

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 17-1149 and 17-1171

IN THE
United States Court of Appeals for the District of Columbia Circuit

UNIVERSITY OF SOUTHERN CALIFORNIA,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

AND

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, CTW, CLC,
Intervenor.

On Petition for Review from the National Labor Relations Board
Case Nos. 31-CA-178831, 31-CA-192125

**BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL ON EDUCATION
AND SEVEN OTHER EDUCATION ASSOCIATIONS IN SUPPORT OF
PETITIONER/CROSS-RESPONDENT**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the American Council on Education, the Association of American Universities, the Association of Catholic Colleges and Universities, the Association of Governing Boards of Colleges and Universities, the Association of Jesuit Colleges and Universities, the College and University Professional Association for Human Resources, the Council of Independent Colleges, and the National Association of Independent Colleges and Universities certify the following:

Parties and Amici. Except for the above-listed amici, all parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in Petitioner’s brief. All the above-listed amici are “trade associations” for purposes of D.C. Circuit Rule 26.1(b).

Rulings Under Review. The rulings under review are listed in Petitioner’s brief.

Related Cases. Counsel is not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Jessica L. Ellsworth
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STATEMENT OF INTEREST OF AMICI CURIAE

This case will determine the framework the National Labor Relations Board (NLRB or Board) uses to determine the managerial status of university faculty, which in turn determines their eligibility or ineligibility to form a collective bargaining unit. Amici are higher education associations whose member institutions put into practice every day the uniquely American tenet of shared governance. Amici seek to ensure that the NLRB’s framework adheres to the

shared governance values that the Supreme Court recognized in *National Labor Relations Board v. Yeshiva University*, 444 U.S. 672 (1980).¹

The **American Council on Education (ACE)** represents all higher education sectors. Its approximately 1,700 members reflect the extraordinary breadth and contributions of degree-granting colleges and universities in the United States. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education system is the cornerstone of a democratic society. ACE regularly contributes amicus briefs on issues important to the education sector.

The **Association of American Universities (AAU)** is a non-profit organization, founded in 1900 to advance the international standing of United States research universities. AAU's mission is to shape policy for higher education, science, and innovation; promote best practices in undergraduate and graduate education; and strengthen the contributions of research universities to society. Its members include 62 public and private research universities.

The **Association of Catholic Colleges and Universities (ACCU)** serves as the collective voice of U.S. Catholic higher education. Through programs and

¹ All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than amici contributed money intended to fund the brief's preparation or submission.

services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that all associated with Catholic higher education can contribute to the greater good of the world and the Church.

The **Association of Governing Boards of Universities and Colleges (AGB)** is the only national association that serves the interests and needs of academic governing boards, boards of institutionally-related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership.

The **Association of Jesuit Colleges and Universities (AJCU)** represents all 28 Jesuit institutions in the U.S. and is affiliated with over 100 Jesuit institutions worldwide.

The **College and University Professional Association for Human Resources (CUPA-HR)**, the voice of human resources in higher education, represents more than 23,000 human resources professionals at over 2,000 colleges and universities. Its membership includes 93 percent of all United States doctoral institutions, 78 percent of all master's institutions, 53 percent of all bachelor's institutions, and nearly 600 two-year and specialized institutions.

The **Council of Independent Colleges (CIC)** represents 684 private, nonprofit liberal arts colleges and universities and 83 state councils and other higher education organizations.

The **National Association of Independent Colleges and Universities (NAICU)** serves as the unified national voice of private, non-profit higher education in the United States. It has more than 1,000 members nationwide.

SUMMARY OF ARGUMENT

The new test announced by the NLRB in *Pacific Lutheran University (PLU)*, 361 N.L.R.B. No. 157 (Dec. 16, 2014), to determine whether faculty members are “managerial” and therefore ineligible to form a collective bargaining unit under the National Labor Relations Act (NLRA), misunderstands shared governance in American higher education. This case presents the first opportunity for a federal court of appeals to evaluate that test and correct the Board’s error.

In the university context, “[s]hared governance is the process by which various constituents (traditionally governing boards, senior administration, and faculty . . .) contribute to decision making related to college or university policy and procedure,”² and “is a basic tenet in higher education.”³ The Supreme Court recognized this special role of shared governance in *National Labor Relations Board v. Yeshiva University*, 444 U.S. 672 (1980), acknowledging that faculty could not be analyzed through the lens of the typical, industrial American

² AGB, *Shared Governance: Changing with the Times* 3 (Mar. 2017) (hereinafter “AGB White Paper”).

³ AGB, *Shared Governance: Is OK Good Enough?* 1 (2016).

workplace to determine if they were managerial and thus ineligible to form a collective bargaining unit. The heart of shared governance is the same today as it was in 1980 when the Supreme Court decided *Yeshiva*: shared managerial authority accomplished through collegial interchange.

