inform our understanding of the history of organizing in the religious healthcare setting and inform strategy in this space moving forward.

Religious organizations include schools, houses of worship, charitable organizations, community centers, and healthcare

covid-health-workers-unions.html (citing Unionstats.com, http://unionstats.com/ (last visited July 18, 2022)).

95 *See* Schwartz, *supra* note 42, at 235 (first quoting Cath. Cmty. Servs., 247 N.L.R.B. 743, 743 (1980); and then quoting Riverside Church, 309 N.L.R.B. 806, 806 (1992)) ("Unlike other employment statutes, such as Title VII of the Civil Rights Act or the Americans with Disabilities Act, the NLRA does not contain an exemption for, or even a definition of, religious organizations. The Board has avoided providing a rigid definition of 'religious organization' and uses only general descriptions such as 'a religious institution with a sectarian philosophy or mission'; 'a religious institution with a stated mission'; and religious institutions that operate 'in a conventional sense using conventional means.'").

96 *See generally* Brian M. Murray, *The Elephant in Hosanna-Tabor*, 10 Geo. J.L. & Pub. Pol'y 493 (2012); Sepper, *supra* note 3.

97 This section is not exhaustive; it does not consider every time the Board interacted with workers at religious organizations. The selection of examples attempts to highlight trends over time and illustrate the arc of history.

institutions.[98] In the 1960s, following the growth of collective bargaining in public schools, lay teachers at religiously affiliated primary schools began to unionize.[99] Teachers at Catholic schools led the charge.[100] Antiunion conduct by Catholic school employers was common in this period,[101] but lay teachers continued to unionize at a modest rate during the 1960s and early 1970s.[102] In 1973, the National Catholic Education Association found that 29 out of 145 dioceses reported that they had recognized lay teachers' unions.[103] Also during the 1960s, workers at religious healthcare institutions were organizing, and the NLRB or state equivalents were protecting their efforts.[104] Examples of organizing at other types of religiously affiliated organizations have arisen at various points in history as well.[105]

The Board and courts' approach to religious employers has shifted over time. In 1940, in one of the earliest cases interpreting the NLRA's application to a religious employer, the Ninth Circuit analyzed a union's allegation of unfair labor practices.[106] In the case, the court did not question the appropriateness of NLRB jurisdiction over the Christian Board of Publication—an employer that today would certainly

98 *See, e.g.*, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1408 (1981) ("The free exercise of religion includes the right to run large religious institutions-certainly churches, seminaries, and schools, and I would add hospitals, orphanages, and other charitable institutions as well.").

99 *See* Gaul, *supra* note 18, at 1520 (citing David L. Gregory & Charles J. Russo, *The First Amendment and the Labor Relations of Religiously-Affiliated Employers*, 8 B.U. Pub. Int. L.J. 449, 453 (1999)). *See also* Robert J. Pushaw, Jr., Note, *Labor Relations Board Regulation of Parochial Schools: A Practical Free Exercise Accommodation*, 97 Yale L.J. 135, 144 (1987) ("The combination of burgeoning Catholic school lay faculties and successful public educational unions catalyzed formation of parochial school teacher associations.").

100 *See* Gaul, *supra* note 18, at 1520–21.

101 *See id.* (citing Gregory & Russo, *supra* note 99, at 454–55). *But see* Pushaw, Jr., *supra* note 99, at 144 ("The Catholic hierarchy's reaction to unionization ranged from encouragement to grudging acceptance to rejection.").

102 Gaul, *supra* note 18, at 1521.

103 *Id.* (citing Gregory & Russo, *supra* note 99, at 454–55).

104 *See, e.g.*, Johnson v. Christ Hosp., 202 A.2d 874 (N.J. Super. Ct. Ch. Div. 1964), *aff'd*, 211 A.2d 376 (N.J. 1965); St. Vincent's Nursing Home v. Dep't of Lab., 169 N.W.2d 456 (N.D. 1969).

105 *See, e.g.*, Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom from and Freedom for*, 49 Vill. L. Rev. 77, 159–60 (2004) (discussing a "bitter fight between the Archdiocese of New York and striking cemetery workers" in 1949).

106 NLRB v. Christian Bd. of Publ'n, 113 F.2d 678, 679 (8th Cir. 1940).

be described as a religious organization.[107] Rather, the court analyzed the charges, assuming the appropriateness of NLRB jurisdiction.[108] The Board and courts started discussing the issue in more depth in the 1970s. In 1970, in *Cap Santa Vue, Inc. v. NLRB*, a nursing home operator refused to meet with its employees' certified union.[109] When the union filed unfair labor practice charges against the employer, the employer argued that requiring it to bargain with the union contravened its religious beliefs in violation of the Free Exercise Clause of the First Amendment.[110] The United States Circuit Court for the District of Columbia rejected the employer's argument and held that assertion of NLRB jurisdiction over Cap Santa Vue and the requirement to bargain in good faith was consistent with the First Amendment.[111] The Circuit Court distinguished between "the absolute freedom to *hold* religious beliefs and the freedom of conduct based on religious beliefs," explaining that the "latter freedom may be curtailed in some circumstances for the protection of society."[112] Analyses like these were common during this period. In 1973, in *Carroll Manor Nursing Home*, the Board asserted jurisdiction over a religiously affiliated nursing home after finding that the nursing home was only "religiously associated," and not "completely religious."[113]

In 1974, the Board three times faced the question of exercising jurisdiction over religious employers.[114] In *Board of Jewish Education of Greater Washington*, the Board held that the employer was a "nonprofit religiously oriented institution whose activities [were] noncommercial in nature and [were] intimately connected with the religious activities of that institution," and, as such, "it would not effectuate the policies of the Act for the Board to assert jurisdiction."[115] It was *both* the religious nature and the noncommercial nature of the organization that led the Board not to assert jurisdiction.[116] In *Association of Hebrew Teachers of Metropolitan Detroit*, the Board also declined jurisdiction over an employer that taught

107 *See About Us*, Chalice Press, https://chalicepress.com/pages/about-us (discussing the religious mission of Chalic Media Group, a subsidiary of Christian Board of Publication today).

108 *Christian Bd. of Publ'n*, 113 F.2d at 679.

109 Cap Santa Vue, Inc. v. NLRB, 424 F.2d 883, 885 (D.C. Cir. 1970).

110 *Id.* at 884–85.

111 *Id.* at 891.

112 *Id.* at 886 (emphasis in original).

113 Carroll Manor Nursing Home, 202 N.L.R.B. 67, 67–68 (1973).

114 *See* Bd. of Jewish Educ. of Greater Wash., D.C., 210 N.L.R.B. 1037 (1974); Henry M. Hald High Sch. Ass'n, 213 N.L.R.B. 415 (1974); Ass'n of Hebrew Tchrs. of Metro. Detroit, 210 N.L.R.B. 1053 (1974).

115 *Bd. of Jewish Educ.*, 210 N.L.R.B. 1037.

116 *Id.*

religious courses in after-school, nursery, and college settings.[117] There, like in *Board of Jewish Education*, the Board relied on the employer's minimal impact on commerce, calling it an "isolated instance of [an] atypical employer," in deciding not to exercise jurisdiction.[118] Neither *Board of Jewish Education* nor *Association of Hebrew Teachers* rested on constitutional necessity. In *Henry Hald High School Association* that same year, the Board, in contrast to *Board of Jewish Education* and *Association of Hebrew Teachers*, asserted jurisdiction over a Catholic diocese-operated high school association, rejecting the argument that such jurisdiction would excessively entangle the Board with religion.[119]

The Board's evolution of approaches to religious organizations was clarified the following year in *Roman Catholic Bishop of Baltimore*.[120] There, the Board explained that its policy was to decline jurisdiction only over "completely religious" organizations, not those "merely 'associated' with a given faith."[121] During this period and under this policy, religious organizations frequently—and generally unsuccessfully—argued that the NLRB exertion of jurisdiction violated the Religion Clauses.[122] The Board, on the other hand, repeatedly maintained that such jurisdiction over organizations associated with religion—schools, healthcare institutions, and so on—posed no constitutional problem.[123]

The Board approach changed dramatically after the Supreme Court decision in *Catholic Bishop*. In *Catholic Bishop*, the Supreme Court construed the NLRA to exclude certain religious employers and certain groups of employees, namely teachers at parochial schools, from coverage of the Act.[124] In so doing, the Court rejected the "completely religious" test articulated in *Catholic Bishop of Baltimore* and held simply that "[s]chools operated by a church to teach both religious and secular subjects are not within the jurisdiction granted by the [NLRA]."[125] The Court expressed concern that there was a risk of excessive entanglement of religion in (1)

117 *Ass'n of Hebrew Tchrs.*, 210 N.L.R.B. 1053.
118 *Id.* at 1058–59.
119 *Henry M. Hald High Sch. Ass'n.*, 213 N.L.R.B. 415.
120 Roman Cath. Archdiocese of Balt., 216 N.L.R.B. 249 (1975).
121 Christian Vareika, *Further and Further, Amen: Expanded National Labor Relations Board Jurisdiction over Religious Schools*, 56 B.C. L. Rev. 2057, 2066 (2015) (quoting Roman Cath. Archdiocese of Balt., 216 N.L.R.B. 249 (1975)).
122 *See id.*, at 2067 n.71 (listing examples).
123 *See, e.g.*, Cardinal Timothy Manning, Roman Cath. Archbishop of the Archdiocese of L.A., 223 N.L.R.B. 1218 (1976).
124 NLRB v. Cath. Bishop of Chi., 440 U.S. 490 (1979); *see Roman Cath. Archdiocese of Balt.*, 216 N.L.R.B. 249.
125 *Cath. Bishop of Chi.*, 440 U.S. at 490.

the NLRB's assessment of employer motivation when evaluating unfair labor practice charges, and (2) the NLRB's determination of mandatory subjects of bargaining.[126] To avoid the "serious constitutional questions" that the Board's exercise of jurisdiction would introduce, the Court asked whether the NLRA "clearly expressed" an intention to cover these employers.[127] Finding "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act," the Court construed the Act to exclude such employees.[128]

Since the constitutional avoidance case of *Catholic Bishop*, the Board and the courts have approached the question of unionization at religious organizations with varying success. In the years immediately following *Catholic Bishop*, the Board and the courts addressed unionization in religious healthcare facilities several times.[129] That approach is discussed in depth below. Outside the religious hospital setting, several circuit courts and the NLRB held that *Catholic Bishop* does not extend to "church operated, non-school institutions," or non-teaching employees.[130] In *Hanna Boys Center*, for example, the Ninth Circuit Court of Appeals held that NLRB jurisdiction over "lay child-care workers, recreation assistants, cooks, cooks' helpers, and maintenance workers" in a religious education and residential setting did not conflict with the Religion Clauses; *Catholic Bishop* did not extend to these nonteaching employees.[131]

This approach, however, was not universal. In *Riverside Church*, the Board declined to exercise jurisdiction over a non-school entity, a large "traditional house of worship," whose maintenance and service

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

127 *Cath. Bishop of Chi.*, 440 U.S. at 501.

128 *Id.* at 504; *see also id.* at 507 ("Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.").

129 *See, e.g.*, Mid Am. Health Servs., 247 N.L.R.B. 752 (1980); Bon Secours Hosp., Inc., 248 N.L.R.B. 115 (1980); St. Elizabeth Hosp. v. NLRB, 715 F.2d 1193 (7th Cir. 1983); Tressler Lutheran Home for Child. v. NLRB, 677 F.2d 302 (3d Cir. 1982); St. Elizabeth Cmty. Hosp. v. NLRB, 626 F.2d 123 (9th Cir. 1980).

130 Volunteers of America, L.A. v. NLRB, 777 F.2d 1386, 1389 (9th Cir. 1985) (listing examples); *see, e.g.*, NLRB v. Salvation Army of Massachusetts Dorchester Day Care Ctr., 763 F.2d 1, 6 (1st Cir. 1985) (day care center); Denver Post of the Nat'l Soc'y of the Volunteers of America v. NLRB, 732 F.2d 769, 773 (10th Cir. 1984) (temporary shelters for women and children); NLRB v. World Evangelism, Inc., 656 F.2d 1349, 1354 (9th Cir. 1981) (commercial hotel complex).

131 NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1297 (9th Cir.), *as amended on denial of reh'g*, (Oct. 30, 1991).

employees sought to unionize.[132] The Board held that it would decline jurisdiction if the religious employer operated "in a conventional sense using conventional means" and the secular employees were necessary for the employer to "accomplish their religious mission."[133] Similarly, in *Faith Center-WHCT Channel 18*, the Board declined jurisdiction over the broadcasting engineers of a church radio station, finding its "purpose and function indistinguishable from 'conventional' churches."[134] In both cases, the Board "wielded a broad brush" in finding seemingly secular employees essential to a religious employer's religious mission.[135] Examples of the Board's approach abound; analysis of the Board's changing approach could alone fill an article.

The NLRB's approach to teachers' unions at religious schools stands apart. While *Catholic Bishop* is directly on point and controlling over teachers' unions at religious primary schools, its extension to religious colleges and universities, as well as non-teacher unions at religious schools, has varied.[136] In 2002, in *University of Great Falls*, the United States Circuit Court for the District of Columbia held that the NLRB must decline to exercise jurisdiction when a religious school (1) "holds itself out to students, faculty, and community as providing a religious educational environment"; (2) is "organized as a nonprofit"; and (3) is "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion."[137] In 2014, rejecting the original *University of Great Falls* test, the Board considered *Catholic Bishop*'s application to a unit of nontenure-eligible contingent faculty members at a religiously affiliated university.[138] The Board in *Pacific Lutheran University* held that a religious college must not only hold itself out as a religious educational environment, "ostensibly accepting the first prong of the Great Falls test."[139] The college must

132 Schwartz, *supra* note 42, at 250 (citing Riverside Church in the City of New York, 309 N.L.R.B. 806, 806 (1992)).

133 *Id.*

134 Schwartz, *supra* note 42, at 250 (citing Faith Ctr.-WHCT Channel 18, 261 N.L.R.B. 106, 108 (1982)).

135 Schwartz, *supra* note 42, at 250.

136 *Compare* Univ. of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002), *with* Pac. Lutheran Univ. & Service Employees International Union, Local 925, 361 N.L.R.B. 1404 (2014).

137 *Univ. of Great Falls*, 278 F.3d at 1335; *see also* Carroll Coll., Inc. v. NLRB, 558 F.3d 568 (D.C. Cir. 2009).

138 *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1404.

