

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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PACIFIC LUTHERAN UNIVERSITY, :
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Employer :
 :
and : Case 19-RC-102521
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SERVICE EMPLOYEES INTERNATIONAL :
UNION, LOCAL 925 :
 :
Petitioner :
 :
Plaintiff. :
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BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES, COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES, COUNCIL OF INDEPENDENT COLLEGES, INDEPENDENT COLLEGES OF WASHINGTON AND NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES

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Amici Curiae American Council on Education, Association of American Universities, Association of Governing Boards of Universities and Colleges, College and University Professional Association for Human Resources, Council of Independent Colleges, Independent Colleges of Washington, and National Association of Independent Colleges and Universities (collectively, the “Higher Education *Amici*”) respectfully submit this brief in response to the Notice and Invitation to File Briefs (“Notice”) issued by the National Labor Relations Board (“Board”) on February 10, 2014.

INTEREST OF AMICI CURIAE

The American Council on Education (“ACE”) represents 1,800 accredited, degree-granting colleges and universities and higher education-related associations, organizations and corporations. Founded in 1918, ACE serves as the nation’s unifying voice for higher education. ACE serves as a consensus leader on key higher education issues and seeks to influence public policy through advocacy, research and program initiatives.

The Association of American Universities (“AAU”) is an organization of 60 United States and two Canadian research institutions distinguished by the breadth and depth of their programs of research and graduate education and committed to developing strong national and institutional policies supporting research and graduate and undergraduate education.

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. Its mission is to strengthen, protect, and advocate on behalf of citizen trusteeship that supports and advances higher education.

The College and University Professional Association for Human Resources (“CUPA-HR”) serves as the voice of human resources in higher education, representing more than 17,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master’s institutions, 57 percent of all bachelor’s institutions, and 600 two-year and specialized institutions. Higher education employs over 3.7 million workers nationwide, with colleges and universities in all 50 states.

Founded in 1956, the Council of Independent Colleges (“CIC”) is the major national service organization for small and mid-sized, independent, liberal arts colleges and universities in the United States. CIC has 746 members and affiliates including liberal arts, comprehensive and international institutions, as well as higher education-related associations. CIC works to support college and university leadership, advance institutional excellence and enhance private higher education’s contributions to society.

Independent Colleges of Washington (ICW), founded in 1953, is an association of 10 private, nonprofit liberal arts colleges and universities in Washington state. ICW’s member institutions share a commitment to high-quality, academically rigorous learning, and to an education that emphasizes critical thinking, lifelong learning, ethics, leadership, and community service.

The National Association of Independent Colleges and Universities (“NAICU”) serves as the unified national voice of private, nonprofit higher education in the United States. Founded in 1976, NAICU currently has more than 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business and other professions. NAICU represents these institutions

on policy issues primarily with the federal government, such as those affecting student aid, taxation and government regulation.

PRELIMINARY STATEMENT

In addition to the threshold issue of whether the Board has jurisdiction over Pacific Lutheran University, this case presents the question of whether a group of full-time contingent (i.e. non-tenure-track) faculty members at the university are “managerial employees” who fall outside the scope of the National Labor Relations Act (“NLRA” or the “Act”), 29 U.S.C. §§ 151-169. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1973) (implying from the Act’s structure and history that “Congress intended to exclude from the protection of the National Labor Relations Act all employees properly classified as ‘managerial’”). In making the managerial determination in the context of higher education, the Board is required to consider certain well-defined factors identified by the Supreme Court of the United States. See *NLRB v. Yeshiva University*, 444 U.S. 672, 686-90 (1980). “The proper analysis, the Court held [in *Yeshiva*] turns on the type of control faculty exercise over academic affairs at an institution.” *Point Park University v. NLRB*, 457 F.3d 42, 46 (D.C. Cir. 2006).

In the *Point Park* case, the Regional Director and the Board originally determined that the university’s faculty members do not fall within the judicially implied exclusion for managerial employees. That determination was reversed by the United States Court of Appeals for the District of Columbia; in remanding the case to the Board, the Court explained that “*Yeshiva* identified the relevant factors that the Board *must* consider” and instructed the Board to identify which of the factors it found “significant, which less so and why.” *Id.* at 51.

Approximately two years ago, the Board invited third parties to address eight questions in connection with its review of the Regional Director’s Supplemental Decision on Remand in the

Point Park case. Many of the Higher Education *Amici* responded to the Board's invitation by filing a brief in that case on July 6, 2012. As the Higher Education *Amici* emphasized in their brief, the breadth of the Board's invitation for the submission of arguments and evidence on those questions in *Point Park* exceeded the scope of D.C. Court's mandate and the actual issues presented in the case.