After this Court repeatedly pointed out that the Board's efforts to apply *Yeshiva* resulted in inconsistent and unpredictable decisions, the Board purported to adopt a comprehensive analytical framework in 2014 to evaluate faculty requests to form a bargaining unit. The *PLU* test, however, fundamentally misunderstands shared governance as its application in this case demonstrates.

First, the test misapprehends that governing boards, administrators, and faculty have comparatively greater voices and ownership in their areas of comparative expertise. For faculty, that means having a more important voice in academic affairs. Yet the *PLU* test affords academic policy less weight than other factors outside the faculty's bailiwick. This is exactly backwards.

Second, *PLU*'s test for "effective control" is divorced from reality. By equating *Yeshiva*'s "effective recommendation or control," 444 U.S. at 683 n.17, with whether a recommendation is "almost always" adopted or, worse, adopted "without thought," the NLRB has imagined a caricature of shared governance where the faculty has no effective recommendation or control unless administrators and the board of trustees blindly rubber stamp faculty suggestions. That standard

would not even pass in a corporate boardroom, where a board member's fiduciary duties would prevent her from adhering to the recommendations of a CEO without thought or analysis.

Third, the *PLU* test is designed to stack the deck against a finding of managerial authority. The Regional Director below wrongly rejected evidence of a “back and forth” with administrators as an indicator of a managerial function. But in a shared governance model, this sort of dialectic is a core part of how faculty exercise effective control. The Regional Director also erred in requiring the faculty group in question to constitute a *majority* of any committee or governing body for committee service to count as managerial. Taken to its logical conclusion, that rule would eviscerate *Yeshiva* by allowing *any* sufficiently small group of faculty to form a bargaining unit.

Finally, the *PLU* test should also flunk this Court's review because it is inconsistent with *Yeshiva*. This Court should set the NLRB back on course with a test that is consistent with *Yeshiva* and the defining principles of shared governance.

ARGUMENT

I. SHARED GOVERNANCE PLAYS A VITAL ROLE IN HIGHER EDUCATION.

A. Shared Governance Has Been A Part Of American Higher Education For Centuries.

The concept of shared governance “evolved from the medieval model of collegial decisionmaking in which guilds of scholars were responsible only to themselves.” *Yeshiva*, 444 U.S. at 680; *see also* Susanne Lohmann, *Darwinian Medicine for the University*, in *Governing Academia*, 71, 74 (Ronald G. Ehrenberg ed., 2004). Harvard College led the way in importing this model to America, with an important change: “Because there were not enough scholars in Massachusetts Bay Colony . . . , the colonists established a lay (in the sense of nonfaculty) governing board.” Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *Geo. L.J.* 945, 951 (2009). This uniquely American form of shared governance “was adopted, in turn, by the other colonial colleges.” *Id.* As time passed, “[t]he development of the research university in the late 19th century, the increased professionalism of faculty . . . , rapid enrollment growth, the changing composition of the student body, and the volatile political climate . . . all helped to increase faculty voice in various areas of institutional governance.” Willis A. Jones,

Faculty Involvement in Institutional Governance: A Literature Review, 6 J.

Professoriate 117, 119 (2011).

This process culminated in the most widely recognized articulation of the principles of shared governance: a 1966 statement jointly formulated by ACE, AGB, and the American Association of University Professors (AAUP) (the “1966 Statement”).⁴ *See* Areen, *supra*, at 962-963. The 1966 Statement recognized that “[t]he variety and complexity of the tasks performed by institutions of higher education produce an *inescapable interdependence* among governing board, administration, faculty, students, and others.” 1966 Statement (emphasis added). One of the 1966 Statement’s “general conclusions” was that “differences in the weight of each voice, from one point to the next, should be determined by reference to the responsibility of each component for the particular matter at hand.” *Id.* For example, the faculty should have “primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.” *Id.*

The 1966 Statement recognized that this authority could be exercised in a variety of ways, including “meetings of all faculty members of a department,

⁴ Available at <https://www.aaup.org/report/statement-government-colleges-and-universities>.

school, college, division, or university system, or may take the form of faculty-elected executive committees in departments and schools and a faculty-elected senate or council.” *Id.* In areas where faculty were to be given primary responsibility, the 1966 Statement cautioned that “the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty.” *Id.* The 1966 Statement thus never envisioned that faculty would have the primary voice over all areas of managerial authority or that faculty decisions would be adopted “without thought.”

B. The Supreme Court Recognized The Importance Of Shared Governance In *Yeshiva*.

Such was the backdrop when the Supreme Court took up *Yeshiva* in 1980. The Court began its analysis of whether faculty were managerial employees by looking to its general test: whether employees “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974) (internal quotation marks omitted). Employees who satisfy this test are barred from forming a collective bargaining unit “[t]o ensure that employees who exercise discretionary authority on behalf the employer will not divide their loyalty between employer and union.” *Yeshiva*, 444 U.S. at 687-688.