139 Bethany Coll., 369 N.L.R.B. No. 98 (2020) (citing *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1415).

also hold out "the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by its representations to current or potential students and faculty members, and the community at large."[140] In other words, the *Pacific Lutheran University* Board would require the school to hold itself out as a religious school *and* hold the faculty member out as playing a religious role. Explaining that both requirements demand an objective holding-out standard—an objective inquiry that the *University of Great Falls* court already blessed[141]—the Board reasoned that this was permissible under the First Amendment.[142]

In 2020, both the NLRB and the D.C. Circuit rejected the *Pacific Lutheran University* test and reverted to the *Great Falls University* standard.[143] In *Duquesne University*, the DC Circuit explained that the inquiry into the specific religious or non-religious role of faculty members posed an impermissible risk of constitutional violation.[144] The court held that this refusal to "examine the roles played by various faculty members followed directly from *Catholic Bishop*."[145] What this area of law will look like under the Biden Administration remains to be seen.[146] No matter which way the Board and the courts go on this issue, however, the instability of this area is unavoidably clear. Such instability can, and should, be considered when organizing at religiously affiliated hospitals.

2. Religiously Affiliated Hospitals

Nearly one in five U.S. hospitals is religiously affiliated.[147] Not all religiously affiliated hospitals, however, are what they seem. Professor Elizabeth Sepper has documented the emergence of "zombie religious hospitals," healthcare facilities that, through contract, were once

140 *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1414.
141 *Univ. of Great Falls*, 278 F.3d at 1343–45, 1347.
142 *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1438.
143 *See* Duq. Univ. of the Holy Spirit v. NLRB, 947 F.3d 824, 837 (D.C. Cir. 2020); Bethany Coll., 369 No. 98 at 1.
144 *Duq. Univ.*, 947 F.3d at 833 (citing *Carroll Coll.*, 558 F.3d at 572).
145 *Id.* at 834.
146 *Cf.* Neil Goldsmith, *The Vanishing (and Reappearing): NLRA Jurisdiction Over Higher Education Students and Faculty*, ABA 5 (2021) (arguing that "given the recent change in administration, and the likely uptick in organizing activity at educational institutions, this issue will continue to be litigated at the NLRB.").
147 Guiahi et al., *supra* note 5, at 2.

"secular, affiliated with other faiths, or operated as public hospitals [and now] assume new religious obligations and privileges."[148] By the contractual terms of their sales, some "formerly religious hospitals maintain a religious identity," even when secular healthcare systems come to own the hospital.[149] In other words, these are hospitals that may be owned and operated by secular corporations, may appear entirely secular to patients and employees alike, but retain a legally religious character through contractual obligations. Sepper continues that in "other instances, hospitals lose their religious affiliation after sale but continue their compliance with religious rules. Zombie religious hospitals—removed of the leadership or mission that might have given them special status as religious institutions—carry on."[150]

Identifying religiously affiliated hospitals sounds easy; it sounds like a niche category. To the contrary, Sepper explains that religious affiliation has proliferated, and the category is not nearly as circumscribed as it seems.[151] While this phenomenon may exist outside of Catholic hospitals, its widespread practice has been documented in the Catholic hospital sphere: "In buying and selling, Catholic healthcare systems have populated the market with secular healthcare entities subject to Catholic restrictions."[152]

The issue of union organizing at religiously affiliated hospitals is no small question. It affects millions of workers and millions of patients at religious hospitals across the country.[153] And that number—both of religiously affiliated hospitals and the workers therein—is growing.[154] Early labor organizing efforts in the healthcare space affected both religious and non-religious hospitals,[155] but collective bargaining grew stronger and more quickly in nonprofit hospitals without a religious affiliation.[156] Before the Health Care Amendments to the NLRA, "religious hospitals had the lowest proportion of collective bargaining agreements of any

148 Sepper, *supra* note 3, at 932.
149 *Id.* at 933.
150 *Id.*
151 *Id.* at 932–34.
152 *Id.* at 970.
153 *See, e.g.*, Cath. Health Ass'n of the U.S., U.S. Catholic Health Care (2021) (Catholic hospitals had nearly 5 million admissions during a one-year period).
154 *See* Sepper, *supra* note 3, at 970.
155 *See supra* Part I, Section B.
156 Data from the 1960s and 1970s show that "collective bargaining [was] less likely to arise in religious [hospitals] than in nonprofit hospitals without a religious affiliation" during that period. Becker et al., *supra* note 43, at 3 (first citing Dworkin et al., *supra* note 62, at 75–81; then citing John T. Delaney, *supra* note 83, at 36–40).

major hospital category."[157] By 1980, despite the rate of union growth at religiously affiliated hospitals increasing, the percentage of religiously affiliated hospitals with collective bargaining agreements remained "nine percentage points below the corresponding percentage for their nonreligious nonprofit counterparts."[158] Religiously affiliated hospitals have used religious arguments to oppose unionization since at least this period.[159]

The Board and the courts have repeatedly held that workers at religiously affiliated hospitals are covered by the NLRA and rejected contentions that *Catholic Bishop* applies to religiously affiliated hospitals. In the 1960s, the NLRB or state equivalents exercised jurisdiction over workers' unionizing and collective bargaining efforts at religiously affiliated hospitals.[160] In 1980, in *St. Elizabeth Community Hospital*, the Ninth Circuit Court of Appeals held that the NLRB properly asserted jurisdiction over hospital service and maintenance employees, and that NLRB jurisdiction over this religious hospital did not violate the Religion Clauses.[161] In so ruling, the court distinguished a parochial school and a religious hospital, noting that the primary purpose of St. Elizabeth, like that of secular hospitals, was health and not religion.[162] In at least two 1980 cases, the NLRB relied on the specific inclusion of healthcare institutions in the 1974 amendments to exercise jurisdiction over religious hospitals, over the employers' First Amendment objections.[163]

In *Tressler Lutheran Home for Children*, in 1982, the Third Circuit Court of Appeals affirmed the permissibility of NLRB jurisdiction over a religiously affiliated nursing home.[164] Echoing the Ninth Circuit in *St. Elizabeth Community Hospital*, the court noted that the primary function of the nursing home was care, not religion.[165] The next year

157 Becker et al., *supra* note 43, at 3.

158 *Id.*

159 *See* Amy Littlefield, *The Rise of the Corporate-Catholic "Zombie Hospital,"* The New Republic (May 4, 2021), https://newrepublic.com/article/162297/catholic-hospital-saint-vincents-profit-patients (citing Guenter B. Risse, Mending Bodies, Saving Souls: A History of Hospitals (1st ed. 1999)).

160 *See, e.g.*, *Johnson*, 202 A.2d at 874; *St. Vincent's Nursing Home*, 169 N.W.2d at 456.

161 *St. Elizabeth Cmty. Hosp.*, 626 F.2d 123 at 126–27, 129.

162 *Id.* at 125–26.

163 *See* Mid Am. Health Servs., Inc., 247 N.L.R.B. 752 (1980); Bon Secours Hosp., Inc., 248 N.L.R.B. 115 (1980).

164 Tressler Lutheran Home For Child. v. NLRB, 677 F.2d 302 (3d Cir. 1982). Nursing homes fall within the same category as hospitals—health care institutions—for NLRA purposes. 29 U.S.C. § 152(14) (1947). As such, analysis of nursing home unionization will occur in tangent with analysis of hospital unionization.

165 *Tressler Lutheran Home for Child*, 677 F.2d. at 307.

in *St. Elizabeth Hospital*, the Seventh Circuit Court of Appeals held that NLRB jurisdiction over a religious hospital was permissible, rejecting the religious employer's contention that the Religion Clauses of the First Amendment precluded NLRB jurisdiction.[166] Relying on earlier cases from the Third and Eighth Circuits, the court held that when an "institution's primary activity is secular, assertion of NLRB jurisdiction does not violate the institution's first amendment rights."[167] The court also explained that *Catholic Bishop* does not compel a contrary conclusion.[168] There, the Court found "no evidence that Congress intended to bring religious schools within the scope" of the NLRA, whereas "Congress specifically amended the [NLRA] to include non-profit hospitals."[169] As such, the court concluded that *Catholic Bishop* "does not control."[170]

More recently, in 2000, the Board again held that the exercise of jurisdiction over a religiously affiliated hospital was proper in *Ukiah Adventist Hospital*.[171] After the NLRB asserted jurisdiction over the hospital operated by the Seventh Day Adventist Church, one commentator stated that the religious hospital "must follow the same labor laws as other nonreligious hospitals."[172] The Board in *Ukiah* applied the Religious Freedom Restoration Act ("RFRA"), which considers whether there was a substantial burden on religion and whether that burden was outweighed by a compelling government interest.[173] The Board held that the hospital's "freedom to operate in accordance with its religious beliefs concerning labor organizations is outweighed by a 'compelling state interest' in averting labor unrest."[174] In 2003, the Board relied on *Ukiah Adventist Hospital* to again reject a religious hospital's arguments under RFRA.[175] As these cases demonstrate, the Board and the courts have, repeatedly and for decades, held that workers at religiously

166 St. Elizabeth Hosp. v. NLRB, 715 F.2d 1193 (7th Cir. 1983).

167 *Id.* at 1196 (citing *Tressler Lutheran Home for Child*, 677 F.2d 302; NLRB v. St. Louis Christian Home, 663 F.2d 60 (8th Cir. 1981)).

168 *Id.* at 1196–97.

169 *Id.* (citing NLRB v. Cath. Bishop of Chi., 440 U.S. 490 (1978)).

170 *Id.* at 1197.

171 Ukiah Adventist Hosp., 332 N.L.R.B. 602 (2000).

172 Ilana DeBare, *NLRB Sides With Nurses at Adventist Hospital; Medical Center Sought Religious Exemption From Labor Laws*, SFGate (Dec. 10, 1998), https://www.sfgate.com/business/article/NLRB-Sides-With-Nurses-At-Adventist-Hospital-2974410.php.

173 *See generally Ukiah Adventist Hosp.*, 332 N.L.R.B. 602.

174 Adventist News Network, *Adventist Hospital Loses Bid to Prevent Union Organizing*, ANN (Nov. 13, 2000), https://adventist.news/news/adventist-hospital-loses-bid-to-prevent-union-organizing.

175 *See* Hosp. Cristo Redentor, Inc., No. 24-CA-9069, 2003 WL 647521 (Feb. 24, 2003).

affiliated hospitals are protected by federal labor law.

Organizing efforts at religiously affiliated hospitals have continued—often successfully—throughout the first two decades of the twenty-first century. While employer objection to unionization is widespread—both amongst religiously affiliated hospital employers and others[176]—the shape of the objections has changed. Objections to NLRB jurisdiction on First Amendment grounds have abated in recent years, replaced with more commonplace anti-union rhetoric and arguments.[177] Numerous examples exist of protracted and bitter fights between religiously affiliated hospital employers and unions, yet they nonetheless lack any suggestion that NLRB jurisdiction is impermissible.[178] Rather,

176 *See, e.g.*, Nancy Cleeland & Margaret Ramirez, *Catholics Split Over Union's Hospital Drive*, L.A. Times, (July 17, 1999), https://www.latimes.com/archives/la-xpm-1999-jul-17-mn-56753-story.html ("The clash between Catholic Healthcare West, which is operated by nine orders of nuns, and the Service Employees International Union is among the most contentious in a growing number of disputes between Catholic-run health care facilities and labor organizations. It puts what has become a standard management response to an organizing drive—hiring consultants who specialize in defeating unions—under the scrutiny of church doctrine, which historically has been pro-labor.").

177 *See* Telephone Interview with Diane Sosne, RN, MN, President, SEIU 1199 NW (Mar. 1, 2022) (discussing the union-busting tactics of various religiously affiliated hospitals, primarily in Washington state between 2015 and 2021). *See, e.g.*, Jefferson Hodge, *Catholic Healthcare Institutions Are Ignoring the Rights of Workers*, The Bias Mag. (March 9, 2020), https://christiansocialism.com/catholic-healthcare-hospitals-workers-labor/ ("St. John's Healthcare in Santa Monica, for example, would spend years on a lawsuit to enforce a ban on pro-union nurses from wearing a simple ribbon stating "Respect & Dignity". The NLRB documents violations at, among others, Mercy Health Partners in 2010, St. Mary-Corwin Medical Center in 2012, and St. Francis Hospital in 2013.").

178 *See, e.g.*, Telephone Interview with Diane Sosne, *supra* note 177; Mercy Health Partners, 358 N.L.R.B. 566 (2012); Cath. Health Initiatives Colo. d/b/a Centura Health St. Mary-Corwin Med. Ctr. & Commc'n Workers of Am., Loc. 7774, No. JD(SF)-25-13, 2013 WL 3006928 (June 17, 2013). *See also* Mass. Nurses Ass'n, *MNA: National Catholic Labor Group Admonishes Trinity Health After NLRB Issues Complaint to Mercy Medical Center for Retaliating Against Nurses' Union Activity*, Cision PR Newswire (July 29, 2021), https://www.prnewswire.com/news-releases/mna-national-catholic-labor-group-admonishes-trinity-health-after-nlrb-issues-complaint-to-mercy-medical-center-for-retaliating-against-nurses-union-activity-301344335.html; Amy Littlefield, *Union-Busting in the Name of God*, The Nation (Mar. 31, 2020), https://www.thenation.com/article/society/religious-universities-unions-labor/#:~:text=More%20than%2040%20years%20later,a%201979%20Supreme%20Court%20decision ("And while the NLRB does protect employees at religious health care facilities, they say that hasn't stopped their employer from slow-walking negotiations or, in the case of Providence workers at Swedish Medical Center in Seattle who went on strike in January, locking them out.").

the permissibility of NLRB jurisdiction is simply presumed.

As an example of religiously affiliated hospitals acceding to the permissibility of NLRB jurisdiction, 2009 Catholic hospital guidelines were titled "Respecting the Just Rights of Workers: Guidance and Options for Catholic Health Care and Unions."[179] These guidelines culminated from a twelve-year process through which the United States Conference of Catholic Bishops worked collaboratively with representatives of Catholic healthcare systems, the AFL-CIO, Service Employees International Union ("SEIU"), and others.[180] Although the guidelines are somewhat dated today, given the recent and rapid change in the federal courts around the Religion Clauses and labor law, they remain illustrative.[181] The guidelines note management and labor's often differing "views on the usefulness and difficulties of the traditional [NLRB] process."[182] They also set practical guidelines related to NLRB-supervised elections.[183] Throughout, the guidelines assume NLRB jurisdiction, not once questioning the constitutionality of such jurisdiction.[184] Even where noting management's aversion to certain practices, the permissibility of NLRB jurisdiction remains a given.[185]

An empirical study on the number of religiously affiliated hospitals with unionized workers today is outside the scope of this Article. Despite lacking the benefit of hard data, some qualitative and quantitative measurements can help inform the current landscape. The Catholic Labor Network tracks "Catholic hospitals and health care institutions whose employees enjoy the benefits of union

179 *Respecting the Just Rights of Workers: Guidance and Options for Catholic Health Care and Unions*, U.S. Conf. of Cath. Bishops (June 22, 2009), http://www.usccb.org/issues-and-action/human-life-and-dignity/labor-employment/upload/respecting_the_just_rights_of_workers.pdf [hereinafter *Respecting the Just Rights of Workers*]; *See also* Cleeland & Ramirez, *supra* note 176 ("Union votes are pending or have recently been held at close to a dozen Catholic hospitals, from Florida to Washington state. Although not all the campaigns have been acrimonious, the trend has prompted the National Conference of Catholic Bishops in Washington to develop guidelines for handling labor-management disputes at church-owned health care institutions, a church official said.").