The Board's February 10, 2014 Notice and Invitation to File Briefs in this case repeats verbatim the eight questions posed in *Point Park* (as renumbered below)¹

4. Which of the factors identified in *NLRB v. Yeshiva*, 444 U.S. 672 (1980), and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?
5. In the areas identified as "significant," what evidence should be required to establish that faculty make or "effectively control" decisions?
6. Are the factors identified in the Board case law to date sufficient to correctly determine which faculty are managerial?
7. If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?
8. Is the Board's application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context, or (b) can the Board more closely align its determination in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?
9. Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?
10. Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board's analysis?

¹ The Higher Education *Amici* do not address the first three questions addressed to the Board's jurisdiction over Pacific Lutheran University under *NLRB v. Catholic Bishop*, 440 U.S. (1979), or the final question as to whether the Regional Director correctly found the faculty members involved in this case to be employees.

11. As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty—such as between professors, associate professors, assistant professors and lecturers or between tenured and untenured faculty—depending on the faculty’s structure and practices?

As in *Point Park*, the Board is again improperly reaching outside the narrow issue presented by the limited record in this case to consider a wide range of questions involving the Board’s application of *Yeshiva*. Higher Education *Amici* nevertheless address the Board’s questions below, substantially the same as they have in *Point Park*.

ARGUMENT

I. YESHIVA REQUIRES A HOLISTIC VIEW OF UNIVERSITY GOVERNANCE, FOCUSED ON FACULTY AUTHORITY WITH RESPECT TO ACADEMIC MATTERS.

Sensitive to the uniqueness of academia, the Supreme Court recognized in *Yeshiva* that in the university context, managerial authority is more shared and less of a hierarchical pyramid than in the more typical industrial model. *Yeshiva*, 444 U.S. at 680. This distinction precludes a rote application of the Board’s managerial standards as developed in the industrial context, but it does not permit the Board or its Regional Directors to impose stricter standards and require an absolute delegation of authority as a condition to finding that faculty act in a managerial capacity. See *LeMoyne-Owen II*, 345 N.L.R.B. No. 93, at *6 (Sept. 30, 2005) (holding that “[a]bsolute’ control need not be demonstrated” for a finding that faculty are managers), *citing Lewis & Clark Coll.*, 300 N.L.R.B. 155, 163 n.41 (1990).

At *Yeshiva*, it was the central administration (comprised of the President, four Vice Presidents and an Executive Council of deans and administrators), and not the faculty, that set general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement and fringe benefits, and developed the budget, subject to the approval of the Board of Trustees. *Id.* at

675-76. The faculty also did not have direct access to the President or even the Vice Presidents. Rather, the five undergraduate and eight graduate schools at the university were largely autonomous entities, headed by a Dean or Director, and it was principally within these decentralized structures that the faculty exercised their managerial authority – meeting formally or informally (depending on the school) to discuss and decide such academic matters as curriculum, the grading system, admission and matriculation standards, academic calendars and course schedules. *Id.* at 676. The faculty at each school also made recommendations to the Dean or Director with regard to faculty hiring, tenure, sabbaticals, termination and promotion and in most cases the faculties’ recommendations were implemented. *Id.*

The faculty at Yeshiva thus played a central, but by no means exclusive, role in managing the educational institution. The faculty’s authority was more circumscribed when the university faced fiscal concerns in the early 1970’s, and the faculty’s recommendations on personnel decisions were subject to budgetary constraints imposed by the administration. *Id.* While the union cited these limitations as evidence that the faculty were employees and lacked managerial authority, the Supreme Court unhesitatingly rejected this argument. The Court explained:

the fact that the administration holds a rarely exercised veto power does not diminish the faculty’s effective power in policymaking and implementation. See nn. 4, 5, *supra*. The statutory definition of “supervisor” expressly contemplates that those employees who “effectively . . . recommend” the enumerated actions are to be excluded as supervisory. 29 U.S.C. § 152 (11). Consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than final authority. That rationale applies with equal force to the managerial exclusion.

Id. at 684 n.17.

The Court went on to highlight certain indicia that were central to its finding of managerial control. The Court observed that the faculty’s effective recommendation of policies in academic matters was of primary concern, and these included: curriculum and course

schedules (“what courses will be offered, when they will be scheduled, and to whom they will be taught”), “teaching methods, grading policies, and matriculation standards,” “which students will be admitted, retained, and graduated,” “the size of the student body, the tuition to be charged, and the location of a school.” *Yeshiva* at 686. The Court also noted that at Yeshiva, the faculty played a predominant role in hiring, tenure, sabbaticals, termination and promotion, but it did not rely on those “non-academic” factors as a basis for its decision.² *Id.* at 686 n.5.