In *Yeshiva*, however, the Supreme Court recognized that it needed to provide more specific guidance in the higher education context because “the authority structure of a university does not fit neatly within the statutory scheme” of the NLRA and its amendments, which “was designed to cope [with] the typical organizations of the commercial world.” *Yeshiva*, 444 U.S. at 680 (quoting *Adelphi Univ.*, 195 N.L.R.B. 639, 648 (1972)). Instead of the traditional “pyramidal hierarchies of private industry,” the Court observed that authority in “‘mature’ private universit[ies] is divided between a central administration and one or more collegial bodies.” *Id.* As a result, “principles developed for use in the industrial setting cannot be ‘imposed blindly on the academic world.’” *Id.* at 681 (quoting *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973)).

The facts in *Yeshiva* nicely illustrated many of the 1966 Statement’s principles in action. The central administration formulated university-wide policies with approval by the board of trustees. *Yeshiva*, 444 U.S. at 675. “The faculty participate[d] in University-wide governance through their representatives on an elected student-faculty advisory council” and on a “Faculty Review Committee,” which negotiated grievances and made advisory recommendations to the administration. *Id.* at 675-676. Most of the schools within the university had their own faculty committees, which “effectively determine[d] [the school’s] curriculum, grading system, admission, and matriculation standards, academic

calendars, and course schedules.” *Id.* at 676. In these “academic matters,” the authority of the faculty was “absolute.” *Id.* at 686. The Court also observed that “[faculty] views have determined the size of the student body, the tuition to be charged, and the location of a school,” but only “[o]n [o]ccasion.” *Id.* The faculty had a very limited role in budgets. *Id.* at 675. The faculty also had the power to make recommendations regarding “faculty hiring, tenure, sabbaticals, termination, and promotion.” *Id.* at 677. Although final authority on these issues rested with the central administration, “the overwhelming majority of faculty recommendations [we]re implemented.” *Id.*

On these facts, the Court found that the Yeshiva faculty were managerial employees. *Id.* at 690 & n.31. Central to this holding was the idea that “[t]he ‘business’ of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions.” *Id.* at 688. The Court rejected the union’s argument that faculty lacked “final authority” over any particular issue, *see id.* at 683 n.17, finding that “infrequent administrative reversals in no way detract[ed] from the institution’s primary concern with the academic responsibilities entrusted to the faculty,” *id.* at 688 n.27. Instead, “the relevant consideration is effective recommendation or control.” *Id.* at 683 n.17.

As a model for future cases, “*Yeshiva* imposed significant demands upon the” NLRB, requiring it to “perform an exacting analysis of the particular institution and faculty at issue.” *Point Park Univ. v. NLRB*, 457 F.3d 42, 48 (2006). “That analysis must look beyond self-serving descriptions of the role of faculty or the administration of a university” to “how a faculty is structured and operates.” *Id.* (quoting *Yeshiva*, 444 U.S. at 690 n.31.).

C. Shared Governance Is Still Dominant Today.

It is no secret that, since *Yeshiva*, colleges and universities have become larger and more complex operations, and the challenges that they face have become increasingly multifaceted as well. *See* AGB White Paper, *supra* note 1, at 6 (including among these challenges “financial sustainability, student demographics, enrollment challenges, strategic planning, campus climate, [and] Title IX”). This growing complexity has caused some concern over whether shared governance remains as vital today as it was when *Yeshiva* was decided in 1980. *See, e.g.*, Susan Resneck Pierce, *Governance Reconsidered: How Boards, Presidents, Administrators, and Faculty Can Help Their Colleges Thrive* 1 (2014); Joan Wallach Scott, *The Critical State of Shared Governance*, *Academe*, July-Aug. 2002, at 41-48.

Little empirical evidence supports this concern. Quite to the contrary, as former Georgetown University Law Center Dean Judith Areen has observed,

shared governance “remains the most common form of university and college governance in the United States.” Areen, *supra*, at 951; accord Kenneth P. Mortimer & Colleen O’Brien Sathre, *The Art and Politics of Academic Governance: Relations among Boards, Presidents, and Faculty* 24 (2007) (“The prevailing culture of academic governance is that the faculty’s voice in matters of academic affairs should be primary.”).