180 *See Respecting the Just Rights of Workers*, *supra* note 179; *See also* Hodge, *supra* note 177.

181 Author interviews with labor lawyers and union organizers in New York, Virginia, and Washington in February and March of 2022 confirm that this trend—of religiously affiliated hospitals presuming NLRB jurisdiction and relying on standard, non-religion specific anti-union arguments—continues today.

182 *Respecting the Just Rights of Workers*, *supra* note 179, at 4.

183 *Id.* at 8.

184 *See, e.g.*, *id.* at 6.

185 *See id.* at 4.

representation."[186] As of the time of writing, the Network had identified more than 100 Catholic healthcare institutions in which at least some categories of workers enjoy union representation.[187] These hundred-plus institutions are located in at least twenty-one states and cover tens of thousands of healthcare workers.[188]

II. Constitutional Limitations: The Religion Clauses Do Not Bar NLRB Jurisdiction Over Employees of Religiously Affiliated Hospitals

Courts, the National Labor Relations Board, and scholars have addressed the potential constitutional problems with NLRB jurisdiction over religious institutions, including religiously affiliated hospitals, in varying terms. Some have pointed out specific actions the NLRB can take that pose constitutional concerns, whereas others have contributed with lavish rhetoric and far-reaching threats.[189] Courts and the Board (both across circuits and administrations) agree, however, that the Religion Clauses do not bar NLRB jurisdiction over employees of religiously affiliated hospitals.[190] The Board and courts have repeatedly held that the constitutional avoidance case of *Catholic Bishop*—holding that teachers at parochial schools are outside NLRB jurisdiction—does not extend to workers at religiously affiliated hospitals.[191]

Although consensus has been strong, the shifting federal bench—and Supreme Court in particular—and shifting Religion Clause

186 The Cath. Lab. Network, *Catholic Employer Project*, Cath. Healthcare, https://catholiclabor.org/catholic-employer-project/ (last visited July 18, 2022).

187 *See id.*

188 *See id.*

189 *See, e.g.*, Donald C. Carroll, *A Groundless Clash of Freedoms?: The Religious Freedom of the Religiously Affiliated University and the Freedom of Faculty to Organize Under the NLRA*, 53 Univ. S.F. L. Rev. 1, 4–5 (2019) (quoting Dennis H. Holtschneider, *Refereeing Religion?*, Inside Higher Educ. (Jan. 27, 2016), https://www.insidehighered.com/views/2016/01/28/new-nlrb-standard-could-have-major-consequences-catholic-colleges-essay) ("Dennis Holtschneider, the then-president of DePaul University, in a piece in Inside Higher Ed claimed that the Board is 'a rogue governmental agency ... attempting to extend its authority over faith-based institutions' and has 'reasserted the 19th-century bias against Catholicism.' Furthermore, it would 'require governmental functionaries to judge the manner in which we implement our faith in a university context.' To some this assertion may sound like a plea for the ancient libertas ecclesiae (the 'freedom of the Church') which is an autonomy that may still adhere at least in the penumbra of our jurisprudence, but may be depreciated in our modern culture to a plea to be left alone.").

190 *See supra* Part I, Section C, Subsection 2.

191 *See id.*

jurisprudence warrants concern about the continued viability of consensus in this area.[192] The institutionalization of religious freedom—the expansion of the Religion Clauses to highlight religious *institutions'* freedom, rather than focusing on individuals'—has been prominent in recent years. This institutionalization spans topics,[193] but is especially prominent in the ever-expanding ministerial exception.[194] Additionally, organized labor has repeatedly lost in the federal courts as the federal bench has grown increasingly anti-union.[195] This combination of increasing focus on religious institutions' religious freedom and waning protection for organized labor indicates that previous consensus that the Religion Clauses do not bar NLRB jurisdiction over employees of religiously affiliated hospitals is tenuous at best.[196]

This Part works to further address the constitutional permissibility of NLRB jurisdiction over workers at religiously affiliated hospitals. At bottom, the NLRB is an agency with limited statutory powers that can, and does, work within First Amendment limitations. Courts need not take the extreme step of stripping NLRB jurisdiction over religiously affiliated hospitals based on mere speculation and fear of First Amendment violations.

192 *See, e.g.*, Sepper, *supra* note 3, at 980 (citing Helfand & Richman, *supra* note 15, at 776) (discussing the 'Establishment Clause Creep"); Littlefield, *supra* note 178 ("'[A] conservative judicial majority right now in the Supreme Court—and a growing sentiment on the federal court benches in general—favors using constitutional principles like the First Amendment as a battering ram against workers' ability to bargain collectively,' said Joseph McCartin, a professor of history at Georgetown University.").

193 *See, e.g.*, Robinson, *supra* note 15, at 244 (noting that "contemporary constitutional religious liberty is marked by the rise of religious institutionalism and the amplification of religion clause protections for religious institutions"); *see also id.*at 244–46 (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. V. EEOC, 565 U.S. 171 (2012) (anti-discrimination in employment); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (contraceptives); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017) (religious school funding)); Carson *ex rel.* O.C. v. Makin, No. 20-1088 (U.S. June 21, 2022) (religious school funding).

194 *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Rachel Casper, *When Harassment at Work is Harassment at Church: Hostile Work Environments and the Ministerial Exception*, 25 U. Pa. J.L. & Soc. Change 11 (2021). The effect of the expansion of the ministerial exception on labor law in religiously affiliated hospitals will be discussed in depth, *infra*, Part II, Section B, Subsection 2 and, *infra*, Part III.

195 *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

196 The shift in Religion Clause jurisprudence in the past decade, including the ministerial exception, as well as the shift in labor law jurisprudence, is discussed in depth *infra*, Part III.

This Part will first review the statutory limitations on NLRB practice. After considering the statutory framework and limitations, this Part will consider specific NLRB actions that give rise to common constitutional arguments. The commonly alleged constitutional infirmities of NLRB jurisdiction over religiously affiliated hospitals can be divided into four main categories: (1) excessive entanglement of government with religion when the Board reviews unfair labor practice charges; (2) intrusion into religious creed when determining and imposing mandatory subjects of bargaining; (3) undermining of managerial prerogatives that the church autonomy doctrine protects; and (4) alteration of the employment relationship and religious environment.[197] This Part will consider, and rebut, each alleged constitutional infirmity in turn. While the persuasiveness of this argument to the current Court is far from clear, the argument is constitutionally sound and should be advocated.

A. The Statutory Limitations on the National Labor Relations Board Assure a Constitutionally Permissible Role

To flesh out the true threat the NLRB poses to religiously affiliated hospital employers, it is crucial to understand the scope of the Board's power and role. The NLRB is a severely constricted entity. Jurisdictional limits, limits on Board-initiated action at both the representative-election stage and in the realm of unfair labor practices, as well as limitations on available remedies, constrain the Board's reach.[198] The statutory limitations placed on the NLRB ensure that it remains within constitutional bounds when exercising jurisdiction over religiously affiliated hospitals. A big, bad NLRB—a "leviathan-like governmental regulatory board"[199]—does not exist. In place of this

197 There are, of course, many other constitutional challenges to union organizing today. For example, in 2018, the Court, in *Janus*, held that mandatory union fees violated public sector employees' right to free speech and association under the First Amendment. *See* Janus, 138 S. Ct. 2448. Since that decision, expressive association challenges to unions have abounded. *See* Ronald J. Kramer, *Janus One Year Later: Litigation Has Come*, State & Loc. L. News, Summer 2019, at 1 (listing cases). While expressive association challenges do pose a hurdle that merits discussion, that constitutional challenge, stemming from the Speech, not Religion Clauses, of the First Amendment is not unique to religiously affiliated organizations. For broader discussion of expressive association challenges, and why it is a surmountable challenge, *see, e.g.*, Bierman v. Dayton, 900 F.3d 570 (8th Cir. 2018).

198 *See* 29 U.S.C. § 160; 29 U.S.C. § 159.

199 S. Jersey Cath. Sch. Tchrs. Ass'n v. St. Teresa of the Infant Jesus Church Elementary

hypothetical administrative state monster is an NLRB with narrow, deeply circumscribed power.

An employer is only within NLRB jurisdiction if its "business operations sufficiently impact interstate commerce under the U.S. Constitution's Commerce Clause."[200] Thanks to minimal levels of interstate commerce requirements, many companies and organizations—entities that the laymen would call employers—fail to qualify as employers under the NLRA.[201] If an entity is outside NLRB jurisdiction, the NLRB role is null.

Even if an employer falls within NLRB jurisdiction, it need only bargain with a union when employees of the covered enterprise choose, by majority support, to be represented by a union.[202] The NLRB only holds an election when asked; it cannot act independently.[203] Before the Board commences an election process, an "employee, individual, or group of employees acting on behalf of employees . . . a labor organization acting on behalf of employees . . . or an employer [if] one or more individuals or labor organizations have presented to it a claim to be recognized as the employees' representative" must file a petition with the regional office of the NLRB.[204]

Seeking an election from the Board is challenging. To start the election process, the employees seeking the election must show "support for the [election] petition from at least 30% of employees."[205] Although only 30% support is needed to petition for an election, many organizers wait to petition for an election until there is clear majority support.[206] This step alone is often protracted, contentious, and the

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Sch., 675 A.2d 1155, 1171 (N.J. Super. Ct. App. Div. 1996), *aff'd as modified sub nom.* S. Jersey Cath. Sch. Tchrs. Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709 (1997).

200 Gaul, *supra* note 18, at 1517 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937)).

201 *See Jurisdictional Standards*, *supra* note 90 (detailing the minimum level of interstate commerce requirements).

202 29 U.S.C. § 159(a).

203 *Health Care Law Under the NLRA*, *supra* note 44, at 1 (citing 29 U.S.C. § 159(c)(1)(B)).

204 *Id.*

205 *Conduct Elections*, Nat'l Lab. Rels. Board, https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections#:~:text=Please%20contact%20an%20information%20officer,at%20least%2030%25%20of%20employees (last visited July 18, 2022).

206 *See* William E. Fulmer, *Step by Step Through a Union Campaign*, Harv. Bus. Rev., July-Aug. 1981, at 94, 94–95.

start and unsuccessful end of the organizing.[207]

If workers do access the NLRB election process, the employer remains uninvolved. Union organizing and union elections, at least initially, do not directly concern the employer.[208] These are between private individuals (workers) and a third-party union. Moreover, just as the Board cannot alone initiate an election procedure, the Board cannot alone initiate charges for unfair labor practices.[209] The government becomes involved only once an individual brings a charge to the Board.[210]

As for remedial power, the Board's authorized remedies are few and far between.[211] For example, if an employer refuses to bargain in good faith, a union may file unfair labor practice charges with the NLRB.[212] If the Board finds that there was in fact an unfair labor practice (like failing to bargain in good faith, discharge because of union support, etc.), the Board can issue a "cease and desist" order and/or an order to take affirmative action such as "reinstatement of employees with or without back pay."[213] The Board cannot order punitive damages.[214] Moreover, the delays in Board proceedings have made even the limited remedies of reinstatement and back pay functionally "insufficient, costly, and capable of chilling worker activity."[215]

The National Labor Relations Act does not compel employers or unions to agree to any conditions or contract.[216] The Board has no power to compel agreement because the "government cannot compel

207 *See* Robert Iafolla & Bruce Rolfsen, *Punching In: Pandemic Union Election Surge Hits Trump-Era Rules*, Bloomberg L. Daily Lab. Rep. (July 18, 2022), https://news.bloomberglaw.com/daily-labor-report/punching-in-pandemic-union-election-surge-hits-trump-era-rules-28; Alana Semuels, *Some Companies Will Do Just About Anything to Stop Workers from Unionizing*, Time: The Future of Work (Oct. 13, 2022), https://time.com/6221176/worker-strikes-employers-unions/.

208 *See* Daniel T. Paxton, *To Solve It Aright: Rerum Novarum and New Jersey's Answer to Catholic Bishop of Chicago*, 2017 BYU Educ. & L.J. 219, 244–45 (2017).

209 *See Investigate Charges*, Nat'l Lab. Rels. Board, https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges (last visited Mar. 29, 2023) (discussing the process of initiating unfair labor practice charges).

210 *Id.*

211 *See* 29 U.S.C. § 160.

212 29 U.S.C. § 158.

213 29 U.S.C. § 160. *See also* Carroll, *supra* note 189, at 31.

214 *See Careful! There Are Limits to the Act's Protections*, Know Your Rts: A Publ'n to Educate, Inform, and Assist the Pub. Concerning Workplace Issues (NLRB Region 19, Seattle, Wash.), Spring 2007, at 3.

215 Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 Cardozo L. Rev. 1455, 1469–70 (2016).

216 *See* Cath. High Sch. Ass'n of Archdiocese of N.Y. v. Culvert, 753 F.2d 1161, 1167 (2d Cir. 1985).

the parties to agree on specific terms," nor to agree whatsoever.[217] The Act does not regulate the substantive terms of a collective bargaining agreement: "agreement, if reached, is voluntary."[218] The Board has no power to impose terms of agreement to remedy bad faith bargaining or other unfair labor practices; "the only remedy for bargaining in bad faith is an order to return to bargaining."[219] Parties fail to bargain, so the Board orders them to bargain. The parties fail to bargain again, so the Boards orders them to bargain again. If this remedial power sounds circular and weak, that is because it is. The Board's remedial power is further limited by the fact that it is not self-enforcing. If the Board finds an unfair labor practice, the Board "may order the employer to return to the bargaining table, but . . . the NLRB must petition a federal appellate court for an order of enforcement."[220] The Board has no independent enforcement authority.[221]

In general, Board jurisdiction does not involve "continuing or systematic monitoring," and does not involve "monitoring the religious aspects of [an organization's] activities at all."[222] It does not "create the reality or the appearance of the government's supervising or collaborating with the Church."[223] The NLRB role is limited: it acts only when it is sought out, and even when it acts, the NLRA severely constrains the role it can play.

