

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POINT PARK UNIVERSITY,

Employer,

and

NEWSPAPER GUILD OF
PITTSBURGH/COMMUNICATIONS
WORKERS OF AMERICA, LOCAL 38061,
AFL-CIO, CLC

Petitioner.

Case No. 6-RC-12276

AMICUS CURIAE BRIEF OF THE NATIONAL EDUCATION ASSOCIATION

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The National Education Association (“NEA”) submits this brief in response to the Notice and Invitation to File Briefs issued by the National Labor Relations Board (“Board”) inviting interested *amici* to file briefs addressing issues raised by the U.S. Court of Appeals for the D.C. Circuit’s remand order in *Point Park Univ. v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006). That order instructs that the Board “explain the weight of the various factors identified by the Supreme Court” in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and, more specifically, “explain ‘which factors are significant and which less so, and why’ in determin[ing] that the faculty at Point Park were not ‘managerial employees.’” *Point Park*, 457 F.3d at 49, 50 (citation omitted).

STATEMENT OF INTEREST OF AMICUS

NEA is a national labor organization representing more than three million education employees, many of whom are employed in colleges and universities. NEA is strongly committed to preserving the collective bargaining rights of education employees in both public and private school systems—including employees of private colleges and universities. Accordingly, *amicus* NEA strongly believes that the judicially created managerial exception to the coverage of the National Labor Relations Act (“NLRA” or the “Act”), as applied to university faculty in *Yeshiva*, must be analyzed judiciously so as to keep faith with the Supreme Court’s teaching in *Yeshiva* while at the same time ensuring that the managerial exception is not given such overly broad application as to deny protection to workers that the Act was intended to cover.

STATEMENT OF FACTS

Point Park University is a private liberal arts university in Pittsburgh Pennsylvania with about 3,200 students and a full-time faculty of 80 instructors, assistant processors, associate professors, and professors. *Point Park Univ.*, Case No. 6-RC-12276, Regional Director’s Decision and Direction of Election at 5, 7, 15 (N.L.R.B. Region 6, April 27, 2004) (hereinafter

“Dec. & Dir. of Election”). The institution was originally founded in 1960 as Point Park College. As explained in more detail below, the college’s administration—without faculty approval or input—substantially restructured the institution in 2002 in order to effectuate the administration’s plan to transform the institution into a university. The administration, then successfully applied for a charter to operate as a university the following year. Dec. & Dir. of Election at 7-8; *Point Park Univ.*, Case No. 6-RC-12276, Regional Director’s Supplemental Decision on Remand at 5, 7, 15 (N.L.R.B. Region 6, July 10, 2007) (hereinafter “Supp. Dec.”).

1. The Institution’s Governance and Operations

A. Governance

Point Park’s Board of Trustees is vested with ultimate authority to govern and manage the university. Dec. & Dir. of Election at 10. The Board of Trustees consists of thirty-five voting members, including the University President; the President of the Faculty Assembly sits as an *ex officio* member of the Board of Trustees but has no voting rights. *Id.* Apart from this non-voting member, the faculty has no other representation on the Board of Trustees. *Id.* at 10-11.

Between meetings, the Board of Trustees’ authority is exercised by its Executive Committee, which consists of no less than six trustees and the university president. *Id.* at 11. Apart from the Executive Committee, the Board of Trustees has six other standing committees—the Finance Committee, the Compensation Committee, the Development Committee, the Nominating Committee, Planning and Facilities Committee, and the Academic and Student Affairs Committee. *Id.* Faculty are represented only on the latter-most committee, which consists of at least four trustees appointed by the Chair of the Board of Trustees, plus two faculty members. *Id.* Thus, in the one standing governance committee in which the faculty has any

voice at all, faculty representatives are in the minority, with their votes outnumbered by Trustee votes by a ratio of at least 3:1.

B. Administration

The day-to-day operations of the university are managed by a staff of twenty administrators, including the University President, four vice-presidents, several associate and assistant vice-presidents, the Deans of Enrollment Management and Community Outreach, the academic deans of each of the university's four schools, the academic chairs of the various departments within those schools, and several program directors. *Id.* at 12-13. The ratio of administrators to full-time faculty is 1:4. *Supp. Dec.* at 10 n.11. The administration sets tuition and fee levels, establishes enrollment targets, and engages in fundraising. *Dec. & Dir. of Election* at 12.