Numerous studies in recent years have confirmed the continued primacy of shared governance. In one comprehensive study from 2001, the researchers surveyed administrators and faculty at “every four-year institution accredited to grant bachelor’s degrees in the liberal arts” and “verif[ied] that the response population matched the sample population in various ways.” Gabriel E. Kaplan, *How Academic Ships Actually Navigate, in Governing Academia*, *supra*, at 165, 172. The survey found that shared governance is “neither as cumbersome and unloved as some critics seem to believe, nor as threatened and supplanted as some advocates seem to fear.” *Id.* at 204. Rather, it found that “[f]aculty seem to have a significant role in governance at many institutions, and their participation appears to be valued.” *Id.* In particular, the survey revealed “that faculty have significant authority in the decision areas where they claim the greatest expertise and tend to demand that their voice be preeminent: the curriculum, degree requirements, appointments and promotions, and determining the arrangements of shared

governance.” *Id.* at 204-05. And just as in *Yeshiva*, “[b]udget making, strategy, and construction planning seem to remain the realm of administrators and boards.” *Id.* at 205.

The 2001 survey included a number of questions from a 1970 survey conducted by the AAUP “in order to see how governance has evolved and, in particular, to see whether shared governance had deteriorated in the face of a more challenging economic environment.” *Id.* at 199. These questions probed faculty control in fifteen areas of decisionmaking, ranging from faculty status to academic planning and policy to financial affairs. *Id.* at 200. The answers led to the study’s “most striking finding”: “that the mean level of faculty participation in all fifteen decision categories has increased” since 1970.⁵ *Id.* at 201.

A 2003 study, involving 763 institutions, corroborated the findings of the 2001 survey. *See* William G. Tierney & James T. Minor, Ctr. for Higher Ed. Policy Analysis, *Challenges for Governance: a National Report* 11 (Apr. 2003). The Tierney and Minor survey determined that “[t]he notion of shared governance has wide support at” baccalaureate, master’s, and doctoral institutions. *Id.* at 9. It found that well over 80% of the surveyed institutions had “governance bodies”

⁵ The survey also addressed contrary perceptions, recognizing that “all groups ascribe to others more influence than those groups ascribe to themselves. No one seems to think they have enough influence, and everyone seems to feel other groups possess more influence than they may actually have.” Kaplan, *supra*, at 205.

such as “‘faculty senates’ (also known as faculty councils or academic senates).” *Id.* at 5. This survey reinforced the notion that “the faculty have authority over the undergraduate curriculum, promotion and tenure guidelines, and standards for evaluating teaching.” *Id.* at 11.

An even more recent survey of over 2,500 university presidents and board members found that this belief remains strong, with substantial majorities of respondents agreeing that “boards recognize the faculty’s authority for academic programs and that faculty members recognize board authority in overseeing the entire institution or system.” AGB, *Shared Governance: Is OK Good Enough?*, *supra* note 2, at ii, 6-7; *accord* Jones, *supra*, at 129 (“Contrary to what is generally believed . . . , research indicates faculty believe there is sufficient levels of trust and communication between faculty and administration with regard to faculty governance.”).⁶

Many of the leading regional accrediting organizations reflect the continued relevance of shared governance by including it in their criteria of accreditation.

See W. Ass’n of Schs. & Colls. Senior Coll. & Univ. Comm’n, *Handbook of Accreditation 2013 Revised* 19 (Standard 3.10) (“The institution’s faculty exercises

⁶ The extent to which any particular subgroup of faculty, including, for example, non-tenure-track faculty, participates in shared governance varies by institution. As this Court observed in *Point Park*, “[e]very academic institution is different, and . . . the Board must perform an exacting analysis of the particular institution and faculty at issue.” 457 F.3d at 48.

effective academic leadership and acts consistently to ensure that both academic quality and the institution's educational purposes and character are sustained.")⁷; *see also* Higher Learning Comm'n, *HLC Policy: Criteria for Accreditation* (Criterion 5.B.3)⁸; New England Ass'n of Schs. & Colls., Comm'n on Insts. of Higher Ed., *Standards for Accreditation* (Standard 3.2)⁹; Nw. Comm'n on Colls. & Univs., *Standards for Accreditation* (Standard 2.A.1)¹⁰.

There is also widespread agreement about the value that shared governance has added, and continues to add, to America's colleges and universities. *See, e.g.*, Steven C. Bahls, *Shared Governance in Times of Change: A Practical Guide for Universities and Colleges* 39 (2014) (observing that ACE, AGB, and AAUP have all endorsed shared governance); AGB, *AGB Board of Directors' Statement on Shared Governance* (2017).¹¹ This is not surprising, given the many valuable benefits that redound to organizations employing shared governance. Research has shown that it is associated with "positive team performance or increased

⁷ Available at <https://www.wscuc.org/content/2013-handbook-accreditation>.

⁸ Available at <https://www.hlcommission.org/Policies/criteria-and-core-components.html>.

⁹ Available at <https://cihe.neasc.org/standards-policies/standards-accreditation/standards-effective-july-1-2016>.

¹⁰ Available at <http://www.nwccu.org/Pubs%20Forms%20and%20Updates/Publications/Standards%20for%20Accreditation.pdf>.