The Free Exercise Clause of the First Amendment protects a religious organization's right to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[224] The Establishment Clause prohibits state establishment of religion, as "interpreted by 'reference to historical practices and understandings.'"[225] When the NLRB exercises jurisdiction over a

217 *Id.*

218 Carroll, *supra* note 189, at 33–34.

219 *Id.*

220 Gaul, *supra* note 18, at 1517–18 (citing 29 U.S.C. § 160(e)).

221 29 U.S.C. § 160(e).

222 NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1304 (9th Cir. 1991). *See also generally supra* Section I. A. National Labor Relations Act.

223 *See, e.g.*, *id.*

224 Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

225 Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 23 (U.S. June 27, 2022) (citations omitted). The *Bremerton School District* opinion overruled *Lemon*, which held that the Establishment Clause prohibits state action that (1) has a non-secular purpose, (2) has a primary effect that advances or inhibits religion, or (3) excessively entangles government with religion. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

religiously affiliated hospital, its scope of influence and choice of action is limited. The Board cannot mandate agreement. Accordingly, the Board cannot mandate any sort of internal religious governing decisions. The Board cannot independently inquire into employer action. As such, the Board has limited interaction with the employer. The statutory limitations on the NLRB ensure that the Board remains within the confines of the First Amendment.

B. Unfair Labor Practices

With the relevant statutory framework in mind, the ensuing subsections deal with particular objections to NLRB jurisdiction over religious entities. These subsections look at the particular role the Board plays in various moments and underlie the conclusion that the NLRB can, and does, work within the limits of the First Amendment.

As the statute demands, when an unfair labor practice ("ULP") charge is brought against a religiously affiliated hospital employer, the NLRB investigates to see if there is "sufficient evidence to support the charge."[226] If there is sufficient evidence, the Board works to "facilitate a settlement between the parties" and, if necessary, holds a hearing to determine the merits of the charge.[227] Whether a ULP charge and investigation threatens excessive government entanglement with religion is best illustrated by examples. This Section proceeds in two parts centered on such examples: first, analyzing an example of an NLRB investigation of an unfair labor practice charge, and second, considering strikes and other concerted activity.

1. NLRB Investigation

Consider the following example: A worker, union, or group of workers brings a charge that a religiously affiliated hospital employer committed an unfair labor practice by firing a worker for discussing wages with his coworkers. Discussing wages is protected by the NLRA as collective action for mutual aid or protection.[228] Firing a worker for collective action taken for their mutual aid or protection is an unfair labor practice; as such, firing a worker for discussing wages with his

226 *See Investigate Charges*, *supra* note 209.

227 *Id.*

228 *Your Right to Discuss Wages*, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/your-rights-to-discuss-wages (last visited July 18, 2022).

coworkers would be an unfair labor practice. In response, the religious hospital employer contends that it did not fire him for his wage discussion. Rather, the hospital claims it fired him because he violated some religious tenet. At this point, the NLRB must determine the merits of the charge.

The constitutional infirmity should already be clear. If the religious employer's firing of the worker is "labeled as [an] unfair labor practice," but the activity is "said to be mandated by religious creed," the Board is in a position to impermissibly question the legitimacy of religious belief.[229] This Board assessment of religious doctrine would cause the Board—a government agency—to excessively entangle itself with religious doctrine and questions.[230] Government excessive entanglement with religion, however, violates the Establishment Clause of the First Amendment.[231]

To put it simply, the constitutional argument is that ULP charges put employer motives in the purview of government investigation. The argument continues that if the government can assess whether religious motivations and beliefs are legitimate, it is intruding on religious freedom. A court assessing government entanglement with a religious organization will ask: Does the government action excessively entangle government with religion?[232] The specific question

229 Tressler Lutheran Home for Child. v. NLRB, 677 F.2d 302, 305 (3d Cir. 1982) (citing NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 503 (1979)). *See also* Carroll, *supra* note 189, at 31 (citing Universidad Cent. de Bayamon v. NLRB, 793 F.2d 383 (1st Cir. 1985)) ("In the First Circuit's opinion in Bayamon, the court theorized that a professor might file a ULP charge over some job action claiming that the university had an anti-union animus while the university might claim its actions were based on religious reasons.").

230 *See generally* NLRB v. Cath. Bishop of Chi., 440 U.S. 490 (1979).

231 *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). In *Kennedy v. Bremerton School District*, the Supreme Court held that the Establishment Clause must be "interpreted by reference to historical practices and understandings." Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (citations omitted). While the *Bremerton School District* Court explicitly overturned the *Lemon* endorsement test, the Court failed to address the excessive entanglement test. While the continued viability of this test remains to be seen, *Bremerton School District* did not dispose of it; the *Bremerton* decision dealt with the endorsement test alone. The Court specifically held that "[i]n place of Lemon *and the endorsement test*, this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id.* (emphasis added) (citations omitted). *See also id.* (Sotomayor, J., dissenting) ("the Court rejects longstanding concerns surrounding government *endorsement of religion* and replaces the standard for reviewing such questions with a new 'history and tradition' test.") (emphasis added).

232 *Lemon*, 403 U.S. at 612–13.

here is: Do government ULP investigations, which allegedly allow for the questioning of a religious employer's religious beliefs, excessively entangle the Board with religion?

The concern of excessive entanglement, on its face, is justified. If the NLRB inquires into employers' reasons for taking a given employment action, it seems clear that the NLRB may have occasion to inquire into a religious reason for an employment action. The NLRB, a government agency, inquiring into a religious employer's religious reasons for their actions intuitively sounds like a problem. However, consider how ULP charges are actually brought to the Board, investigated, and adjudicated.

The Board's authority to investigate and adjudicate ULPs arises under Section 10 of the Act.[233] Section 10 authorizes the Board to receive ULP charges, to investigate, to issue complaints, and to hold trials.[234] To reiterate, this only happens when someone brings a charge to the Board. The Board cannot alone initiate an action. If the Board finds a ULP, it can issue a cease-and-desist order and/or it can order "reinstatement of employees with or without back pay."[235] If the employee was fired for cause, however, the Board does not have the authority to require reinstatement or back pay.[236]

Consider the example that started this subsection. If the NLRB questioned the "correctness" of the religious doctrine, First Amendment issues would abound. However, the Supreme Court has approved a methodology for resolving these "dual motive" cases that protects dismissal for cause and prevents intrusion into the employer's religious freedom.[237] In *NLRB v. Transportation Management Corp*, the Court held that in a dual motive case, the NLRB bears the burden of first showing that the employee's discussion of wages or other union support was "at least a factor motivating" the employer's adverse employment action.[238] Upon that showing, the employer can then show that its adverse employment action was motivated by "cause," something outside of the worker's pro-union activity.[239] Violating a religious doctrine would qualify. A religious employer would "not have to explain or defend its

233 *See* 29 U.S.C. § 160.
234 *See id.*
235 *Id.*
236 *Id.* ("No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.").
237 *See* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393 (1983). *See also* Carroll, *supra* note 189, at 31–32.
238 Carroll, *supra* note 189, at 31–32 (citing *Transp. Mgmt. Corp.*, 462 U.S. at 401–04).
239 *Id.*

doctrine but simply show that it acted pursuant" to it.[240] The Board need not inquire whether the religious reason is *correct*, merely whether the religious reason was the motivation.

The Board is expert at considering sincerity in the context of unfair labor practices. Moreover, the Board and courts regularly consider sincerity in the context of religious belief without fanfare and without First Amendment problems.[241] As one commentator noted: "If courts are competent to determine whether a conscientious objector's religious faith is genuine, it follows that they are also competent to determine whether administrators at a [religiously affiliated hospital] decided to terminate [a non-ministerial employee] for bona fide" reasons.[242] Bona fide reasons, in this case, merely mean reasons not motivated by union animus. Religious doctrine is bona fide. The Board will thus end its inquiry there, preventing excessive entanglement between the Board and religion.

2. Strikes and Other Concerted Activity

A separate-but-related constitutional concern stems from worker strikes and other concerted activity. Strikes are when state compulsion is strongest: Employers are prohibited from firing workers who are expressly disobeying or protesting them.[243] If an employer cannot fire a worker for striking, what happens when workers strike over religious duties?

Here, the broad ministerial exception serves to protect religious hospital employers.[244] The ministerial exception is a judicially created constitutional exception that "holds that religious organizations must be free from state interference when selecting their ministers."[245] The ministerial exception protects religious employers' decision to hire or

240 *Id. See also* Universidad Cent. de Bayamon v. NLRB, 793 F.2d 383 (1st Cir. 1985) (Torruella, J., dissenting).

241 *See, e.g.*, Garden, *supra* note 20, at 122–23 (citing Holt v. Hobbs, 135 S. Ct. 853, 862 (2015)); Welsh v. U.S., 398 U.S. 335, 340 (1970); U.S. v. Seeger, 380 U.S. 163, 163 (1965)).

242 Gaul, *supra* note 18, at 1531. *See also* Susan J. Stabile, *Blame It on Catholic Bishop: The Question of NLRB Jurisdiction over Religious Colleges and Universities*, 39 Pepp. L. Rev. 1317, 1336 (2013).

243 *Right to Strike and Picket*, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/right-to-strike-and-picket (last visited Mar. 29, 2023).

244 Discussed in depth *infra* Part III.

245 Casper, *supra* note 194, at 13.

fire a ministerial employee for any reason or no reason at all, without government intervention.[246] Ministerial employees, thanks to the ministerial exception, lack protection from employment discrimination laws.[247] Importing the ministerial exception to the realm of federal labor law means that the government cannot prohibit a religious employer from firing a ministerial employee for concerted activity, even if it would otherwise be protected by the NLRA.

Ministerial employees number in the hundreds of thousands.[248] Courts determine whether a worker is a ministerial employee based on a functional test that asks "at bottom, . . . what an employee does."[249] Consider an example: A religious hospital employer requires some subtype of medical worker to lead morning prayers for patients on their wing of the hospital. The workers, thinking the policy takes them away from their primary medical duties, initiate a strike to change the policy. Here, those workers have religious duties. As such, those workers are likely going to be considered ministerial employees. As ministerial employees, they *are* in fact outside of NLRB coverage. As ministerial employees, they lack protection from the NLRA and therefore can be fired without question and without raising winnable unfair labor practice charges.

To answer the question posed above (what happens when workers strike over religious duties?): it is up to the religious employer. Workers with religious duties are likely ministerial employees, and ministerial employees are not protected by the NLRA. Workers that fall outside the category of ministers under the law (janitorial staff, nurses, x-ray technicians, and so on), by definition, do not face this problem. While strikes raise First Amendment questions, the ministerial exception ensures that the employer's religious freedom remains protected, even while non-ministerial employees have the protection of the NLRA.

Even outside the broad ministerial exception, employer religious freedom need not be threatened by strikes and other concerted activity. Consider another example: A religiously affiliated hospital follows laws of kashrut (religious dietary laws). The hospital cafeteria serves only kosher food and outside food is prohibited. After repeatedly being told that he could not bring his home-cooked food to the hospital to eat

246 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

247 *See generally id.*

248 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2082 (2020) (Sotomayor, J., dissenting).

249 *Id.* at 2064 (majority opinion).

for lunch, a disgruntled hospital cafeteria worker organizes a walk-out with some coworkers to protest the policy. In this example, the religious hospital employer's kashrut laws are clearly tied to religion. If covered by the NLRA, however, the worker's walk-out over the policy would be protected. In other words, the employer could not fire him for that concerted action.

Although the employer cannot fire that disgruntled worker for his concerted activity, the employer's hands are not nearly as tied as they seem. The NLRA does not prevent an employer from firing an employee for cause.[250] If the worker in this example violated the rule and tried to bring his food into the hospital, for example, the employer would have cause to fire him. Workers, in other words, are protected in protesting the rule, but they lose protection if they violate it.[251] Moreover, the concern is ameliorated by the weak protections afforded to workers under the NLRA and the robust economic weapons that remain available to employers. Worker tools like work slowdowns or intermittent strikes are unprotected.[252] Striking workers can be permanently replaced.[253] That not only discourages strikes, but it also means that if workers strike over this topic, the religious employer can replace them with workers who respect the policy. The religious hospital employer never need cede its position, and it has the economic weapons (permanent replacements) to ensure that it is not hurt in the process. In practice, the NLRA is not nearly as protective of workers, or as restrictive on employers, as this example fears. Between the ministerial exception and the statutory limits on worker concerted activity, religious employers' religious freedom is protected.

250 29 U.S.C. § 160 ("No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.").

251 It is worth noting here that an employer cannot fire a worker for violation of a rule out of animus for his pro-union activity. 29 U.S.C. § 158(a)(1). If violation of this rule uniformly gives rise to for-cause termination, however, thus demonstrating that it was not discriminatorily applied to union supporters or otherwise out of animus, the employer would not be prevented from terminating the employee.

252 *See* Walmart Stores, Inc., 368 N.L.R.B. 24 (2019) (citing Int'l Union v. Wis. Emp. Re. Bd., 336 U.S. 245 (1949)) ("The Board has consistently held since the Supreme Court's decision in [Briggs & Stratton], that intermittent strikes are unprotected by the Act. In other words, intermittent strikes are not unlawful, but employers do not contravene the Act by disciplining participants in such strikes.").

253 NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

C. Mandatory Subjects of Bargaining

The Board's determination of mandatory subjects of bargaining has also raised constitutional concerns.[254] "Terms and conditions of employment" are mandatory subjects of bargaining.[255] That means employers and unions in collective bargaining relationships are required to bargain over certain matters, specifically issues concerning rates of pay; wages; hours of employment; bonuses; safety practices; seniority; procedures for discharge, layoff, recall, and discipline; and more.[256] In *Catholic Bishop*, the Court feared that "nearly everything that goes on in the schools," including religious matters, may be considered a term and condition of employment.[257] If a religious matter is a term of employment, it will, consequently, be subject to mandatory bargaining.

It is easy to imagine the constitutional infirmities here. Consider a religiously affiliated hospital that requires its healthcare workers offer religious services to patients. Offering spiritual as well as physical healing is central to the hospital's religious beliefs; giving patients the option for religious services is crucial to its religious practice. The argument posits that if this requirement is considered a term or condition of employment, the NLRA's mandatory bargaining would require the religiously affiliated hospital to bargain over this religious practice. The intrusion of government by mandating such bargaining is not hard to see. Forcing a religious organization to bargain over religious creed, doctrine, or practice clearly intrudes on freedom of religion.

As above, this concern seems reasonable on its face. If religiously affiliated hospital employers did in fact have to negotiate over religious practice or creed, that seems to clearly pose insurmountable First Amendment challenges. Fortunately, that is not the case. Management rights clauses are a common feature of collective bargaining.[258] As

254 *See* Garden, *supra* note 20, at 114–15 (citing NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 502–03 (1979)).