The University's budget is prepared by the Vice-President of Finance and Operations with no faculty input; the Vice-President of Finance and Operations submits the budget to the Board of Trustees' Finance Committee and ultimately to the full Board of Trustees for a vote. *Dec. & Dir. of Election* at 12. The university's enrollment goals are set by the Dean of Enrollment Management, also without faculty input. *Id.* Those enrollment goals—which effectively determine the size of the student body and thereby directly impact the delivery of educational services by the faculty—are a particular point of contention between the university's administration, which has pursued an expansionary enrollment policy, and the faculty members, who favor more modest enrollment targets that they believe more suited to the university's facilities, but who lack any voice in the shaping of enrollment policy. *Id.* at 13.

Academic policies are set by the Vice-President of Academic Affairs, upon recommendations by two standing committees: The Deans Council and the Graduate Council. *Id.* at 13. The Deans Council consists of the deans of the four schools, plus two program

directors, the Director of Library and the Director of Honors Program. *Id.* The Graduate Council consists of the directors of each graduate program, who report to the chairs of the various departments within which the graduate programs operate. *Id.* at 14.

C. Faculty

Point Park's full-time faculty members act through their governing body, the Faculty Assembly, which meets monthly throughout the academic year. Dec. & Dir. of Election at 15-16. The Faculty Assembly has nine standing committees, including, of particular relevance here, the Curriculum Committee, whose function is to make recommendations to the Faculty Assembly concerning such matters as adding new courses, programs, and majors as well as structural changes in existing degree programs and course offerings that have the potential to have effects beyond a single department. *Id.* at 16 & n.32.

"The normal process" by which changes are made to undergraduate programs is as follows: Since the 2002-03 restructuring, proposals would originate at the school level, whereas before the restructuring, such proposals would originate from the departments. Dec. and Dir. of Election at 17 & n.34. Any such proposal is referred to the Faculty Assembly's Curriculum Committee, which is empowered to either reject the proposal or recommend it to the full Faculty Assembly for a vote. If the proposal is approved by the Faculty Assembly, it is then referred to the Vice-President for Academic Affairs, who can either reject the proposal or submit it with a recommendation for approval to the University President. *Id.* at 17 & n.35.

Graduate programs originate from the administration, which submits a statement of design to the Pennsylvania Department of Education and then completes a program proposal to the Graduate Council. Dec. & Dir. of Election at 18. If the Graduate Council approves the program, the proposal then goes to the Faculty Assembly's Curriculum Committee. *Id.* If the Curriculum Committee approves the program, it is then submitted to the full Faculty Assembly

for a vote. *Id.* Programs approved by the Faculty Assembly are then submitted to the Vice-President of Academic Affairs and the University President, who have final authority to approve the program; if the President approves, the program must be resubmitted in its final form to the Pennsylvania Department of Education. *Id.*

2. Decision-Making Regarding the Overall Nature and Direction of the Institution and the Structure of Departments and Academic Programs

Notwithstanding the fact that Point Park’s bylaws ostensibly require faculty consultation “[f]or decisions that affect programs, curricula, or faculty,” Dec. & Dir. of Election at 17, the reality is that major decisions regarding course offerings, the structure of degree programs and departments, and the even the very nature of the institution have routinely been made by the administration either without faculty consultation or contrary to the stated position of the faculty.

Most importantly, in the period from 2002 to late 2003, the administration of the institution—then operating as Point Park College—began a major restructuring that culminated in the transformation of the institution from a college to a university. Before 2002, the college was organized into academic departments and programs, each headed by a department chair or program director; the department chairs and program directors reported directly to the Vice-President for Academic Affairs, who, in turn, reported to the University President. Supp. Dec. at 9 & n.9. In 2002, the administration, without faculty input or participation, created a new layer of administration above the department chairs and program directors by creating four schools, each headed by a dean—the School of Arts and Sciences, the School of Business, the Conservatory of Performing Arts, and the School of Adult and Professional Studies. *Id.* at 10. After this restructuring, there were “not one but two buffers” between the faculty and the administration: “The department chairs and all but one program director ... and the newly created deans.” *Id.* Consequently, a substantial amount of authority shifted from the department

chairs and program directors to the deans of the four schools, thereby “dilut[ing]” the faculty’s “input on academic matters.” *Id.*