¹¹ Available at https://www.agb.org/sites/default/files/u27335/2017_statement_sharedgovernance.pdf.

effectiveness” and “increased satisfaction among team members.” Adrianna J. Kezar & Elizabeth M. Holcombe, *Shared Leadership in Higher Education: Important Lessons from Research and Practice* 7-8 (2017) (emphasis omitted).¹² It has also been connected with “increased social integration, problem-solving quality . . . , organizational citizenship behavior . . . , and a more constructive interaction style.” *Id.* (internal citations omitted). Studies have shown that “shared leadership is especially beneficial in complex environments that require frequent adaptations,” *id.* at 8, a description that surely characterizes the field of higher education. And shared governance remains one of the most widely admired features of America’s higher education system in the global community. *See* Richard Legon, *The Effective Board*, *Change*, Jan.-Feb. 2013, at 24, 24; Jill Derby & Joseph Burke, *The Import and Export of American Higher Ed—and Its Governance*, *Trusteeship*, Sept.-Oct. 2015.¹³

The academy witnessed firsthand the danger of failing to take shared governance seriously during a recent governance crisis at the University of Virginia. In 2012, the university’s rector (that is, the chair of its board) and a handful of board members “orchestrated [the] forced resignation” of the

¹² Available at <http://www.acenet.edu/news-room/Pages/Shared-Leadership-in-Higher-Education-Important-Lessons-from-Research-and-Practice.aspx>.

¹³ Available at <https://www.agb.org/trusteeship/2015/septemberoctober/the-import-and-export-of-american-higher-ed-and-its-governance>.

university's newly-appointed president. Moody's Inv'rs Serv., *Virginia Dispute Highlights Governance Stress and Economic Threats Facing US Higher Education* 1 (July 2, 2012).¹⁴ The process left the faculty out of the loop and sparked protests across campus. *Id.*; Pierce, *supra*, at 159. Reacting to the news, “two faculty groups took votes opposing the board’s actions” and “[s]ome faculty members contemplated a faculty ‘walkout.’” Pierce, *supra*, at 160. After sixteen days, “the board voted unanimously to reinstate” the president and the vice-rector had to resign from the board. *Id.* at 159. This incident illustrates how “dramatically different” the university environment is from “top-down corporate governance models.” Moody’s, *supra*, at 1.

II. THE *PLU* TEST AS APPLIED HERE MISUNDERSTANDS SHARED GOVERNANCE.

A. The Board’s Decision In This Case Adds Several Onerous Elements To The Already-Burdensome *PLU* Framework.

After this Court repeatedly criticized the Board’s inconsistent approach to *Yeshiva*, see, e.g., *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 60 (D.C. Cir. 2004) (Roberts, J.), the Board “undert[ook] to develop a more workable, more predictable analytical framework to guide employers, unions, and employees alike.” *PLU*, 361 N.L.R.B. No. 157, slip op. at 16. The Board’s *PLU* test resulted. *Id.*

¹⁴ Available at <http://www.chronicle.com/blogs/ticker/files/2012/07/UVA.pdf>.

The test has three basic steps. First, the Board examines the faculty's authority over five areas of decisionmaking—three of which it designated “[p]rimary areas” and two of which it termed “[s]econdary areas.” *Id.* at 17. The three “primary” categories are: (1) “[a]cademic [p]rograms,” which includes “topics such as the university’s curricular, research, major, minor, and certificate offerings and the requirements to successfully complete” a degree; (2) “[e]nrollment management,” which refers to “the size, scope, and make-up of the university’s student body;” and (3) “[f]inances,” regarding “both income and expenditure.” *Id.* The “secondary” areas are, continuing the numbering from the primary group: (4) “[a]cademic [p]olicy,” including “teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy;” and (5) “[p]ersonnel [p]olicy and [d]ecisions,” which includes “hiring, promotion, tenure, leave, and dismissal.” *Id.* at 17-18. According to the Board, the primary areas are assigned more weight because they “affect the University as a whole,” while the secondary areas reflect the latitude that faculty have “within their individual classrooms or research projects.” *Id.* at 17.

Second, the Board looks at whether the faculty exercise “[a]ctual control or effective recommendation” in these five areas. *Id.* at 18. Although that language comes from *Yeshiva*, the Board concluded that “to be ‘effective,’ recommendations must *almost always* be followed by the administration.” *Id.* (emphasis added).

The Board then added that it would consider recommendations to be “‘effective’ if they routinely become operative *without independent review* by the administration.” *Id.* (emphasis added).

Third, the *PLU* test requires the Board to consider all this information in light of the “nature of the faculty’s employment relationship with the university,” including whether the faculty in question are tenured or tenure-track. *Id.* at 20.