255 Cath. Bishop of Chi., 440 at 502–03 (citing 29 U.S.C. § 158(d)).

256 *Basic Guide to the National Labor Relations Act*, Nat'l. Lab. Rel. Board 22 (1997), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf [hereinafter *Basic Guide*].

257 *Cath. Bishop of Chi.*, 440 U.S. at 503.

258 *See generally* U.S. Dep't of Lab., *Major Collective Bargaining Agreements: Management Rights and Union Management Cooperation* 1 (Apr. 1966), https://fraser.stlouisfed.org/files/docs/publications/bls/bls_1425-5_1966.pdf; Kathryn Siegel, *NLRB Requires Specificity in Management-Rights Clauses*, Littler (July 28, 2016), https://www.littler.com/publication-press/publication/nlrb-requires-specificity-management-rights-clauses#:~:text=When%20drafting%20a%20collective%20bargaining,the%20union%20about%20that%20action (explaining that "[w]

discussed more in depth below, management rights clauses preserve the rights of management to make unilateral decisions over enumerated managerial prerogatives.[259] In the religiously affiliated hospital setting, management rights clauses can insulate religious questions from bargaining in complete accord with the requirements of the NLRA. In other words, religion is not a mandatory subject of bargaining and can be avoided by religious employers.

In *Federation of Teachers v. Hill-Murray High School*, the Minnesota high court held that "negotiable terms and conditions of employment are limited to exclude matters of inherent managerial policy . . . [and, accordingly,] matters of religious doctrine and practice at a religiously affiliated school are intrinsically inherent matters of managerial policy and therefore nonnegotiable."[260] Although in the context of a religious school and under state law, this principle applies with equal force to religiously affiliated hospitals operating under the NLRA. Mandatory subjects of bargaining exclude inherent managerial policy.[261] Inherent managerial policy or decisions are generally "matters that relate to the nature and direction" of the employer.[262] While an employer and union may bargain over these topics, the NLRA does not mandate it and the parties "can refuse to discuss them without fear of an unfair labor practice charge."[263] Religious creed and religious practice is part of a religiously affiliated hospital's inherent managerial policy. As such, mandatory subjects of bargaining exclude religious creed and questions. To put a finer point on this: although religious hospitals under NLRB jurisdiction must bargain over mandatory subjects of bargaining, religious hospitals need not bargain over religious practice.

In addition, and importantly, the Act merely requires bargaining in good faith. The duty of good faith bargaining includes "the mutual

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hen drafting a collective bargaining agreement, employers often insist on a management-rights clause.").

259 *See infra* Part II, Section D.

260 Hill-Murray Fed'n of Tchrs. v. Hill-Murray High Sch., 487 N.W.2d 857, 866 (Minn. 1992) (citations omitted).

261 *See Basic Guide*, *supra* note 256, at 24.

262 *Subjects of Bargaining*, United Steel Workers (2015), https://m.usw.org/workplaces/public-sector/2015-conference-material/5-Subjects-of-Bargaining.pdf [hereinafter *Subjects of Bargaining*]; *see also Basic Guide*, *supra* note 256, at 24 ("Certain managerial decisions such as subcontracting, relocation, and other operational changes may not be mandatory subjects of bargaining, even though they affect employees' job security and working conditions. The issue of whether these decisions are mandatory subjects of bargaining depends on the employer's reasons for taking action.").

263 *Subjects of Bargaining*, *supra* note 262, at 2.

obligation of the employer and [union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," as well as "the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached . . ."[264] But, the Act imposes no obligation on either party to "agree to a proposal or require the making of a concession . . ."[265] Additionally, "the Act does not regulate the substantive terms governing wages, hours, and working conditions because agreement, if reached, is voluntary."[266]

The NLRA "never requires an employer to accept a bargaining proposal from a union, much less one that conflicts with the employer's religious commitments."[267] Not only does the law not require the employer to agree to anything, but "about 50% of the time they don't[.]"[268] Employers regularly—and legally—refuse union requests and demands. The NLRA allows an employer who has reached an impasse in the bargaining process to "unilaterally implement its final offer."[269] Because the NLRA imposes a duty to bargain in good faith but does not compel agreement on any given term of employment, and because the state's role is to bring the parties to the table but then "leave them alone[,]"[270] there is no excessive entanglement created by the duty to bargain and mandatory subjects of bargaining therein.[271] Religion is not a mandatory subject of bargaining and a religious employer need never accept a union proposition. Together, this ensures that religious employers maintain control over religious doctrine and practice, thereby protecting First Amendment rights.

264 29 U.S.C. § 158(d).

265 *Id.*

266 Carroll, *supra* note 189, at 33–34 (citing NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 401–02 (1952)).

267 Garden, *supra* note 20, at 119.

268 Michael M. Oswalt, *Alt-Bargaining*, 82 L. & Contemp. Probs. 89, 92 (2019) (citing Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and Employee Free Choice Act*, 70 La. L. Rev. 47, 54–55 (2009)).

269 Garden, *supra* note 20, at 119.

270 Cath. High Sch. Ass'n of Archdiocese of N.Y. v. Culvert, 753 F.2d 1161, 1167 (2d Cir. 1985).

271 *See* Marisela Pena, *The "Catholic Union" Dichotomy: Are the Catholic Church's First Amendment Rights and the Collective Bargaining Rights of Catholic Church Employees Mutually Exclusive?*, 42 Hous. L. Rev. 165, 189 (2005) (citing Cath. High Sch. Ass'n of Archdiocese of N.Y. v. Culvert, 753 F.2d 1161, 1167 (2d Cir. 1985)).

D. Managerial Prerogatives

Looking at the Free Exercise Clause, courts and commentators have expressed concern about the "long-term effect of forcing religious leaders to share authority with a secular union."[272] This idea echoes the concern that interference with church management prerogatives undermines religious freedom.[273] If religious doctrine mandates sole power reside in one central authority, for example, sharing that authority with a union of workers would violate the religious organization's religious freedom according to this argument.[274] This idea of management prerogatives has at times been sculpted as a Free Exercise argument,[275] although often it is left ambiguous as to whether it falls under the Free Exercise Clause or the Establishment Clause.[276]

Intrusion into a religious employer's managerial prerogatives implicates the church autonomy doctrine.[277] The church autonomy doctrine holds that a church's "religious doctrine, polity, and practice" must be free from state interference.[278] According to this doctrine, NLRB intervention could interfere with religious organizations' internal governance and employment relations. That interference, in turn, could undermine church autonomy and violate the employer's First Amendment rights.

That employers are never required to accept a bargaining proposal from a union and can "unilaterally implement its [own] final

272 *See, e.g.*, Laycock, *supra* note 98, at 1391–92.

273 *See* NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 496 (1979) ("The [circuit] court held that interference with management prerogatives, found acceptable in an ordinary commercial setting, was not acceptable in an area protected by the First Amendment. 'The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools.'") (citations omitted). *See also* Gaul, *supra* note 18, at 1529 ("At the crux of the court's excessive entanglement rationale was its fear that the mere prospect of NLRB oversight would 'chill' the school's capacity to manage ecclesiastical functions that clearly were beyond the secular government's competence.").

274 *See* Carroll, *supra* note 189, at 30 (quoting Cath. Bishop of Chi. v. NLRB, 559 F.2d 1112, 1123 (7th Cir. 1977)) ("The Board's certification of a winner, however, was described as problematic by the Seventh Circuit in the Catholic Bishop case. It 'necessarily alters and impinges upon the religious character of all parochial schools [because] [n]o longer would the bishop be the sole repository of authority as required by church law, Canon 1381.'").

275 *See, e.g.*, Laycock, *supra* note 98, at 1408.

276 *See, e.g.*, NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 496 (1979).

277 *See generally* Laycock, *supra* note 98; Brady, *supra* note 105.

278 Jones v. Wolf, 443 U.S. 595, 603 (1979).

offer,"[279] illustrates not only why mandatory subjects of bargaining pose no constitutional problem, but also why employers' managerial prerogatives remain safe from government intrusion. This bears repeating: a religious employer never need accept a union's bargaining proposal. A religious employer can *unilaterally* implement its own proposal. Moreover, a religiously affiliated hospital can insist on a "management rights clause which reserves exclusive power over certain carefully enumerated facets of [hospital] life that the [hospital] feels it needs to protect its religious mission."[280] Consider these two facts together: (1) an employer can unilaterally implement its own final proposal, and (2) that proposal can include a management rights clause. With these powers intact, managerial prerogatives remain firmly in employer control.

Management rights clauses are a common practice in unionized religiously affiliated hospitals today.[281] So, too, is this common in parochial schools that independently recognize unions and pursue collectively bargained agreements.[282] Management rights clauses "preserve the autonomy of [management] over matters central to the religious mission of the institution while still giving employees access to a formal bargaining scheme."[283] The existence and success of unionized religiously affiliated hospitals and other religious institutions—unionized

279 Garden, *supra* note 20, at 118–19.

280 Carroll, *supra* note 189, at 35.

281 *See, e.g.*, *Collective Bargaining Agreement Between Mercy Hospital of Buffalo and Communications Workers of Am., AFL-CIO*, CWA, (2022), https://cwadl.org/sites/default/files/2022-09/2022.09.09_ch_cwa_contract_final.pdf; *Collective Bargaining Agreement Between Lieberman Skilled Nursing Facility LLC and Service Emps. Int'l Union Loc. 73, CTW*, SEIU73, (Aug. 1, 2021 – Aug. 30, 2022), https://seiu73.org/wp-content/uploads/2022/02/32721747v1-Final-CBA-SEIU-73-Lieberman-execution-draft-002.pdf. This is also a common practice in unionized non-hospital religious organizations. *See Collective Bargaining Agreement between SEIU 775 and Cath. Cmty. Servs.*, SEIU 775, (July 1, 2019 – June 30, 2021), https://seiu775.org/wp-content/uploads/2020/11/CCS-SEIU-775-2019-2021-CBA-FINAL-1.pdf; *Agreement Between Trinity Wash. Univ. and Servs. Emps. Int'l Union, Loc. 500, CtW*, Trinity Wash. Univ., (Dec. 13, 2021 – June 30, 2024), https://discover.trinitydc.edu/academic-affairs/wp-content/uploads/sites/14/2022/01/Trinity-Ratified-CBA-2021-to-2024-FINAL.pdf.

282 *See* Vareika, *supra* note 121, at 2089; *see also* Pushaw, Jr., *supra* note 99, at 145 ("[T]he National Association of Catholic School Teachers, which represents many unions, insists on inclusion in bargaining agreements of broad 'management rights' clauses guaranteeing the hierarchy's freedom to operate schools according to Catholic principles and removing all matters of faith from arbitration and the unfair labor practice process.").

283 Vareika, *supra* note 121, at 2089.

institutions that maintain religious managerial prerogatives—"refute[s] the myths that bargaining inevitably causes spiritual and economic chaos and that enforcement of labor acts entails insoluble constitutional difficulties."[284] Union representation, collective bargaining, management rights clauses, and robust protection of managerial prerogatives can all go hand in hand.

E. Altering the Employment Relationship

Unions' power to alter the employment relationship and pervade a previously religious environment also poses a threat to a religious organization's free exercise of religion. Exploring this concern, Professor Kathleen A. Brady argues that the NLRA "presumes and perpetuates an adversarial relationship between workers and management."[285] In contrast, the Catholic Church (or, insert any other religion and its teachings here)[286] teaches that the labor-management relationship "should be based upon mutual concern, cooperation and willingness to forgive and seek reconciliation."[287] Because these theories of the labor-management relationship—one governmental and one religious—are inherently contradictory, NLRB jurisdiction forces a religious employer to forgo its religious views of this relationship.

Brady's theory can be seen in practice in Buffalo, New York, where a Catholic hospital, Mercy Hospital, rebuffed the unionization efforts of its workers.[288] There, Mercy management explained its "efforts to counter the threat of unionization" by saying that "unions placed employees and management in an adversarial relationship [that threatened] their carefully nurtured apostolic mission."[289] At Mercy, Brady's concern came to fruition.

Brady's argument continues that the "Church rejects an essentially adversarial understanding of labor-management relations and a model for labor peace that is built upon the balance of power rather than a spirit of unity."[290] Because of this conflicting understanding of the labor-management relationship and principle through which to

284 Pushaw, Jr., *supra* note 99, at 145.
285 *See* Brady, *supra* note 105, at 80.
286 Brady considered Catholic institutions in particular, but her argument may transcend any particular religion.
287 Brady, *supra* note 105, at 156.
288 *See* Risse, *supra* note 159, at 555 (citing Kochery & Strauss, *supra* note 70, at 255–73).
289 *Id.*
290 Brady, *supra* note 105, at 156.

achieve labor peace, enforcing the NLRA's statutory scheme against religious institutions would undermine the religious institution's free exercise of religion.

This concern is well taken but overstated. NLRB jurisdiction does not displace a religious employer's ability to shape its environment and relationships. Unionized religious organizations have long maintained their particular type of labor-management relationship. As discussed *supra*, in 2009 the United States Conference of Catholic Bishops published a document with guidance for Catholic hospitals and unions.[291] The document explored religious teachings, recommended steps that employers could take to fulfill their religious beliefs, and detailed what a labor-management relationship "based on mutual respect, equal access to truthful communications, and freedom from coercion" could look like.[292] The guidelines also recognize that NLRB jurisdiction is permissible.[293] These Catholic guidelines do not stand alone; examples of religious employers utilizing religious teachings to shape their labor-management relationship abound.[294] These examples demonstrate that an NLRB assertion of jurisdiction over a religious employer—a religiously affiliated hospital, for example—"does not prevent the institution from developing and modeling" an "approach to labor relations" that accords with its own religion.[295]

III. Building Power Among Workers of Religiously Affiliated Hospitals Today

The law is on the side of labor. Workers at religiously affiliated hospitals are protected by the NLRA: they can take concerted action for their mutual protection, they can organize unions, they can strike. Workers at religiously affiliated hospitals can build solidarity and power, all within the protection of federal labor law. That they are protected on paper, however, does not mean that working within the confines of the

291 *See Respecting the Just Rights of Workers*, *supra* note 179.

292 *Id.* at 8.

293 *See supra* Part I, Section C, Subsection 2 (citing *Respecting the Just Rights of Workers*, *supra* note 179).

294 *See, e.g.*, Sam Baltimore, *Jews United for Justice Unionizes with NPEU*, Jews United for Just. (Dec. 5, 2019), https://jufj.org/jufj-union/; *JOIN for Justice Staff Union Receives Voluntary Recognition*, Nonprofit Pro. Emps. Union (Sept. 30, 2020), https://npeu.org/news/2020/9/30/join-for-justice-staff-union-receives-voluntary-recognition#:~:text=The%20union%20offers%20a%20new,to%20achieve%20positive%20social%20change.