After this restructuring, the administration of what was then Point Park College applied for accreditation as a university. This action, too, was undertaken without faculty input; indeed, the faculty was not informed of the administration’s decision to seek university status until after the application was completed. Supp. Dec. at 9-10 & n.10. The application was finally approved in October of 2003. Dec. & Dir. of Election at 7-8.

The administration also made substantial changes to departments and academic programs without consulting the faculty. In 2001, for instance, the administration dismantled the Government and International Studies Department and reassigned the courses previously taught by faculty members from that department to the Business Department and the Humanities Department. *Id.* at 14. Although this action required the Business and Humanities Departments to offer additional courses, the faculty was not consulted before the administration implemented this change. *Id.* In the same year, the administration also merged the International Master in Business Administration (“International MBA”) degree program with the Master of Business Administration (“MBA”) program. *Id.* at 15. The result of this merger was to cease offering the International MBA degree program altogether, in favor of offering an “international business track” within the MBA program, and to eliminate twenty-two international business course offerings. *Id.* The administration effected this change without any consultation with the faculty. *Id.* Also in 2001, the administration created a new program within the Department of Journalism and Mass Communication called the Innocence Institute of Western Pennsylvania, thereby creating new curriculum and independent study opportunities. *Id.* Again, the faculty was not consulted on the creation of this new program. *Id.* at 16.

And in 2002, amidst the restructuring of the entire institution, the University President decided to contract out the English as a Second Language (“ESL”) Program—previously run by the Humanities and Human Sciences Department—to a private, for-profit company, Berlitz/ELS Educational Services, Inc., and to reduce the number of ESL courses offered to international students. Supp. Dec. at 16. This action was taken without faculty input and over the objection of the chair of the Humanities and Human Sciences Department. *Id.* In the same year, the administration, again acting unilaterally, changed the course requirements for students seeking an undergraduate degree in Early Childhood Education and Elementary Education by adding a required course and rejected the recommendation of the National Collegiate Honors Council to offer a separate curriculum for students in Point Park’s Honors Program. *Id.* at 17-18.

3. Decision-Making Regarding Academic Policies

In the area of academic policy, too, the administration of Point Park frequently acted unilaterally with respect to purely academic matters. As explained above, the administration’s unilateral restructuring of programs and departments led to the elimination of more than twenty academic courses, the elimination of the International MBA degree program, and the contracting out and consequent reduction in ESL offerings. Of equal moment, in those instances in which the administration did consult with the faculty concerning changes to existing academic programs or the creation of new programs—as ostensibly required under the institution’s bylaws—the administration frequently acted contrary to the faculty’s recommendations. With respect to undergraduate programs, the Regional Director found that “the outcome of 4 out of 14 undergraduate programs, or approximately 29 percent of the undergraduate programs about which there is evidence in the record, was not decided on by the faculty.” *Id.* at 12. This included the administration’s decisions not to offer three degree programs recommended by the Faculty Assembly and its creation of a new undergraduate degree program without faculty

approval. *Id.*; Dec. & Dir. of Election at 18. As to graduate programs, “the faculty’s recommendation ... was not followed [by the administration] nearly 17 percent of the time.” Supp. Dec. at 13; Dec. & Dir. of Election at 18-19.

The administration showed a marked tendency to disregard the faculty’s purported control over curriculum as outlined in the university’s Faculty Handbook. Supp. Dec. at 20. Notably, in 2003, the administration unilaterally established new policies concerning online courses, “special delivery courses,” independent study courses, and faculty-led study abroad programs. *Id.* Specifically, the administration unilaterally created a stipend for the development of online courses, required that faculty add fourteen hours of “special delivery courses” taught outside the classroom, required approval by deans of all independent study courses, and suspended study abroad programs. *Id.* at 20-21.