Thus, *Yeshiva* counsels that managerial authority is not to be reviewed in absolutist terms. Rather, there are many facets of university governance to be considered, particularly academic concerns, and the emphasis should be on “effective recommendation.” It is irrelevant whether the faculty’s decisions are potentially subject to veto by administrators or the trustees or whether in exceptional circumstances the faculty’s input was rejected or ignored.

II. PRIOR BOARD DECISIONS HIGHLIGHT THE RELATIVE IMPORTANCE OF THE YESHIVA FACTORS.

In question 4, the Board asks: Which of the factors identified in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?” Following *Yeshiva*, the Board has reviewed numerous claims of employee status at colleges and universities throughout the country. Those decisions highlight that certain factors are most determinative on the issue of managerial status. Most significantly, in every case in which the Board has held that faculty members were managers, it found that they effectively recommended policies with respect to the curriculum and course offerings. *See, e.g., Carroll Coll., Inc.*, 350 N.L.R.B. No. 30 (July 20, 2007); *LeMoyne-Owen II*, 345 N.L.R.B. No. 93 (Sept.

² The Supreme Court and subsequent Board decisions have used the term “non-academic” to refer to personnel-type decisions such as faculty hiring, tenure, sabbaticals, termination and promotion; the *amici curiae* accept that terminology, while noting that many of these decisions also have important academic significance.

30, 2005); *Lewis & Clark Coll.*, 300 N.L.R.B. 155, 161-63 (1990); *Elmira Coll.*, 309 N.L.R.B. 842, 844 (1992); *Univ. of Dubuque*, 289 N.L.R.B. 349, 350, 352 (1988); *Livingstone Coll.*, 286 N.L.R.B. 1308, 1310-11, 1313 (1987); *Am. Int'l Coll.*, 282 N.L.R.B. 189, 190, 201 (1986); *Univ. of New Haven*, 267 N.L.R.B. 939, 941 (1983). Further highlighting the importance of these criteria, in all but two of the cases in which the Board held the faculty lacked managerial authority, it also found that the faculty's authority with respect to the curriculum and course offerings was severely circumscribed. *Compare Univ. of Great Falls*, 325 N.L.R.B. 83, 95-96 (1997) *enforcement denied on other grounds*, 278 F.3d 1335 (2002) (finding no managerial authority where details as to nature and number of faculty recommendations as to curriculum were lacking); *Loretto Heights Coll.*, 264 N.L.R.B. 1107 (1982), *enforced sub nom*, 742 F.2d 1245, 1251 (10th Cir. 1984) (finding no managerial authority where faculty control of curriculum and course offerings is limited to their own disciplines or program areas).

The Board's findings with respect to this factor are consistent with the *amici's* own experience and understanding of university governance. Nearly 50 years ago, ACE and the Association of Governing Boards of Universities and Colleges commended a joint statement prepared by the American Association of University Professors, reflecting the principles of shared responsibility and cooperative action in the context of academic governance. Statement on Government of Colleges & Universities (1966) ("Joint Statement"). Among the principles outlined in the Joint Statement is the agreement that the "faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction." Joint Statement, Art. V. Curriculum development and course selection, within the framework of the institution as a whole, are the types of core academic decisions to which the skills, training, and

expertise of the faculty are uniquely suited, and institutions of higher education will typically vest their faculty with virtually complete authority in these areas.

Under the Board's decisions, and in practice, other academic factors, such as course scheduling, grading, graduation policies, student admission and retention policies, matriculation standards and teaching methods, are important but not determinative indicia of managerial status.³ In each of the cases in which the Board found managerial status, the faculty was found to effectively recommend policies with respect to at least four of these seven factors. *See, e.g., LeMoyne-Owen II*, 345 N.L.R.B. No. 93 (faculty determine or effectively recommend grading, graduation standards, academic retention policies, teaching methods and selection of textbooks, and academic honors); *Lewis & Clark*, 300 N.L.R.B. at 161 (faculty made effective recommendations with regard to student admission and retention policies, matriculation standards, graduation policies, grading and teaching methods); *Dubuque*, 289 N.L.R.B. at 350, 352-53 (faculty made effective recommendations with respect to course schedules, teaching methods, graduation policies, grading and student admission and retention policies); *Am. Int'l*, 282 N.L.R.B. at 195-96, 201 (faculty made effective recommendations with respect to course schedules, matriculation standards, graduation policies, grading and student admission policies but not individual student admissions).