295 Stabile, *supra* note 242, at 1343.

NLRA and Board jurisdiction is the most prudential path forward.

Though the law is on the side of labor, workers at religiously affiliated hospitals should not rely on NLRB jurisdiction to build worker power. The makeup of the federal bench, the anti-labor and pro-institutionalized religious freedom bent of the bench and federal jurisprudence, as well as the regular policy oscillations of the NLRB, translate to instability for worker power and protections. These factors counsel against workers at religiously affiliated hospitals relying on NLRB jurisdiction.

Across every level of the federal judiciary, judges appointed by President Trump have been more conservative and more numerous than both their Democratic and Republican-appointed predecessors.[296] Moreover, in the first two decades of the twenty-first century, the Supreme Court has repeatedly ruled against organized labor on several fronts.[297] Organized labor has also lost in the lower federal courts as the federal bench has grown increasingly anti-union.[298]

Although hostility to union success has flourished in the federal courts, sympathy towards religious institutions' religious freedom arguments has grown. The success of institutionalized religious freedom in the courts spans across topics, reaching religious school funding, the application of anti-discrimination laws, and more.[299] With the introduction of justices nominated by President Trump, the current Supreme Court is positioned to be the Court most protective of institutional religious freedom in modern history.[300]

296 John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, Pew Rsch. Ctr. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ (analyzing the quantity of Trump judges); Li Zhou, *Study: Trump's Judicial Appointees are More Conservative than Those of Past Republican Presidents*, Vox (Jan. 25, 2019), https://www.vox.com/2019/1/25/18188541/trump-judges-mconnell-senate (analyzing how conservative Trump judges are).

297 *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

298 *See, e.g.*, Mulhall v. Unite Here Local 355, 667 F.3d 1211 (11th Cir. 2012). *See also generally* Celine McNicholas et al., *Unprecedented: The Trump NLRB's Attack on Workers' Rights*, Econ. Pol'y Inst. (Oct. 16, 2019), https://www.epi.org/publication/unprecedented-the-trump-nlrbs-attack-on-workers-rights/ (discussing the Trump NLRB's anti-worker bent).

299 *See* Robinson, *supra* note 15.

300 *See, e.g.*, Carson v. Makin, 142 S. Ct. 1987 (2022); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. Times (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html.

The growing success of the institutionalized Religion Clauses can be seen in the ever-expanding ministerial exception.[301] The ministerial exception not only serves to illustrate the arc of the modern Religion Clauses, but it also poses a direct threat to labor protections for workers at religiously affiliated hospitals. As stated briefly *supra*, the ministerial exception is a judicially created constitutional exception to employment discrimination laws.[302] As the Supreme Court has now twice held, once in 2012[303] and then reaffirming and broadening the exception in 2020,[304] the ministerial exception is an affirmative defense available to religious employers when a ministerial employee alleges discrimination in violation of federal law.[305] The ministerial exception precludes government inquiry into why a religious employer fired a ministerial employee; the "constitutional exception holds that religious organizations must be free from state interference when selecting their ministers."[306] The exception is a far-reaching hole in federal employment law. The definitions of both "religious institution" and "ministerial employee" are gaping,[307] resulting in ministerial employees—for legal purposes, at least—numbering in the hundreds of thousands.[308]

Although federal labor law purportedly protects workers at religiously affiliated hospitals, ministerial employees stand in a unique position: they lack NLRA protections. A necessary consequence of the ministerial exception is that the government cannot prevent a religious employer from firing a ministerial employee for their union activity. Although that activity would otherwise be protected by the NLRA, the ministerial exception allows a religious employer to fire its ministerial workers without any inquiry as to the reason why.

As it stands, nurses and other healthcare workers have not been categorized as ministerial employees. That, however, is subject to change. The definition of ministerial employees has been ever-expanding, and

301 *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Casper, *supra* note 194.

302 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

303 *See id*.

304 *See Morrissey-Berru*, 140 S. Ct. 2049.

305 *Hosanna-Tabor*, 565 U.S. at 195 n.4.

306 Casper, *supra* note 194, at 13.

307 The courts typically fail to even ask what counts as a religious institution. *See generally* Murray, *supra* note 96. Rather, courts simply accept employers' assertions without more. *See id*; *see also Morrissey-Berru*, 140 S. Ct. at 2064 (holding that determining whether a worker is a ministerial employee is a functional test that considers "at bottom, . . . what an employee does.").

308 *See Morrissey-Berru*, 140 S. Ct. at 2081–82 (Sotomayor, J., dissenting).

advocates have been successfully pushing for a broader and broader view.[309] The inclusion of healthcare workers within the category of ministerial employees would threaten the entire framework for NLRB jurisdiction and unionization within religiously affiliated hospitals. And even outside the definition of ministerial employees, the trend seen in ministerial exception cases demonstrates the bench's wariness about inquiring into religious employer's employment decisions. If healthcare workers become ministerial employees, NLRB jurisdiction is off limits. Even if healthcare workers remain, generally not as ministerial employees, the courts are showing their hand: institutional religious freedom is on the rise, no matter the cost to workers.

Outside of the court context, the shifting politics and policy preferences of the National Labor Relations Board threatens the stability of protection for workers at religiously affiliated hospitals.[310] Workers at religiously affiliated colleges and universities have faced the brunt of this instability.[311] In that context, workers went from having the protection of federal labor laws during the Obama Administration, to losing that protection during the Trump years, to potentially gaining that protection once again under President Biden.[312] Although this ping-pong effect has not manifested in the context of religious hospitals, the threat of such instability must be considered.

Rather than contend with this shifting and uncertain landscape, workers at religiously affiliated hospitals should build solidarity and power by working outside of NLRB jurisdiction. This Part will first discuss what organizing and harnessing power outside of NLRB jurisdiction looks like, including potential models for such an approach. From there,

309 *See generally id. See also* Cameron G. Kynes & David D. Leishman, *U.S. Supreme Court Broadens Ministerial Exemption to Employment Discrimination Claims*, McGuire Woods (July 10, 2020), https://www.mcguirewoods.com/client-resources/Alerts/2020/7/us-supreme-court-broadens-ministerial-exemption-employment-discrimination-claims (providing religious organizations with guidance on how to get more employees covered under the ministerial exception).

310 *See* Charlotte Garden, *Religious Accommodation at Work: Lessons from Labor Law*, 50 Conn. L. Rev. 855, 864 (2018) ("The NLRB has been routinely criticized for policy oscillation, a fact of life that is probably inevitable given the role of partisan political affiliation in filling Board seats and the fact that the text of the NLRA itself leaves considerable room for interpretation.").

311 *See National Labor Relations Act supra*, Section I(A).

312 *Compare* Pac. Lutheran Univ. & Serv. Emps. Int'l Union, Loc. 925, 361 N.L.R.B. 1404 (2014) *with* Bethany Coll., 369 N.L.R.B. No. 98 (June 10, 2020). *See also* Goldsmith, *supra* note 146 (explaining that "given the recent change in administration, and the likely uptick in organizing activity at educational institutions, this issue will continue to be litigated at the NLRB.").

this Part will turn to factors that make this approach likely to succeed in this historical moment and will address potential challenges therein.

A. Comprehensive Campaigns Outside the NLRB

Rather than rely on the traditional path to unionization through NLRB-run elections, workers at religiously affiliated hospitals should run "comprehensive campaigns"[313] to get employer hospitals to agree to remain neutral through organizing campaigns and to use "fast and fair private recognition procedure[s]."[314] This raises two important questions: (1) what is a comprehensive campaign, and (2) what is neutrality and a fast and fair recognition process?

Let's start at the end: What exactly should workers be seeking? What is neutrality and a "fast and fair private recognition procedure"?[315] Private recognition procedures—mechanisms through which employers and workers agree to recognize a majority-supported union[316]—can look like many different things. While the specifics may differ, all private recognition agreements set forth a code of conduct that both the union and employer must follow during an organizing campaign.[317] Neutrality agreements mandate employer neutrality to the question of whether workers should or should not unionize.[318] Such agreements are a common element of that code of conduct.[319] In addition to rules of conduct, the agreement sets forth the process through which the union—if it achieves majority support—will be recognized by the employer.[320] While this may include an NLRB election, it frequently includes private processes

313 Josh Eidelson, *Alt-Labor*, Am. Prospect (Jan. 29, 2013), https://prospect.org/notebook/alt-labor/.

314 Telephone Interview with Judy Scott, Gen. Couns., SEIU (Feb. 22, 2022).

315 *Id.*

316 *See* Aurelia Glass, *Voluntary Recognition of Unions is Increasingly Popular Among U.S. Employers*, Ctr. for Am. Progress, (Jan. 18, 2023), https://www.americanprogressaction.org/article/voluntary-recognition-of-unions-is-increasingly-popular-among-u-s-employers/.

317 *A Negotiator's Guide to Recognition Agreements*, UNISON (Mar. 2016), https://www.ilo.org/legacy/english/inwork/cb-policy-guide/newunisonnegotiatingrecogag.pdf.

318 *See* Glass, *supra* note 316.

319 As one possible source of language for such a neutrality agreement, the 2009 principles developed by unions and the USCCB states that "management agrees not to use traditional anti-union tactics or outside firms that specialize in such tactics and unions agree to refrain from publicly attacking Catholic health care organization." *Respecting the Just Rights of Workers*, *supra* note 179, at 1.

320 *A Negotiator's Guide to Recognition Agreements*, *supra* note 317.

outside of the NLRB altogether.[321] As Judy Scott, former General Counsel to the Service Employees International Union ("SEIU") and one of the developers of the private recognition procedure between the SEIU and Catholic Healthcare West, stated, the agreement is a way to set up "new rules that both parties agree to abide by."[322] As others have stated, it sets up ground rules and procedures that include an agreement by the employer to "forgo union-busting."[323]

One example of such an agreement is the SEIU private recognition procedure agreement with Catholic Healthcare West ("CHW"). That agreement stated that "both parties would not denigrate the mission of the other," it required that the union "organize on a positive tone," and it provided union organizers with access to hospital meeting rooms to meet with workers, among much else.[324] The agreement also stated that if and when the union filed for recognition, the hospital would not litigate or object to the bargaining unit, and the election would take place seven to ten days later.[325] Many private recognition procedures include agreements to utilize "card check," a process by which the employer recognizes a union as its employees' collective representative if a "majority of workers in a relevant unit sign authorization cards solicited in an open process by union organizers and other employees," and provide those "cards" to the employer.[326] Card check agreements replace elections with this alternative procedure.[327] Importantly, the SEIU and CHW agreement also included a private arbitrator, meaning any disputes over the enforcement of the agreement would go to the private arbitrator—not the NLRB—and the arbitrator could fashion a remedy.[328]

With this goal—employer neutrality and an agreed upon recognition process that works outside of NLRB purview—in mind, the question remains: How do workers get there? The answer is a comprehensive campaign. Analyzing unionization efforts at religiously affiliated colleges and universities, Professor Charlotte Garden noted:

> [U]nions' ability to convince employers to agree to remain neutral about the prospect of union organizing and to agree

321 *See, e.g.*, *Respecting the Just Rights of Workers*, *supra* note 179.
322 Telephone Interview with Judy Scott, *supra* note 314.
323 Eidelson, *supra* note 313.
324 Telephone Interview with Judy Scott, *supra* note 314.
325 *Id.*
326 Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 Harv. L. Rev. 655, 657 (2010).
327 *Id.*
328 Telephone Interview with Judy Scott, *supra* note 314.

> to alternative election procedures [is increasingly important]. Perhaps paradoxically, this means that the visibility of unions' work organizing instructors at [religiously affiliated colleges and universities] could increase rather than decrease, particularly on campuses where instructors and unions perceive that a robust publicity campaign might prompt an employer to agree to neutrality and an alternative election process. [329]

This astute observation is equally applicable in the context of religiously affiliated hospitals. Getting hospital employers to agree to private recognition procedures will require increased visibility of union organizing and a "robust publicity campaign."[330] Alt-labor provides a model for such a campaign. While the specific definition of "alt-labor" is hard to pin down,[331] it "incorporates 'traditional' tactics such as boycotts and pickets [with] . . . social movement strategies that involve broader swaths of the community, press attention and other forms of pressure on employers outside of traditional union pressure tactics."[332] The alt-labor approach has been utilized across industries—from agriculture to domestic work, college football, white collar Google work, and sex work, to name a few.[333]

Alt-labor's use of "social movement strategies"—harnessing community support and other extra-legal factors—is key for workers at religiously affiliated hospitals.[334] As discussed extensively *infra*, community support for hospital workers is high.[335] And together with

329 Garden, *supra* note 310, at 865.

330 *Id.*; *see also* Risse, *supra* note 159, at 515 (citing Sr. J. of the Cross, *The Catholicity of the Catholic hospital*, Hosp. Progr 31 (October 1950), 300–02); Risse, *supra* note 159 ("Catholic hospitals as well as nondenominational institutions were concerned about their public image.").

331 *See* Oswalt, *supra* note 268, at 89 ("The current trend is 'alt,' short for 'alternative-labor,' and invoked where unions or non-profits mobilize workers for better working conditions but not necessarily collective bargaining. As its name implies, the efforts have varied origins, tactics, and aims, making the category hard to define with specificity.").

332 Kati L. Griffith & Leslie C. Gates, *Milking Outdated Laws: Alt-Labor as a Litigation Catalyst*, 95 Chi.-Kent L. Rev. 245, 248 (2020).

333 Catherine L. Fisk, *Sustainable Alt-Labor*, 95 Chi.-Kent L. Rev. 7 at 7–9 (2020); *see, e.g.*, *id.* at 266–68. *See also* Valeriya Safronova, *Strippers Are Doing It for Themselves*, N.Y. Times (July 24, 2019), https://www.nytimes.com/2019/07/24/style/strip-clubs.html; Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 Cardozo L. Rev. 1627, 1642 (2017).

334 Griffith & Gates, *supra* note 332, at 248.

335 *See infra*, Part III, Section B, Subsection 1.

community support, ethical arguments for dignity and respect have power. As alt-labor has shown, moral arguments for worker justice can prevail.[336] And the weight of moral arguments is that much stronger when it comes to religious employers.[337] Workers at Catholic institutions, for example, have "invoked the long history of support for unions in Catholic teaching" to pressure religious employers to voluntarily recognize their unions; recognizing the union is the ethical thing to do.[338] Workers at religious organizations have a "unique advantage when it comes to union rights," [339] as many religious organizations and religions vocally promote pro-labor principles. We have examples of this, both within[340] and outside[341] the healthcare setting.