Member Johnson dissented. Regarding the weighting of the five factors, he expressed his “concern that, if applied too inflexibly, the new division of areas of decisionmaking into ‘primary’ and ‘secondary[.]’ importance could fail to give adequate weight to certain instances in which faculty members are effectively making decisions in areas affecting—to paraphrase *Yeshiva*—the university’s overall product.” *Id.* at 39 (Johnson, M., dissenting). He singled out “academic policy” as an area “that, in fact, can significantly affect the university as a whole.” *Id.* And he “disagree[d] strongly with the majority’s imposition of th[e] new, overly onerous standard” that recommendations must “almost always” be followed to be effective. *Id.* at 40. He went on to challenge the “false dichotomy” between “recommendations that are subject to ‘independent review’” and those that were not. *Id.* In Member Johnson’s view, it was “evident that a recommendation that is implemented, even after independent review, can still be considered ‘effective,’ and reflective of managerial authority.” *Id.* at 40-41.

This case is one of the first to apply the *PLU* framework. But in applying it, the Regional Director used—and the Board endorsed—an even more stringent approach to the concept of effective recommendation or control. *See Univ. of S. Cal. (USC)*, 365 N.L.R.B. No. 11, slip op. at 1 n.1, 15-17 (Dec. 30, 2016). First, as part of his inquiry into whether administrators conducted an independent review, the Regional Director concluded that evidence of a “back and forth” was sufficient to call into question the faculty’s recommendation even when it was adopted. *Id.* at 15. Similarly, the Regional Director refused to consider evidence that a faculty recommendation was accepted because he was unconvinced that the board of trustees would have “sign[ed] off without second thought.” *Id.* at 17. Then, the Regional Director concluded that *even if* the faculty generally exercised control over an area through membership on two relevant committees, the particular group of faculty at issue did not exercise the necessary degree of control because “they do not constitute a majority of either committee.” *Id.* at 16.

USC sought review by the Board, which concluded that the “Regional Director’s decision properly applied” *PLU*. *Id.* at 1 n.1. Then-Member (now Chairman) Miscimarra, who originally concurred in *PLU*, now issued a full-throated dissent. *See id.* at 1-5. He rejected the premise “that faculty members cannot be considered ‘managerial’ under [the NLRA] unless they have unreviewable authority” and instead asserted that “[f]aculty authority is managerial

regardless of whether it is exercised hierarchically or collegially, and it does not require evidence that faculty recommendations are approved ‘without a second thought.’” *Id.* at 2-3. Member Miscimarra also pointed out that the Regional Director’s majority-of-the-committee rule “cannot be reconciled with the Court’s holding in *Yeshiva*.” *Id.* at 3-4.

B. The Board’s Approach Misunderstands Shared Governance.

The Board’s approach in *PLU* and this case fundamentally misunderstands shared governance in a number of ways. For one thing, it is a fundamental tenet of shared governance that participants have the greatest authority over the areas where they have the greatest expertise. *See* 1966 Statement. For faculty, as the *Yeshiva* Court recognized, this means “academic matters.” *Yeshiva*, 444 U.S. at 686; *see also* 1966 Statement; Jones, *supra*, at 124. By contrast, faculty have not historically had much direct authority over finances and the budget. *See Yeshiva*, 444 U.S. at 675 (noting that “[t]he budget for each school is drafted by its Dean or Director, subject to approval by the President after consultation with a committee of administrators”); Kaplan, *supra*, at 200 (fewer than twenty percent of survey respondents reported faculty control over financial planning and policy in 1970 and 2001); Bahls, *supra*, at 22 (“Board members . . . tend to place a much greater emphasis on budget matters than faculty members do.”).

The *PLU* weighting system gets this arrangement exactly backwards. It artificially divides academic policymaking into two different categories—academic programs and academic policy—and assigns less weight to the latter. *PLU*, 361 N.L.R.B. No. 157, at 17. Although this was nominally because the latter group dealt more with “individual classrooms or research projects,” *id.*, this distinction makes no sense. Academic policies may impact the classroom experience, to be sure, but they are still university-wide policies that govern “the terms upon which” the academic product is offered. *See Yeshiva*, 444 U.S. at 686; 1966 Statement (listing “curriculum, subject matter and *methods of instruction, research, faculty status, and those aspects of the student life which relate to the educational process*” as being within the “primary responsibility” of the faculty (emphasis added)). Worse still, the *PLU* Board includes financial matters as one of its “primary categories” of authority, even though this has *never* been a significant area of expertise or concern for the faculty. *See* 1966 Statement; Kaplan, *supra*, at 200; Jones, *supra*, at 124.

As a result, the *PLU* weighting system bears little relationship to the principles of comparative advantage on which shared governance rests. It also seems to assume that faculty must have managerial authority over all or most of those five areas, when managerial authority over a single one would be enough to support a conclusion of managerial status in almost any other context. A chief

operating officer may only exercise managerial authority of operations, and leave budgeting decisions for the chief financial officer, but both employees are readily recognizable as part of a company's management. *Cf. Bell Aerospace*, 416 U.S. at 286 (finding that procurement officers wielded managerial authority). Similarly, a university is entitled to the undivided loyalty of its faculty when the faculty is responsible for making managerial judgments about, say, which academic programs to add or eliminate, even if the faculty has limited managerial authority in another supposedly "primary" area. *See Yeshiva*, 444 U.S. at 688.