Variation among institutions with respect to faculty authority in these areas is, again, consistent with our experience. The uniqueness of each academic institution, historical differences in approach to governance, and market considerations will necessarily affect whether, and to what extent, these seven factors are within faculty control. *See Joint Statement, Art. V* (“[b]udget, manpower limitations, the time element, and the policies of other groups,

³ The Board noted in *Univ. of Dubuque*, for example, that the lack of controlling authority with respect to grading policies does not, in itself, preclude a finding of managerial status. 289 N.L.R.B. at 353.

bodies and agencies having jurisdiction over the institution may set limits to realizations of faculty advice.”) For example, faculty will most frequently be involved in setting student admission and retention policies in highly selective schools, while there will be little need for faculty input at schools that have open enrollment. Course scheduling also will generally fall within faculty control, but administrative concerns with optimizing classroom space or complying with accrediting standards may affect scheduling.

The three remaining academic factors cited by the Supreme Court in *Yeshiva* – size of student body, tuition and location of school – were of lesser importance in that case, and are mentioned infrequently as factors in subsequent decisions. *See Yeshiva*, 444 U.S. at 686. Although designated by the Supreme Court as “academic”, these factors are largely determined by economic considerations, which traditionally are the concern of the president and the trustees, rather than the faculty.

Finally, post-*Yeshiva* decisions have, at times, noted such academic considerations as setting the academic calendar, *see, e.g., Boston Univ.*, 281 N.L.R.B. 798 (1986), *aff’d*, 835 F.2d 399, 401 (1st Cir. 1987), the acceptance of transfer credits, *Elmira*, 309 N.L.R.B. at 844, student absence policies, *Livingstone*, 286 N.L.R.B. at 1311, course enrollment levels, *Lewis & Clark*, 300 N.L.R.B. at 161, and student advising, *Am. Int’l*, 282 N.L.R.B. at 191, as indicative of managerial authority. The absence of any of these factors in *Yeshiva* precludes granting them controlling weight and they have not, in fact, been determinative in the Board decisions considering managerial authority.

Variability with respect to these factors is again consistent with the varying philosophies, traditions and economic considerations among institutions of higher education. At some institutions for example, faculty will have primary responsibility for student advising, while

other institutions view this task as an administrative function and have independent counseling centers or designated advisors to assist with this responsibility. Faculty will frequently have input into course enrollment levels and some discretion as to whether to admit students into their class, but concerns with classroom assignments, average class size, accrediting standards and the like may necessitate administrative caps on enrollment levels. Similarly, acceptance of transfer credits has economic implications because students receive the benefit of a degree without having paid the degree-granting institution for a full academic program. It is thus appropriate for the Board to consider these factors in assessing managerial authority, but not to predicate its determination on their existence or absence.

While of lesser importance, Board decisions following *Yeshiva* have recognized that faculty control with respect to certain non-academic decisions is also relevant to managerial status. Foremost among these are decisions pertaining to faculty hiring, tenure, and promotions. In virtually every case in which faculty were found to have managerial status, they also were found to make effective recommendations with respect to these factors.⁴ *See, e.g., Lewis & Clark*, 300 N.L.R.B. at 158 n.30; *Univ. of Dubuque*, 289 N.L.R.B. at 351-52; *Am. Int'l*, 282 N.L.R.B. at 199, 201.

Similarly, in the Joint Statement, Art. V, faculty are recognized as having primary responsibility with respect to matters of “faculty status”, including “appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal.” These decisions require consideration of scholarship, service and citizenship that faculty are uniquely qualified to assess.

⁴ Other non-academic factors, such as selecting administrators, terminations and sabbaticals and leaves, were cited less frequently as indicia of managerial control. *See, e.g., Lewis & Clark*, 300 N.L.R.B. at 158, n.30 (faculty had managerial authority with respect to terminations and sabbaticals and leaves).

The Board's decisions and the practice within the academic community point to three distinct levels of inquiry: First, faculty authority in matters of curriculum and course selection is, for all practical purposes, a *sine qua non* of managerial status. Second, graduation policies, course scheduling, grading, student admission and retention policies, matriculation standards and teaching methods are also important and relevant considerations, and faculty should ordinarily have authority in a majority of these areas to be considered management. Third, other considerations, ranging from the academic calendar and course enrollment levels to faculty status matters, remain relevant considerations but were not central to the Supreme Court's holding in *Yeshiva* and should not be determinative.