Graduate student workers at Jesuit colleges and universities have called on the religious mission and morals of their employers in comprehensive union campaigns.[342] In 2017 at Georgetown University,

336 *See, e.g.*, Kent Wong, *A New Labor Movement for a New Working Class: Unions, Worker Centers, and Immigrants*, 36 Berkeley J. Emp. & Lab. L. 205, 205–06 (2015) (explaining how domestic workers have aligned with "progressive religious leaders to bring a moral dimension to [their worker justice] crusade. The UFW forged a vision of social justice unionism that extended beyond just fighting for better wages to fighting for a cause, for human dignity and justice").

337 *See, e.g.*, Jane Slaughter, *Nurses Decry Multitude of Sins at Union-Busting Catholic Hospitals*, LaborNotes (July 15, 2010), https://labornotes.org/blogs/2010/07/nurses-decry-multitude-sins-union-busting-catholic-hospitals ("Father Norman Thomas, whose Sacred Heart church hosted a press conference for the unions and IWJ, said he was proud that 'people expect more of us because we're Catholic than they do of other hospitals. It saddens me when we don't measure up.'"). Shifting the narrative about unionization from solely money-focused to a larger ethical discussion has happened across industries. That ethical arguments are even stronger in the case of religious organizations only serves to benefit labor. *See, e.g.*, Oswalt, *supra* note 268, at 89, 95.

338 Littlefield, *supra* note 178.

339 *Id.* This quote is specific to Catholic institutions, but many religions promote principles in line with unionization. *See* Interfaith Worker Justice, *What Faith Groups Say About Worker Justice*, A.M. Fed'n Lab. & Cong. Indus. Orgs. (2011), https://www.aflcio.org/sites/default/files/2021-12/WFaithGSay2011%20%281%29.pdf (last visited July 18, 2022) (collecting religious group views on unionization and worker justice).

340 *See, e.g.*, Telephone Interview with Judy Scott, *supra* note 314 (discussing SEIU's work with the United States Conference of Catholic Bishops, as well as Catholic Healthcare West).

341 *See, e.g.*, Baltimore, *supra* note 294 ("[Jews United for Justice ("JUFJ")] management has voluntarily recognized its staff's union . . . The JUFJ union was inspired by the Jewish values that shape JUFJ, including that all people should be treated with dignity and respect, because we are all created in the divine image."); *JOIN for Justice Staff Union Receives Voluntary Recognition*, *supra* note 294.

342 *See, e.g.*, Danielle Douglas-Gabriel, *Georgetown University Agrees to Allow Graduate*

for example, workers requested voluntary recognition of their union with the note: "With hope and expectation that this institution will do the right thing, we call on Georgetown University to live up to its highest Jesuit values of promoting cura personalis [care of the whole person] and offering dignified work."[343] The workers' campaign also included slogans and hashtags like hashtag "PracticeWhatYouPreach" and quotations from the Pope on the value of unions.[344] The workers at Georgetown were, in turn, voluntary recognized.[345] While this moral push for recognition may not alone suffice—and certainly does not always work[346]—it is one of many crucial tools in a comprehensive social campaign.

B. Community and COVID on Labor's Side

Factors specific to this historical moment make comprehensive campaigns for neutrality and private recognition procedures at religiously affiliated hospitals uniquely likely to succeed. COVID-19 and the harrowing and deadly experience of the United States in 2020, 2021, 2022, and beyond, strengthens labor's bargaining position. The COVID-19 pandemic strengthens the "hand of unions looking to organize more healthcare workers."[347] COVID-19 has not only mobilized healthcare workers for their own solidarity but has also increased community support and advocacy for these "hero" essential workers.[348] The resolve of workers combined with this community support presents a unique opportunity for the cause of organized labor. Workers can use the sheer economic power of labor and community to better

Students to Vote on Unionizing, Wash. Post (Apr. 2, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/04/02/georgetown-university-softens-position-against-grad-union/.

343 Littlefield, *supra* note 178.

344 *Id.*

345 *Id.*

346 *See, e.g.*, Anna Kaplan & Tess Riski, *The Battle for Adjunct Unionization Comes to a Halt*, The Spectator (Jan. 17, 2018), https://seattlespectator.com/2018/01/17/battle-adjunct-unionization-comes-halt/ (discussing Seattle University adjunct professor's failed organizing campaign).

347 Stephanie Goldberg, *Why the Pandemic Has Energized Hospital Unions*, Modern Healthcare (June 15, 2020), https://www.modernhealthcare.com/hospitals/why-pandemic-has-energized-hospital-unions.

348 *See, e.g.*, Dave Muoio, *Catholic Health Mercy Hospital Workers Take to the Picket Line, Citing Unsafe Staffing, Supplies*, Fierce Healthcare (Oct. 1, 2021), https://www.fiercehealthcare.com/hospitals/catholic-health-mercy-hospital-workers-take-to-picket-line-citing-unsafe-staffing.

their working conditions and get the respect, dignity, and terms and conditions of employment they deserve.

1. Community Support

With or without a global pandemic killing millions of people—highlighting the essentiality of healthcare workers and putting healthcare workers lives at risk—supporting healthcare workers is relatively easy. Healthcare workers are, to put it simply, easy to like and support. Healthcare workers help us when we are vulnerable, they save lives, they are ubiquitous in our media and psyche, they are a "light in the face of uncertainty."[349]

Healthcare workers are not only healthcare "heroes," but they are heroes who have been "traditionally among the lowest paid" workers in the nation's economy.[350] While healthcare heroes are underpaid, hospitals, including religiously affiliated hospitals, are often multibillion-dollar corporations.[351] Healthcare workers fighting against hospital systems truly look like David fighting Goliath; and who doesn't like an underdog? Hospitals, including religiously affiliated hospitals, tend to look "much more like big businesses, paying their CEOs millions of dollars and charging patients high rates for care."[352] Illustrative is one religiously affiliated hospital that boasted of "$97 million in first-quarter profits . . . even as it [spent] millions to fend off a strike the singular stated mission of which [was] to improve patient safety."[353] To repeat: David vs. Goliath.

Not only are healthcare workers the underdog, but they are also the underdog fighting for the community. The fight of healthcare workers is a fight for patients.[354] As unions and workers fight for better

349 Eric Mosley, *Recognizing Our Healthcare Heroes*, Forbes (Apr. 20, 2020), https://www.forbes.com/sites/ericmosley/2020/04/20/recognizing-our-healthcare-heroes/?sh=740cc78f42ad.

350 Shulte, *supra* note 61, at 333. *See also Overworked, Underpaid: Report Finds Wages Lag for U.S. Health Care Workers*, U.S. News & World Rep. (Mar. 2, 2022), https://www.usnews.com/news/health-news/articles/2022-03-02/overworked-underpaid-report-finds-wages-lag-for-u-s-health-care-workers#:~:text=For%20the%20study%2C%20the%20researchers,respectively%2C%20for%20health%20care%20workers (explaining that "[w]ages for health care workers actually rose less than the average across all U.S. employment sectors during the first and second years of the pandemic").

351 *See* Littlefield, *supra* note 159.

352 Littlefield, *supra* note 178.

353 *See* Littlefield, *supra* note 159.

354 *See, e.g.*, Morgan Lee, *Hospital Physicians Seek to Unionize Amid Pandemic Turmoil*,

working conditions, they are necessarily fighting for better patient conditions.[355] Healthcare union demands regularly include better staff-patient ratios, for example.[356] Such ratios are "a life and death issue in any medical facility," and unions "are champions of safer staffing ratios that lead to better patient outcomes."[357] Even worker demands like increased wages that seem somewhat removed from patient care conditions have been shown to benefit patient care.[358] Looking to patient care during COVID-19 in particular, some studies have shown that unionized healthcare facilities have better patient outcomes, including lower COVID-19 mortality rates, than facilities without unionized workers.[359] Because of this common-good unionization, or "bargaining

U.S. News & World Rep. (Aug. 10, 2021), https://www.usnews.com/news/best-states/new-mexico/articles/2021-08-10/hospital-physicians-seek-to-unionize-amid-pandemic-turmoil ("Physicians are concerned about the hospital's financial standing and whether it can sustain a high standard of care for patients amid recent layoffs."); *MNA: National Catholic Labor Group Admonishes Trinity Health After NLRB Issues Complaint to Mercy Medical Center for Retaliating Against Nurses' Union Activity*, Cision PR Newswire (July 29, 2021), https://www.prnewswire.com/news-releases/mna-national-catholic-labor-group-admonishes-trinity-health-after-nlrb-issues-complaint-to-mercy-medical-center-for-retaliating-against-nurses-union-activity-301344335.html ("Throughout the pandemic, Mercy nurses have engaged in public action calling for improved safety standards for patients, nurses, and other healthcare workers. They held two informational pickets in May and August of 2020 about conditions related to working during the pandemic, and held a picket this spring to protest Trinity's refusal to agree to a fair contract that improves patient care and working conditions.").

355 *See* Michael Ash et al., *What Do Health Care Unions Do? A Response to Manthous*, 52 Med. Care 393, 393 (2014) ("Health workers' working conditions are patients' care conditions."). *Cf.* Jorts (and Jean) (@JortsTheCat), Twitter (Mar. 20, 2022), https://twitter.com/jortsthecat/status/1505433859122368512 ("teacher working conditions are student learning conditions. If the teachers are under duress: STUDENTS ARE TOO.").

356 Ash et al., *supra* note 355, at 394–95.

357 Hodge, *supra* note 177. *See also* Higgins, *supra* note 65, at 14 ("It is widely reported that a decrease in nurse-patient ratios is often affiliated with improved patient outcomes, especially mortality. Nursing unions use their collective voice to include patient-nurse ratios in employer negotiated contracts.") (citations omitted).

358 Ash et al., *supra* note 355, at 394 ("Even the desire for middle-class wage, which might seem removed from the immediacy of the workplace, affects care quality. Health care workers who feel the need for second jobs, or are anxious about their own health insurance, child care, or mortgage, may be more prone to errors. Ultimately, wages contribute importantly to staffing availability in the short run, to recruitment and retention in the medium term, and to the long-term sustainability of a high-quality workforce.").

359 *See* Adam Dean et al., *Resident Mortality and Worker Infection Rates from COVID-19 Lower in Union Than Nonunion U.S. Nursing Homes, 2020-21*, 41 Health Affairs 751 (May 2022); Aneri Pattani, *For Health Care Workers, the Pandemic Is Fueling Renewed*

for the common good," which coordinates union "demands with those of their community allies,"[360] communities have a stake in labor's fight in general, and particularly at hospitals.

A common retort to the argument that healthcare worker unions benefit patient care is that unionization leads to strikes and strikes hurt patient care.[361] Although true that strikes in healthcare "can affect care quality, strikes and slowdowns are rare" in the healthcare industry.[362] Rather than strikes and slowdowns, healthcare unions often use "nontraditional workplace tactics including work-to-rule, regulatory interventions, lobbying, and community, patient, and stakeholder mobilization."[363] In 2012, for example, the Bureau of Labor Statistics "identified only 8 health care work stoppages involving 1000 or more workers . . . . With over 3 million RNs in the United States, this is not a lot of nurse-related work stoppages."[364] Moreover, "all 8 were short; 5 lasted for 5 days and 3, just 1 day each."[365] While such actions may affect patient care, these short actions "are often symbolic rather than intended to shut down the activity of the hospital."[366] Additionally, when there are strikes like these, they are "highly regulated, requiring advance notice and other patient safeguards."[367]

Community support for healthcare workers is not hypothetical. Community support for healthcare workers, especially in the face of the COVID-19 pandemic, is already strong. For example, in a recent contract fight with a religiously affiliated hospital system in Buffalo, elected officials wrote letters to hospital management in support of the union.[368] These officials noted that the contract proposals were "completely unacceptable to the heroes who got us through last year."[369] A petition with thousands of community signatures called on the

Interest in Unions, NPR (Jan. 11, 2021), https://www.npr.org/sections/health-shots/2021/01/11/955128562/for-health-care-workers-the-pandemic-is-fueling-renewed-interest-in-unions.

360 Oswalt, *supra* note 268, at 101. *See also* Apesoa-Varano & Varano, *supra* note 54, at 79.

361 *See, e.g.*, *What Are the Pros and Cons of Joining a Nursing Union?*, NurseJournal (Nov. 29, 2022), https://nursejournal.org/resources/nursing-union-pros-cons/.

362 Ash et al., *supra* note 355, at 395.

363 *Id.*

364 *Id.*

365 *Id.*

366 *Id.*

367 *Id.*

368 Muoio, *supra* note 348.

369 *Id.*

religious employer, Catholic Health, to "increase staffing and wages."[370] Moreover, public support of unions generally is up.[371]

Community support is a central factor in the success of a comprehensive campaign for voluntary union recognition, a mutually beneficial recognition procedure, and employer neutrality. When workers organize outside the confines of NLRB jurisdiction, sheer economic power is what gets employers to the bargaining table. Worker power depends on community support. Workers at religiously affiliated hospitals are in an excellent position to garner community support and bolster successful comprehensive organizing campaigns.

2. COVID Has Exacerbated a Healthcare Worker Shortage

Community support is a windfall for healthcare workers, but it is far from the only factor on labor's side. There is a dearth of healthcare workers in the United States.[372] That dearth has only gotten worse with the COVID-19 pandemic, which has "mentally and physically exhaust[ed] nurses . . . as they worked long hours, scrambled to take care of patients and worried about spreading the virus to others."[373] Healthcare workers have taken "early retirement, chased higher wages as travel nurses or, emotionally drained, quit healthcare altogether."[374] The healthcare labor market is facing current shortages and "unprecedented projected shortages" as the "exodus of exhausted and depleted care workers

370 *Id.*

371 *See* Jon Harris, *'We definitely do have leverage,' Mercy Hospital Nurses say Amid Strike, Labor Shortage*, The Buff. News (June 10, 2022), https://buffalonews.com/business/local/we-definitely-do-have-leverage-mercy-hospital-nurses-say-amid-strike-labor-shortage/article_99400f16-284f-11ec-98f9-7f309dc496fd.html.

372 *Id.* ("And the biggest challenge facing hospitals is filling registered nurse positions as well as those directly supporting them, such as certified nurse assistants, licensed practical nurses and medical technicians, according to a Sept. 12 report from the Healthcare Association of New York State. The association's survey, which more than 60 of its members responded to, noted a registered nurse vacancy rate of 25%, while other rates varied by position but averaged 19%."); *see id.* ("This week, Catholic Health echoed a recent Morning Consult survey of 1,000 U.S. health care workers that found 18% of them had quit their jobs during the pandemic. 'This is a national staffing crisis,' Catholic Health CEO Mark Sullivan said Wednesday. 'Health care, overall, is broken.'"). *See generally US Healthcare Labor Market*, Mercer Report (2021), https://www.mercer.us/content/dam/mercer/assets/content-images/north-america/united-states/us-healthcare-news/us-2021-healthcare-labor-market-whitepaper.pdf [hereinafter *Mercer Report*].