Decisions regarding admissions, enrollment targets, and tuition levels, as noted above, are structurally committed to the administration, and nothing in the actual practice of the institution shows that the administration chose to share that authority with the faculty. *Id.* at 23-25, 32-33, 35.

The administration’s tendency to act unilaterally on academic matters even reached into such areas as the development of course syllabi and the assigning of student grades. In 2003, faculty members were provided with a detailed model syllabus developed by the administration for the redesign of all classes, whereas faculty members previously were required to prepare a syllabus for each course, without being subject to any particular model. Supp. Dec. at 30. At the same time, the administration required faculty to assign library work and research for all students and established attendance and grading policies directing faculty members to decrease student grades by a set number of points for missing a specified number of classes, and to reduce students’ grades by one full letter grade for all late assignments “without exception.” *Id.*

Administrative interference in grading also took the form of altering grades assigned to individual students by faculty members. The Vice President for Academic Affairs unilaterally ordered the registrar to change a student's grade in an MBA course from a B- to an A and to change in another graduate student's grade to an A+ in order to raise the student's grade-point average to 4.0. *Id.* at 27. And the same Vice-President approved a committee's determination to change the grades of eighteen students in an undergraduate business class, even though the committee process did not comport with the university's process for student appeals of grading decisions. *Id.*

4. Decision-Making Regarding the Terms and Conditions of Faculty Employment

The Point Park administration also displays a penchant for unilateral actions concerning the terms and conditions of faculty employment to a significant degree.

The administration, for instance, repeatedly flouted the Faculty Handbook's guidelines as to faculty hiring by directly appointing tenure-track faculty, and in one instance promoting an existing faculty member to chair a department, without convening a search committee of faculty members. *Id.* at 36-37. As with appointments, the administration in three instances directed the award of tenure despite Faculty Handbook requirements mandating that a departmental review committee be established to review tenure requests. *Id.* at 43-44. These three incidents constituted about seventeen percent of all tenure decisions during the relevant period. *Id.* at 44. The administration also routinely ignored faculty input in the selection of deans and department chairs. *Id.* at 40-41.

Significantly, in 2002, amidst the overall restructuring of the institution, the University President and the Vice-President for Academic Affairs decided to implement, for the first time in the institution's history, a comprehensive personnel manual for the entire university and engaged

an outside consultant to draft the policies—which has resulted in six separate draft volumes. While the administration has allowed faculty an opportunity to comment on the draft policy, it has set a tight deadline, and of course failed to involve faculty in the initial decision to promulgate such policies or to hire a consultant rather than develop them in-house. *Id.* at 47.

Finally, and perhaps most importantly, the administration implemented a merit pay system despite the fact that the Faculty Assembly voted the proposal down twice, and also implemented a corresponding evaluation system for that purpose. *Id.* at 47.

PRIOR PROCEEDINGS

In late 2003, the Newspaper Guild of Pittsburgh, affiliated with the Communications Workers of America, AFL-CIO, petitioned the Board to represent a unit consisting of approximately 77 full-time faculty members at Point Park University, teaching artists, and laboratory associates, but excluding the university's president, vice-presidents, associate and assistant vice-presidents, deans, department chairs, and part-time faculty. Dec. & Dir. of Election at 5. The university's administration argued that all members of the petitioned-for unit are managerial employees excluded from the Act's coverage. After a twenty-day hearing and full briefing by the union and the university, the Regional Director issued his 109-page Decision and Direction of Election, concluding that the university's full-time faculty were not managerial employees and that the proposed bargaining unit was an appropriate one.

The university sought review by the Board, which the Board denied by order dated June 23, 2004, without issuing a written opinion. After the bargaining unit's members voted in favor of the union's representation in Board-supervised election, the union was certified as the bargaining agent for the unit. The university refused to bargain in order to test the certification, and the union filed unfair labor practice charges alleging a violation of the duty to bargain. The

Regional Director filed a complaint, which the Board resolved against the university on summary judgment.