III. IN DETERMINING EFFECTIVE AUTHORITY, THE BOARD SHOULD CONTINUE TO EVALUATE ALL RELEVANT EVIDENCE AND AVOID IMPOSING AN EVIDENTIARY BURDEN THAT UNDERMINES YESHIVA.

In question 5, the Board asks: "In the areas identified as 'significant,' what evidence should be required to establish that faculty make or 'effectively control' decisions?" *Yeshiva* itself establishes the legal framework on this issue. The "relevant consideration is *effective* recommendation or control rather than final authority." *Yeshiva*, 444 U.S. at 683 n.17 (emphasis added). For example, the fact that the faculty's authority in certain areas may be circumscribed by fiscal or other long-range policy concerns does not diminish the faculty's effective power in policymaking and implementation. *See id.* at 683 n.17, 688 n.27. Moreover, the Board has consistently rejected a "mechanical application of *Yeshiva*, i.e., counting and comparing the number of areas in which faculty have input with the number of such areas in *Yeshiva*." *LeMoyne-Owen Coll.*, 345 N.L.R.B 1123, 1128 (2005) ("*LeMoyne-Owen II*"), *on remand from LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004) ("*LeMoyne-Owen I*"); *see also Univ. of Dubuque*, 289 N.L.R.B 349, 353 (1988) (explaining that a mechanical application of *Yeshiva* "fails to take into account the many different combinations and permutations of

influence that render each academic body unique”). Therefore, it would likewise be improper for the Board to set rigid standards for determining effective recommendation, especially in an environment such as higher education, where the prevalence of collegial decision making requires an institution-specific inquiry rather than a wooden application of bright-line rules.

As noted above, the most significant area for consideration is authority over curriculum and course offerings. In all areas, however, the Board should continue to use objective evidence such as historical data with respect to institutional decision making (e.g., how often faculty recommendations are accepted by an institution’s administration or governing body). *See Yeshiva*, 444 U.S. at 688 n.27 (“[I]nfrequent administrative reversals in no way detract from the institution’s primary concern with the academic responsibilities entrusted to the faculty.”). The Board should also continue to use subjective evidence such as non-faculty members’ perceptions regarding the influence of faculty recommendations. *See Yeshiva*, 444 U.S. at 676 n.4 (crediting testimony of deans and other administrators regarding the influence of faculty recommendations), 677 n.5 (same). Care should be taken not to impose an evidentiary burden that is so high that it essentially negates the judicially implied exclusion for managerial employees first recognized by *Bell Aerospace* and later applied to higher education by *Yeshiva*.

IV. THE FACTORS IDENTIFIED BY EXISTING PRECEDENT ARE SUFFICIENT TO ACCURATELY DETERMINE WHETHER FACULTY ARE MANAGERIAL EMPLOYEES.

In question 6, the Board asks: “Are the factors identified in the Board case law to date sufficient to correctly determine whether faculty are managerial?” Question 7, in turn, asks: “If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?” *Id.*

The Supreme Court in *Yeshiva* identified the factors the Board is to consider. As the D.C. Circuit explained in *Point Park University v. NLRB*, 457 F.3d 42, 49 (DC Cir. 2006)

applying *Yeshiva* to this case, the Board “*must* consider the degree of faculty control over academic matters such as curriculum, course schedules, teaching methods, grading policies, matriculation standards, admission standards, size of the student body, tuition to be charged, and location of the school.” (emphasis added). The Higher Education *Amici* are not aware of any evidence that the *Yeshiva* factors are insufficient, nor are they aware of any request by the parties for the Board to identify additional factors. That Congress has not amended relevant provisions of the Act in the 34 years since *Yeshiva* was decided provides compelling evidence that *Yeshiva* is consistent with congressional intent and cannot be altered in the absence of congressional action. *See, e.g., Bell Aerospace*, 416 U.S. at 275 (citing congressional acquiescence as evidence previous interpretation of Act satisfied congressional intent).

V. YESHIVA RECOGNIZES THAT HIGHER EDUCATION IS UNIQUE.

In question 8, the Board asks if its “application of the *Yeshiva* factors to faculty [is] consistent with [the Board’s] determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context or (b) can the Board more closely align its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?”