The Regional Director's decision below, which the Board concluded "properly applied" *PLU*, reflects this misunderstanding. USC presented evidence that its faculty has decisionmaking authority over "academic policies, such as the academic integrity policy, the grading policy, and the research and mentoring policies," *USC*, 365 N.L.R.B. No. 11, at 17, and that their faculty handbook recommendations "are approved by the University president *100 percent* of the time." *Id.* (emphasis added). But despite this significant policymaking authority, the Regional Director concluded that "such authority in a secondary area of consideration alone does not support a conclusion" that the relevant faculty are managerial. *Id.* Except for referencing the *PLU* categories, the Regional Director gave no reason for summarily discounting this significant area of faculty authority. *See id.*

This omission is telling. It betrays the thin foundation of the *PLU* test, which relegates professorial authority over the educational “product” of a university to second-class status. *See Yeshiva*, 444 U.S. at 686. Any test for the managerial authority of faculty should recognize that the faculty’s authority over “academic matters” is “the template for Board analysis of whether faculty are managerial employees.” *Point Park*, 457 F.3d at 49.

The *PLU* test also misunderstands the role of deliberation and exchange of ideas in shared governance. College and university governance “works best when communication among the governing board, the administration, and the faculty . . . is regular, open, and honest.” Hans-Joerg Tiede, *Faculty Communication with Governing Boards*, *Academe*, May-June 2013, at 8-12; Jones, *supra*, at 122. This dialogue is crucial to ensuring that stakeholders “have a sense of ownership, responsibility, and accountability for the institution’s health, vitality, and relevance.” AGB White Paper, *supra*, at 6. As a result, shared governance often operates through committees and other task forces “composed of those with the experience and expertise to best explore the issue and options, and make recommendations to the board and the administrative leadership.” *Id.*

These principles cannot be squared with *PLU*’s requirement that faculty recommendations be “almost always” adopted “without independent review,” *PLU*, 361 N.L.R.B. No. 157, at 18, much less with the Regional Director’s even

more stringent demands that the authorities sign off “without second thought” or without exchanging in a “back and forth” with the administration on the subject. *USC*, 365 N.L.R.B. No. 11, at 15-17. Many aspects of shared governance depend on precisely the sort of back and forth that the Regional Director wrote off. *See* 1966 Statement; Hans-Joerg Tiede et al., AAUP, *Faculty Communication with Governing Boards: Best Practices* 3 (Feb. 2014). Indeed, the sort of blind acceptance described by the Regional Director would be alien to a corporate boardroom, much less the more collegial environment of a university. *See USC*, 365 N.L.R.B. No. 11, at 2-3 (Miscimarra, M., dissenting) (“Our cases do not limit managerial status to the single person in an organization—for example, the president or chief executive officer (CEO)—who reports to nobody else.”); *cf.* *John Swann Holding Corp. v. Simmons*, 62 F. Supp. 3d 304, 310-311 (S.D.N.Y. 2014) (noting that directors’ fiduciary duties include a duty of “oversight” (internal quotation marks omitted)).

The Regional Director’s insistence that the relevant faculty group form a *majority* on the pertinent committees exacerbates the problem. *See USC*, 365 N.L.R.B. No. 11, at 16. Line-drawing of this sort fails to recognize that shared governance will often require compromise; no one professor or group of professors will always have things exactly their way. Moreover, a faculty can be divided along countless lines—by title, by seniority, by department, and the list goes on.

Asking whether any particular group commands a majority on the relevant committee is therefore a slippery slope—any group of faculty can be sub-divided until it no longer commands a majority. *See id.* at 4 (Miscimarra, M., dissenting). This danger is particularly acute in light of the Board’s recent practice of recognizing so-called “micro-units,” or small bargaining units with a narrowly defined “community of interests.” *See, e.g., Macy’s Inc. v. NLRB*, 844 F.3d 188, 191 (5th Cir. 2016) (per curiam); *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. 934, 943 (2011) (“Nor is a unit inappropriate simply because it is small.”). Taken to its logical conclusion, the Regional Director’s approach would eviscerate the managerial exception by permitting *any* sufficiently small group of faculty to form a bargaining unit—regardless of how much authority it exercises in tandem with the rest of the faculty.