The university then filed a petition for review with the U.S. Court of appeals for the D.C. Circuit. The court granted the petition on the ground that “the Board and the Regional Director “failed to ... explain which factors are significant and which less so, and why’ in their determination that the faculty at Point Park were not ‘managerial employees.’” *Point Park*, 457 F.3d at 50 (citation omitted). Accordingly, the court remanded the case to the Board to provide such an explanation. *Id.* at 50-51. The Board, in turn remanded the case to the Regional Director, who issued his Supplemental Decision on July 10, 2007, in which he offered a fuller legal analysis based on the same record. This review proceeding followed.

ARGUMENT

I. INTRODUCTION

The D.C. Circuit’s remand order in this case presents the Board with an opportunity both to clarify its application of the Supreme Court’s teaching in *Yeshiva* in a way that is responsive the D.C. Circuit’s direction that the Board “explain ‘which factors are significant and which less so, and why,’” *Point Park*, 457 F.3d at 50, and to build on the *Yeshiva* factors, consistent with the Supreme Court’s admonition that the factors it identified “are a starting point only, and that other factors not present here may enter the analysis in other contexts,” 444 U.S. at 690 n.31. In this regard, we suggest that the Board take due account of the substantial changes to the landscape of academia that have that have occurred in the decades since the Supreme Court issued its *Yeshiva* decision—many of which are amply reflected in the record here.

Accordingly, we suggest that the Board develop a decisional matrix for evaluating whether faculty members in a particular institution of higher education are professional employees protected by the NLRA that eschews the ‘laundry list’ approach but instead focuses

on the locus of decision-making in broad areas. Briefly stated, our suggested approach is this: Analysis must begin, but certainly not end, with a careful consideration of the governance and administrative structures of the institution, with an eye to the question whether the overall structure suggests a hierarchical organization or a collection of collegial bodies with broadly shared authority between faculty and administration. While this is a necessary starting point, it is by no means the most important consideration. Far more significant is how the actual, operational decisions are made in three critical areas: (a) decisions as to the structure of the institution's academic programs and/or the overall nature and direction of the institution; (b) decisions as to the institution's academic policies; and (c) decisions as to the terms and conditions of faculty members' employment. Consideration of the actual decision-making process in these areas should be the backbone of the Board's analysis. And on such analysis, the full-time faculty included within the Regional Director's Decision and Direction of Election easily qualify as professional employees entitled to the protections of the Act, rather than managerial employees who are excluded from the Act.

We will detail our proposed approach in Part II below, but in order to place the discussion in its proper context, we will first discuss the development of the managerial exception, with particular focus on its application in higher education settings, and then survey broad developments in academia that post-date the *Yeshiva* decision that are pertinent to the issues to be decided by the Board.

1. The managerial exception to the NLRA's coverage is not stated in the text of the Act, but in *NLRB. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974), the Court concluded—based on an analysis of the legislative history of the Taft-Hartley Act of 1947 and Board decisions prior to *Packard Motor Car*, 64 N.L.R.B. 1212 (1945), *enforced* 157 F.2d 80 (6th Cir. 1946), *judgment aff'd* 330 U.S. 485 (1947)—“that Congress intended to exclude from

the protections of the Act all employees properly classified as ‘managerial.’” *Id.* at 275. In reaching this conclusion, the Court placed particular emphasis on the legislative rationales underlying the Act’s express exclusion of supervisory employees (29 U.S.C. § 152(3)).¹ The Court found that the two houses of Congress, while in disagreement over the precise shape that the supervisory exclusion should take, shared the concern that in *Packard Motor Car*, the Board had broadly read the Act “to include those clearly within the management hierarchy” and thereby potentially “depriv[ing] employers of the loyal representatives to which they were entitled” in such a way as to impair productivity and “upset the balance of power between labor and management.” *Bell Aerospace*, 416 U.S. at 281.

The *Bell Aerospace* Court did not endeavor to define the precise scope of the managerial exclusion, although it did approvingly quote the Board’s definition of “managers” as set forth in another case: “those who ‘formulate and effectuate management decisions by expressing and making operative the decisions of their employer.’” *Id.* at 288, quoting *Palace Laundry and Dry Cleaning*, 75 N.L.R.B. 320 (1947). Having done so, however, the Court closed its discussion of the issue by saying “the Board ‘is now free to’ read a new and more restrictive meaning into the Act.” 416 U.S. at 289 (citation omitted).