Yeshiva expressly recognized that the Act cannot be applied to higher education in the same manner that it would be to private industry generally. “The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry,” the Supreme Court explained. *Yeshiva*, 444 U.S. at 680. “In contrast, authority in the typical ‘mature’ private university is divided between a central administration and one or more collegial bodies. . . . This system of ‘shared authority’ evolved from the medieval model of collegial decision making in which guilds of scholars were

responsible only to themselves.” *Id.* “Distinguishing between excluded managers and included professional employees is a fact-intensive inquiry that presents special challenges in the unique and often decentralized world of academia.” *Point Park Univ.*, 457 F.3d at 51.

Therefore, the Board “must determine whether the faculty in question so controls the academic affairs of the school that their interests are aligned with those of the university or whether they occupy a role more like that of the professional employee in the ‘pyramidal hierarchies of private industries.’” *Id.* at 48 (quoting *Yeshiva*, 444 U.S. at 680). “That,” the D.C. Circuit explained, “is by its very nature a fact-bound inquiry.” *Id.*; *see, e.g., LeMoyne-Owen II*, 345 N.L.R.B at 1128-31 (applying *Yeshiva* factors to detailed factual record focused specifically on collegiate employer at issue). If such an inquiry proves different in the context of higher education than it does in the context of manufacturing, retail, health care or any of the other myriad areas subject to the Board’s jurisdiction, it is simply a product of the fact that, as recognized by *Yeshiva*, higher education does not fit within the mold of pyramidal hierarchies found in private industry generally. *See Yeshiva*, 444 U.S. at 681 (explaining that the “principles developed for use in the industrial setting cannot be imposed blindly on the academic world”) (internal quotations and citation omitted).

VI. THE BOARD’S PROFESSIONAL STATUS QUESTION IS MISDIRECTED.

In question 9, the Board asks: “Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?” One of the central lessons of *Yeshiva*, however, was that merely being a professional employee does not preclude one from being a managerial employee. The Supreme Court specifically rejected the Board’s argument that the judicially implied exclusion for managerial employees cannot be applied to professional employees. *Yeshiva*, 444 U.S. at 683-84. Furthermore, in light of the fact that Pacific Lutheran

University does not challenge the professional status of its full-time faculty, it would be improper for the Board to use this adjudication as a means to address an issue not presented by this case.

VII. THERE HAVE BEEN NO SIGNIFICANT DEVELOPMENTS IN PRIVATE UNIVERSITIES' DECISION-MAKING MODELS SINCE YESHIVA.

In question 10, the Board asks: “Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board’s analysis?” As outlined below, research supports the conclusion that faculties continue to exert the same amount of influence and control, if not more, over the aspects of institutional governance identified in *Yeshiva* and subsequent Board decisions as being indicative of managerial status.

For almost 190 years, starting with Harvard University in 1826, the decision-making model of shared governance has been utilized at most private colleges and universities. Due to the development of the research institution, increased professionalism of faculty, rapid enrollment growth, the changing composition of the student body, and the volatile political climate of the 1960s, the model of shared governance has developed to increase faculty voice in various areas of institutional governance. See Willis A. Jones, *Faculty Involvement in Institutional Governance: A Literature Review*, 6 J. Professoriate 117, 119-35 (2011). Shared governance was utilized at Yeshiva University, which prompted the Supreme Court to conclude that the university’s full-time faculty were managerial employees. See *Yeshiva*, 444 U.S. at 680.

Shared governance is still the general rule at institutions today. Approximately 90 percent of four-year institutions currently have faculty governing boards that participate in institutional governance. Jones, *supra*, at 120. Recent research studies and articles confirm that

faculties still have a major role in areas such as curriculum, the establishment of teaching standards, academic performance, and standards for promotion and tenure. *See id.* at 124 (collecting and discussing recent studies on faculty influence on institutional governance). “Faculty appear to be given great decision-making authority over the areas in which they presumably have the most expertise.” *Id.* at 129-30. Setting budget priorities and evaluating presidents and vice presidents are areas where faculty sometimes had the least control. However, one study found that even where faculty had little overall control or influence over budgeting, they were often consulted on specific areas such as salaries and the merger or discontinuation of programs. *Id.* at 125. Such findings align with *Yeshiva* and subsequent decisions holding that faculty need not play an exclusive role in governing the institution in order to exercise effective managerial control.