373 Harris, *supra* note 371.

374 *Id.*

continues."[375]

Worker shortages provide leverage for workers and unions.[376] As employers grow more desperate for workers, workers' bargaining position grows stronger. And healthcare management knows that. As one Forbes Magazine article noted, "without major, systemic change, the healthcare industry is facing a dangerous chapter and healthcare leaders are sounding the alarm."[377] That article concludes by stating that "it's imperative to place an emphasis on improving the working conditions for *people* in healthcare, in addition to advancing the technology they use."[378]

American healthcare is in a unique moment, a "dangerous chapter" whereby there is a growing need for healthcare workers and a burgeoning scarcity of such workers, and both labor and management know it. Healthcare workers' newfound bargaining power should be harnessed as part of a comprehensive campaign for voluntarily recognized healthcare worker unions. The healthcare worker shortage reinforces the extent of worker power today and underscores the potential for a truly successful comprehensive campaign.

3. COVID Has Mobilized Workers

The COVID-19 pandemic has garnered community support for healthcare workers and has worsened a healthcare worker shortage. It has also mobilized healthcare workers themselves.[379] Cass Gualvez,

375 Joe Harpaz, *A Plan for Healthcare's Labor Shortage*, Forbes (Feb. 4, 2022), https://www.forbes.com/sites/joeharpaz/2022/02/04/a-plan-for-healthcares-labor-shortage/?sh=239f27bf43d4 (citing *Mercer Report*, *supra* note 372).

376 *See* Harris, *supra* note 371. *See, e.g.*, Jayson Bussa, *Union Workers Gain Leverage in Labor Market Altered by Pandemic*, MiBiz (Nov. 21, 2021), https://mibiz.com/sections/manufacturing/union-workers-gain-leverage-in-labor-market-altered-by-pandemic.

377 Harpaz, *supra* note 375.

378 *Id.*

379 *See, e.g.*, Beverly Alfon & Michael Hughes, *Health Care Workers & Labor Unions: The COVID "Bump" & the New Administration's Efforts to Unionize More Workers*, Amundsen Davis LLP: Lab. & Emp. L. Blog (Apr. 29, 2021), https://www.jdsupra.com/legalnews/health-care-workers-and-labor-unions-1469557/ ("For health care workers, the issues of staffing, wages and benefits are typically what unions have focused on in their organizing campaigns. Against the backdrop of the COVID-19 pandemic, these issues are heightened with the added urgency of worker safety. The realities created by the pandemic have and will likely continue to make their impact on health care workers – even prompting some who never may have considered union representation – to reconsider their position."). *See also* Philbrick & Abelson, *supra* note 94 ("The past year has created conditions ripe

Organizing Director for Service Employees International Union-United Healthcare Workers West in California, stated that "[t]he urgency and desperation [she's] heard from workers is at a pitch [she hasn't] experienced before in 20 years of this work . . . [She's] talked to workers who said, 'I was dead set against a union five years ago, but COVID has changed that.'"[380] Mary Kay Henry, President of the SEIU, also stated that in her "40 years of organizing health care workers, [she has] never experienced a time when people are more willing to take risks and join together to take collective action . . . . That's a sea change."[381]

Organizing and building worker solidarity is challenging work. It requires worker leaders taking risks and having sometimes uncomfortable conversations with their colleagues about taboo topics or personal hardships. Organizing is impossible—and imprudent—without worker enthusiasm. COVID-19 has lit a fire under healthcare workers who have fought a pandemic, and yet, still face the daily workplace difficulties and indignities certainly not fit for "essential workers" and "heroes."[382] The mobilization of workers is a crucial boon to organizing efforts.

Healthcare workers are mobilized; they want to fight and organize for better working conditions, dignity, and respect in their workplaces. Healthcare workers' own commitment and desire to organize is absolutely essential and central to any comprehensive campaign for union organization. Today, healthcare workers have that fire, they have the bargaining power, and their communities support them. These factors make for the perfect storm. Healthcare workers at religiously affiliated hospitals, and in general, are in a position to push for neutrality agreements and voluntary recognition procedures from

for organizing to address longstanding issues like inadequate wages, benefits and staffing, a problem exacerbated by health care workers falling ill, burning out or retiring early for fear of getting sick. The unions 'have successfully been able to use the pandemic to rebrand those same conflicts as very urgent safety concerns,' said Jennifer Stewart, a senior vice president at Gist Healthcare, a consulting firm that advises hospitals.").

380 Pattani, *supra* note 359.

381 Philbrick & Abelson, *supra* note 94.

382 *See* Goldberg, *supra* note 347, at 4 ("'Stories of healthcare providers who've gotten sick from the virus and died, those kinds of stories will probably strengthen the spine of workers who might have been on the fence' about organizing, says Robert Bruno, director of the labor studies program at the University of Illinois at Urbana-Champaign. 'Now, as conditions begin to improve—and particularly when the industry gets billions of dollars in subsidies from the federal government—it's going to be harder to say you don't want to sign a union contract. . . .That's a strong environment for labor to be organizing in, and labor is aware of that.'").

their employers, and they are in a position to succeed.

C. Challenges of this Approach

There are three primary challenges to organizing workers at religiously affiliated hospitals outside of NLRB jurisdiction that are worth discussing. These challenges are: (1) worker commitment and loyalty to their employers, (2) employer anti-union campaigns, and (3) structural limits of voluntary recognition. This Section will discuss each challenge in turn.

1. Worker Loyalty to Employers

Organizing workers at religiously affiliated hospitals is different than organizing workers elsewhere. Healthcare workers often have deep commitment to their patients and the missions of their employers. Workers at religious organizations may have deep emotional, spiritual, or religious connections to their employers. With these factors at play, organizing healthcare workers at religiously affiliated hospitals is clearly unique and filled with its own challenges.

Professor Eduardo Capulong, analyzing unionization in the nonprofit sector generally, found that nonprofit workers "want to 'do good.' . . . [They] were less motivated by 'job security, the salary, benefits or the paycheck' than they were by the 'chance to help the public, to make a difference, to do something worthwhile, and [to have] pride in the organization . . ."[383] Capulong continued:

> '[N]onprofit employees love their work so much that they set themselves up for exploitation.' The commitment to clients is, in fact, such a powerful motivator that it sometimes discourages nonprofit workers from leaving substandard employment. Thus, even as nonprofit workers tend to be pro-union generally, they may not be pro-union for themselves. Believing that they should not take funds dedicated to client programs, particularly when budgets are tight, many nonprofit workers minimize their own work-related concerns.[384]

Capulong is discussing nonprofit workers generally, but it stands to reason that this inclination is even stronger when we consider workers at nonprofit, faith-based organizations that may be similarly (if

383 Eduardo R.C. Capulong, *Which Side Are You on? Unionization in Social Service Nonprofits*, 9 N.Y.C. L. Rev. 373, 388 (2006) (citations omitted).

384 *Id.* at 388–89 (citations omitted).

not more so) steeped in the mission of their organization. When we add in the connection healthcare workers have to their patients, Capulong's explanation of nonprofit workers' aversion to unionization only grows more compelling. As others have noted, "the more employees identify with the company, the less likely they will identify with an outside union."[385] Amy Gladstein, a New York labor lawyer who, since 2002, has been "responsible for directing the new organizing program for 1199 SEIU,"[386] stated that "workers in Catholic hospitals are often more mission focused. [Some] people work there because they believe in the mission, as the Church says, that it is about providing healthcare for and helping the poor."[387] With that image of a healthcare worker at a religiously affiliated hospital in mind, the challenge of overcoming worker loyalty to their employers comes into focus.

Although this challenge remains present, the contours of the employment relationship in healthcare, even religiously affiliated healthcare, have changed tremendously due to COVID-19. As discussed *supra*,[388] healthcare workers in and out of religiously affiliated hospitals have been mobilized by the widespread death, overwork, underpay, and unsafe worker and patient conditions of the COVID-19 pandemic. Workers who were once devoted to their employers and expected their employers to protect them have both seen, and felt, their employers fail them.[389] Workers who were "dead set against a union five years ago," have had their minds changed by COVID-19.[390] Facing colleague death, a lack of personal protective equipment, unsafe patient care levels, and personal sickness and hardship has irrevocably changed the workplace experience of healthcare workers.[391]

COVID-19 has exposed the connection between patient care and working conditions. Healthcare workers committed to patient care have a different relationship with their employers and with the idea of unions than they did even three years ago. The challenge of worker loyalty to hospital employers has been displaced by worker loyalty to patient care. And loyalty to patient care is pro-union.

385 Whitney, *supra* note 215, at 1492.

386 *Amy Gladstein*, Gladstein, Reif & Meiginniss, https://www.grmny.com/our-team/amy-gladstein/ (last visited July 18, 2022).

387 Telephone Interview with Amy Gladstein, Partner, Gladstein, Reif & Meginniss (Feb. 28, 2022).

388 *See supra*, Part III, Section B, Subsection 3.

389 *See, e.g.*, Pattani, *supra* note 359.

390 *Id.*

391 *See generally supra*, Part III, Section B, Subsection 3.

2. Hospital Union-Busting

The second challenge identified is hospitals' anti-union campaigns. Hospital employers are "known to launch aggressive and well-funded anti-union campaigns."[392] Religiously affiliated hospitals are not immune. Speaking about Catholic hospitals in particular, Notre Dame Sister Barbara Pfarr (Chicago nun and coordinator of the Religious Employers' Project of the National Interfaith Committee for Worker Justice) noted that "for decades, organizing efforts at Catholic hospitals have been met with strong anti-union campaigns . . . . [T]here is a demonization of unions and everyone involved with unions."[393]

Without neutrality agreements, anti-union campaigns are a fact of life in American labor organizing.[394] This challenge should not be understated; employer union-busting is a huge threat to unionization. However, this is a threat to organizing whether working within or outside NLRB jurisdiction, this is not unique to any particular approach. In fact, neutrality agreements are the best antidote to employer union-busting,[395] and neutrality agreements are a central feature of a union campaign outside the confines of the NLRA, as detailed above. In sum, this is a worthwhile concern. However, this concern is not unique to organizing outside the NLRB. Rather, organizing outside the NLRB provides the opportunity for neutrality agreements, the sharpest tool to defend against this challenge.

3. The Limits of Voluntary Recognition

The third challenge stems from the limits of voluntary recognition standing alone. As one scholar stated, "voluntary bargaining necessarily concentrates power on the side of the institution: if the employer withdraws from bargaining, the employees have no legal recourse."[396]

This final concern is undeniable. Without legal protections, labor is incredibly vulnerable. Voluntary recognition without legal

392 Pattani, *supra* note 359. *See also* Kochery & Strauss, *supra* note 70, at 271 ("Hospital administrators and boards of trustees have shown sharp resistance to unions.").

393 Cleeland & Ramirez, *supra* note 176.

394 *See What to Expect From your Employer*, UFCW Local 152, https://ufcwlocal152.org/what-unions-do/what-to-expect-from-your-employer/ (last visited July 18, 2022).

395 *See, e.g.*, Glass, *supra* note 316.

396 Vareika, *supra* note 121, at 2089. *Cf.* Oswalt, *supra* note 268, at 117 (discussing teacher strikes outside of NLRA protection in which "[w]hat states gave they could also take away, and some did").

protections cannot alone protect workers. As many have noted, the NLRA, however, is not up for the challenge.[397] The weak federal labor law excludes vulnerable workers, has weak, inoperable remedies, and fundamentally "fails to protect workers' ability to choose to organize and bargain collectively with their employers."[398] As Professor Ben Sachs, among others, has noted, the "NLRA is ill-fitted to the contours of the contemporary economy, and increasingly out of steps with its demands."[399] We need federal labor law reform.[400] At the same time, voluntary recognition of unions at religiously affiliated hospitals promotes worker respect and dignity and furthers the cause of organized labor today. Both things are and can be simultaneously true.

It is crucial to remember that, under the current (insufficient) legal regime, workers at religiously affiliated hospitals *do* have access to the National Labor Relations Board. In other words, the NLRB exercising jurisdiction over religiously affiliated hospitals is constitutional. While the NLRA is inadequate and it is not the most strategic approach for these workers to utilize NLRB jurisdiction, that does not mean they cannot utilize it. If voluntary recognition does fall apart and the hospital "withdraws from bargaining," the Board is an available backup for workers at religiously affiliated hospitals.[401] The availability of that plan B should be comforting to organizers and tactically useful in convincing employers to adhere to mutually beneficial agreements.

These challenges are undoubtedly hurdles. Yet these hurdles are also undoubtedly surmountable. Workers, banded together, are strong. Healthcare workers at religiously affiliated hospitals, particularly in 2023 America facing a waning COVID-19 pandemic, are even stronger. Healthcare workers at religiously affiliated hospitals have the drive, the community support, and the bargaining power to effectuate a successful comprehensive campaign for voluntary recognition outside the confines of NLRB jurisdiction. Though NLRB jurisdiction is tenuously available, workers at religiously affiliated hospitals need not utilize it to effectuate their goals. Avoiding NLRB jurisdiction preempts constitutional

397 *See generally* Sharon Block & Benjamin Sachs, Clean Slate for Worker Power (2019).

398 Benjamin I. Sachs, *Labor Law Renewal*, 1 Harv. L. & Pol'y Rev., 375, 375 (2007).

399 *Id.*

400 What worker power for workers at religiously affiliated hospitals might look like in a post-NLRA world is beyond the scope of this Article, but is an important question to consider. In a sectoral bargaining system, for example, a question of integrating religiously affiliated hospital employers with secular hospital employers may ameliorate some constitutional concerns and raise others.

401 Vareika, *supra* note 121, at 2089.

challenges and ensures the continued viability of successful organizing in the religiously affiliated hospital space. These challenges are surmountable and worth the fight.

Conclusion

Workers at religiously affiliated hospitals cannot rely on the Board and the courts to recognize and effectuate their legal rights. Fortunately, workers at religiously affiliated hospitals do not need to rely on the Board or the courts to build worker power. While the changing legal landscape around religious institutions' Religion Clause protections, as well as the anti-union bent of the federal bench, is a challenge for organizing religiously affiliated hospitals, workers need not surrender. In the wake of the COVID-19 pandemic, workers at religiously affiliated hospitals have the drive, the community support, and the economic power to demand better working conditions and better patient conditions. Workers at religiously affiliated hospitals can and should work outside the confines of NLRB jurisdiction to better their working conditions and increase workplace dignity and respect. Healthcare workers have been central to the labor movement for decades. Today, workers at religiously affiliated hospitals—and healthcare workers in general—have the opportunity to lead the charge for robust worker rights, with or without NLRB jurisdiction.