C. The Board’s Approach Is Inconsistent With *Yeshiva*.

Not only are the *PLU* and *USC* tests inconsistent with the empirical reality of shared governance, they cannot be squared with *Yeshiva*. Regarding the categories of authority, *Yeshiva* made no distinction among different types of academic authority. Rather, it observed that the faculty’s “authority in academic matters [was] absolute,” listing “grading policies” and “teaching methods”—which would fall in *PLU*’s “secondary” category—right alongside “matriculation standards”—which would fall in *PLU*’s “primary” category. *Compare Yeshiva*,

444 U.S. at 686, *with PLU*, 361 N.L.R.B. No. 157, at 17. And *Yeshiva* did not rely heavily on financial recommendations. The Court merely observed that the *Yeshiva* faculty did not directly participate in budgeting and only determined tuition “[o]n [o]ccasion.” *Yeshiva*, 444 U.S. at 675, 686.

On the issue of the necessary degree of authority, the *Yeshiva* Court articulated the standard as whether the faculty exercised “effective recommendation or control,” not whether the faculty’s recommendations are “almost always” adopted, much less without a second thought or any other independent review. *See generally id.* at 675, 683 n.17, 686. Further, the Court approved the exercise of the faculty’s managerial authority through committees, without ever discussing whether the faculty were always, or even usually, unanimous—an unlikely proposition, given that the Court was considering the *entire* *Yeshiva* faculty. *See id.* at 678 n.7. In short, the framework announced in *PLU* and as applied by the Regional Director here goes well beyond the principles set by the Supreme Court in *Yeshiva*.

In application, it is easy to see that the very faculty at issue in *Yeshiva* would likely be found non-managerial under *PLU* and *USC*. The Supreme Court did not find that the *Yeshiva* faculty had any significant involvement in two out of the three “primary areas of decision making” in *PLU*: enrollment management or finances. *See Yeshiva*, 444 U.S. at 686. It is unclear whether regular authority

over a single primary area would be sufficient to satisfy the *PLU* test. *See PLU*, 361 N.L.R.B. No. 157, at 39 (Johnson, M., dissenting) (“[T]he majority does not really give guidance concerning how our regional directors and future Boards will decide the ultimate outcome based on the factors.”). The Court also frankly acknowledged that, even in those areas where the faculty had regular authority, “administrative concerns with scarce resources and University-wide balance have led to occasional vetoes.” *Yeshiva*, 444 U.S. at 688 n.27. It is unlikely that review thorough enough to produce “occasional vetoes” would survive the *PLU* Board’s “almost always” test, and it would certainly fail the Regional Director’s demand that recommendations be adopted without a second thought.

In *PLU*, the Board appeared to tacitly acknowledge that its test was more stringent than *Yeshiva* when it explained that its reasoning rested in part on its “experience applying *Yeshiva*,” which the majority felt “ha[d] generally shown that colleges and universities are increasingly run by administrators, which has the effect of concentrating authority away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself.” *PLU*, 361 N.L.R.B. No. 157, at 19. This reasoning makes too much of too little. Even a cursory read of Justice Brennan’s dissent in *Yeshiva* reveals that many of those same concerns were aired, and rejected, in *Yeshiva* itself. Justice Brennan lambasted the “rose-colored lens” through which the Court “view[ed] the

governance structure of the modern-day university.” 444 U.S. at 702 (Brennan, J., dissenting). In his view, education had “become ‘big business,’ and the task of operating the university enterprise ha[d] been transferred from the faculty to an autonomous administration.” *Id.* at 702-703. The majority of the Court was unpersuaded, explaining that this shift was “neither universal nor complete.” *Id.* at 689 n.29. Time and additional research have proven that the majority had the better of this argument then, and that the voice of the faculty in governance has gotten stronger since. *See Kaplan, supra*, at 200; Tierney & Minor, *supra*, at 11.

* * *

The Board’s aim to improve the analytical rigor and predictability of its approach to questions of university governance is laudable. But its articulation of a framework in *PLU* misses the mark and cannot be sustained. The test fundamentally misunderstands the role of faculty in shared governance, assigning the least weight to some of the most important spheres of faculty authority. The decision of the Regional Director below demonstrates the dangers that inhere in the *PLU* test. By focusing too much on final authority and unanimity of decisionmaking, the Regional Director viewed university governance through the lens of “the pyramidal hierarchies of private industry.” *Yeshiva*, 444 U.S. at 680. That approach neglects the reality of shared governance and abandons the careful course set by the Supreme Court in *Yeshiva*. It falls to this Court to bring the

NLRB back on track.

CONCLUSION

For the foregoing reasons and those in the brief of the University of Southern California, the Court should grant the University of Southern California's petition for review and deny the Board's cross-application for enforcement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed R. App. P. 32(g)(1) and Circuit Rule 32(e), I hereby certify that the foregoing brief was produced using the Times New Roman 14-point typeface and contains 6,453 words.

/s/ Jessica L. Ellsworth
Jessica L. Ellsworth

CERTIFICATE OF SERVICE

I certify that on October 31, 2017, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Jessica L. Ellsworth
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