Two studies—the 2001 Survey of Higher Education Governance and the 2003 survey conducted by the Center for Higher Education Policy Analysis—provide additional data on the distribution of power among various parties on campus. The 2001 Survey of Higher Education Governance asked respondents (governing boards, presidents, deans and division heads, department chairs and faculty governance bodies) at both private and public institutions to evaluate how their relative formal powers had changed in the previous two decades. Gabriel E. Kaplan, *How Academic Ships Actually Navigate*, in *Governing Academia* 165, 178 (2004). The overwhelming majority of private faculty governance bodies (92 percent) responded that their power had stayed the same or increased. *Id.* Only 8 percent of faculty governance bodies responded that they had less power. *Id.* Another question revealed that 86 percent of respondents from private institutions felt that the main representative body of faculty either influenced or directly made policy at the institution. *Id.* at 181. Almost 90 percent of faculties

(private and public) had determinative or joint authority with the administration on content of the curriculum; 69.9 percent had determinative or joint authority on faculty appointments; and 66.1 percent had determinative or joint authority on tenure decisions. *Id.* at 184.

The survey also included questions from a 1970 American Association of University Professors survey in order to see how governance has changed and whether shared governance had deteriorated in the face of economic challenges. One author summarized a comparison of the relevant findings of the studies as follows:

[F]aculty participation in governance of academic matters increased over time. In 1970, faculties determined the content of curriculum at 45.6% of the institutions, and they shared authority with the administration at another 36.4%. By 2001, faculties determined curriculum content at 62.8% of the institutions, and they shared authority at 30.4%. In 1970, faculties determined the appointments of full-time faculty in 4.5% of the institutions, and they shared authority at 26.4%. By 2001, faculties determined appointments of full-time faculty in 14.5% and shared authority in 58.2% of the institutions.

Judith Areen, *Government As Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *Geo. L.J.* 945, 966 n.99 (2009).

Similarly, the Center for Higher Education Policy Analysis survey asked all respondents (faculty, academic vice presidents and senate leaders) to report the perceived level of faculty influence in decision making for various domains. *See* Ctr. for Higher Educ. Policy Analysis, *Challenges for Governance: A National Report* (2003). The survey revealed that 67 percent of faculty reported having formal authority over undergraduate curriculum, 59 percent of faculty reported formal authority over tenure and promotion standards, and 50 percent of faculty reported formal authority over the standards for evaluating teaching. *Id.* at 8. Further findings showed that over 75 percent of faculty at baccalaureate, master's and doctoral institutions believe there is sufficient trust and 70 percent of faculties believe there is sufficient communication

between administrators, a necessary element of successful shared governance. Jones, *supra*, at 122.

Accordingly, recent surveys and articles support the conclusion that faculties not only continue to be heavily involved in the governance of institutions on many levels and in multiple forms, but that such involvement has increased since *Yeshiva* was decided.

VIII. THE USE OF FACULTY JOB CLASSIFICATIONS WOULD BE NEITHER SOUND POLICY NOR FACTUALLY SUPPORTABLE GIVEN THE LACK OF STANDARDIZATION THROUGHOUT HIGHER EDUCATION.

Finally, in question 11, the Board asks if there are “useful distinctions to be drawn between and among different job classifications within a faculty—such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty—depending on the faculty’s structure and practices.”

It is well established that job classifications are an inaccurate guide for determining an employee’s status under the Act. *See, e.g., Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007) (rejecting use of job classifications as means to determine supervisory status); *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 590 (7th Cir. 2012) (same); *NLRB v. ADCO Elec. Inc.*, 6 F.3d 1110, 1117 (5th Cir. 1993) (“In determining whether someone is a supervisor, job titles reveal very little, if anything.”). Using job classifications would be particularly unwise in this context because there is no set definition in academia used to describe a particular job title.

As this case illustrates⁵, academic titles, and the policies that govern them, vary widely among different institutions. “[T]erminology varies, making it difficult, in some cases, to define

⁵ As the Regional Director found here:

Contingent faculty have the following job titles: Instructor, senior instructor, clinical instructor, resident instructor, visiting instructor, lecturer, senior lecturer, visiting lecturer, associate professor, visiting professor, visiting assistant professor, resident assistant professor, professor, (Footnote continued on next page)

clearly who may be included in a generalization and who may not.” David W. Leslie, *Part-Time, Adjunct and Temporary Faculty: The New Majority?, A Report of the Sloan Conference on Part-Time and Adjunct Faculty* 21 n.1 (May 1998) (unpublished manuscript). Because of this inconsistency, attempts to create useful distinctions between and among different job classifications is neither sound policy nor factually supportable.

One distinction that is often drawn among faculty members is the difference in tenure status. However, this distinction does not accurately categorize different faculty, their level of commitment or their interests. For example, a survey of 25 universities revealed that a significant portion of non-tenure-track (“NTT”) faculty, 44 percent, are working at their institution full-time. A full-time NTT faculty member will often have interests similar to a full-time tenure-track (“TT”) faculty member. Furthermore, while the titles of assistant, associate and full professor are usually reserved for TT faculty members, the titles of lecturer, instructor, and visiting and adjunct professor are usually reserved for NTT faculty members. *Id.* However, these titles are not used *exclusively* to refer to one or the other. For example, while “Professor,” “Associate Professor” and “Assistant Professor” are generally used to describe TT faculty, those titles account for 18 percent of NTT faculty. *Id.* Similarly, the title of “Adjunct Professor” is used at institutions for both TT faculty and NTT faculty. *Id.*

There are also significant practical distinctions among adjunct professors at different institutions. For example, adjunct faculty may or may not be salaried depending on the institution. At some institutions adjunct faculties are given fixed-length appointments, while at

clinical assistant professor, and clinical supervisor. Tenure-eligible faculty have the job titles of professor, associate professor, and assistant professor.

Pacific Lutheran contends that full-time contingent faculty members in any of these job titles, who are voting members of the Faculty Assembly, should be excluded as managerial. The bargaining unit found by the Regional Director, however, also includes part-time faculty with benefits and part-time faculty without benefits, who are not claimed to be managerial. (Regional Director at 9)

others they can be given an indefinite appointment. Policies regarding benefits for adjunct faculty also vary among institutions. Some institutions provide no benefits for adjunct faculty while others provide adjunct faculty the same benefits as they do for TT faculty. There are similar distinctions for the titles of “Lecturer” and “Senior Lecturer,” which represent 0.5 percent of TT faculty and 46 percent of NTT faculty, and “Instructor,” which represents 0.3 percent of TT faculty and 10 percent of NTT faculty with regard to such things as length of appointment and benefits. *See id.* (discussing variations at different institutions).

A recent survey conducted by Hart Research Associates on behalf of the American Federation of Teachers (“AFT”) also found that part-time/adjunct faculty members vary considerably in the extent of their participation in institutional governance. Am. Fed’n of Teachers, *A National Survey of Part-Time/Adjunct Faculty*, 2 Am. Academic 3 (Mar. 2010). An earlier comprehensive study of non-tenure-track faculty similarly found considerable variation in such participation, while reporting that 89 percent of private institutions surveyed permitted NTT faculty to participate in departmental committees and 51 percent permitted participation by full-time NTT faculty in the Senate or its equivalent. Roger G. Baldwin and Jay L. Chronister, *Teaching Without Tenure: Policies and Practices for a New Era* (2001), at 57-60. As the study observed, “The extent of their governance role will vary with the functions the non-tenure-track faculty fill on their campuses. *At institutions where they function interchangeably with tenure-class faculty, faculty members off the tenure track often engage in all aspects of governance with the exception of participation in tenure decisions.*” *Id.* at 159 (Emphasis added)

There are also personal accounts from part-time professors similarly attesting to the difference in treatment of part-time faculty at different institutions. For example, at Ventura College, “adjuncts can control their own courses, participate in curriculum revisions, and vote in

departmental meetings.” Scott Smallwood, *United We Stand?*, Chron. of Higher Educ., Feb. 21, 2003, at A10. However, the same professor teaching part-time at College of the Canyons “can’t choose [his] own books, and taking part in curriculum discussions is unheard of.” *Id.* Therefore, at some institutions, an adjunct faculty member will be more like a full-time TT employee.

Ultimately, though, the lack of consistency makes it impossible to identify useful distinctions between types of faculty based solely on job classification. As the D.C. Circuit explained in *Point Park University*, “[e]very academic institution is different, and in determining whether a particular institution’s faculty are ‘managerial employees’ excluded from the Act,” the Board “must perform an exacting analysis of the particular institution and faculty at issue.” *Point Park Univ.*, 457 F.3d at 48.

CONCLUSION

The Supreme Court’s decision in *Yeshiva University* describes the factors to be considered in determining the managerial status of faculty members and the Board’s decisions since *Yeshiva* highlight the relative importance of those factors. There is no need or appropriate basis on the limited record of this case for a broader re-examination of the Board’s application of *Yeshiva*, and the Board should decline to conduct one.

Dated: March 28, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 28th day of March, 2014, I electronically filed with the NLRB via e-file in NLRB No. 19-RC-102521 the Brief of Amici Curiae American Council on Education, Association of American Universities, Association of Governing Boards of Universities and Colleges, College and University Professional Association for Human Resources, Council of Independent Colleges, Independent Colleges of Washington and National Association of Independent Colleges and Universities and served the document via electronic mail upon the following:

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