The Court revisited the managerial exclusion in the higher education context in *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980). There, the Court further sharpened the definition of exclusion, holding that managers “exercise discretion within, or even independently of,

¹ The Act defines “supervisor” as:

any individual having the authority, in the interest of an employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires use of independent judgment. [29 U.S.C. § 152(11).]

established employer policy and must be aligned with management.” *Id.* at 683. The Court elaborated that an employee is “aligned with management” if he or she “represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” *Id.*

The Court in *Yeshiva* noted that these benchmarks were difficult to apply in the academic context because, in contrast to the “purely hierarchical” structures common in industrial organizations, private universities typically have “shared authority” structures pursuant to which “authority ... is divided between a central administration and one or more collegial bodies.” *Id.* at 680. The Court also recognized the difficulty of distinguishing between explicitly-covered professionals² and those endowed with managerial status.³

Ultimately, however, the Court did not delve too deeply into this issue, as it concluded that the faculty members at *Yeshiva* were clearly managerial because, in matters essential to the operation of the university, they “exercise[d] authority which in any other context unquestionably would be managerial.” *Id.* at 686. The Court summed up the evidence as follows:

[The faculty members’] authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. To the

² The Act defines “professional employees” as those who perform work “predominantly intellectual and varied in character ... involving the consistent exercise of discretion and judgment in its performance ... requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study ... or from training” the output of which “cannot be standardized in relation to a given period of time.” 29 U.S.C. § 152(12).

³ As the Board has acknowledged, “managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction.” *General Dynamics Corp.*, 213 N.L.R.B. 851, 857-58 (1974).

extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served. [444 U.S. at 686.]

The Board had argued that even though the faculty's members effectively control academic matters at Yeshiva, they should not be excluded from the Act because the "independent professional" judgment they exercise mitigates the concerns over divided loyalty that underlie the managerial exception. The Court rejected that approach, reasoning that "[t]he problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the independent professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals." *Id.* at 865-66.

Furthermore, as a factual matter, the Court rejected the union's contention that the faculty's role was "merely advisory" and that the administration had the power to override the professional advice offered by the faculty, concluding that "the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation." *Id.* at 683 n.17. In this regard, the Court pointed out that the record revealed, *inter alia*, the following: "budget requests prepared by the senior professor in each subject receive the 'perfunctory' approval of the Dean '99%' of the time and have never been rejected by the central administration"; that the deans of two of Yeshiva's colleges "regard faculty actions as binding"; that "[o]ne Dean estimated that 98% of faculty hiring recommendations were ultimately given effect"; that "[t]he President has accepted all decisions by the Yeshiva faculty as to promotions and sabbaticals, including decisions opposed by the Dean." *Id.* at 675-77 nn.3,4,&5.

At the same time, the Court took pains to outline the limits of its holding. The Court made clear that its decision was *not* intended to "sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them" and that faculty members who merely

engaged in “the routine discharge of professional duties in projects to which they have been assigned” were not managerial employees, even if their inclusion in a bargaining unit involved “some divided loyalty.” *Id.* at 690. In other words, that faculty members are performing the traditional role of professors is not enough, without more, to confer “managerial” status.

Of critical significance here, the Court further stressed that its analysis was “a starting point only, and that other factors ... may enter into the analysis in other contexts.” 444 U.S. at 691 n.31. For example, the Court said that there may be “institutions of higher learning unlike *Yeshiva* where the faculty are entirely or predominantly nonmanagerial.” *Id.* The Court went on to note that “[t]here may be faculty members at *Yeshiva* and like universities who properly could be included in a bargaining unit” but expressed no opinion on that issue because it was “clear that the unit approved by the Board was too broad.” *Id.* .

Of equally critical importance at this juncture, the Court acknowledged the dissent’s point that the “shared governance” structure on which the Court’s decision rests was becoming less common in universities, even at that time, while pointing out that any such shift was “neither universal nor complete” and stressing that, in any event, the Court’s “decision must rest on the record before us.” *Id.* at 689 n.29.

2. Board decisions subsequent to *Yeshiva* have, to say the least, not displayed a consistent approach. There is general agreement across existing decisions that the kind of “absolute” faculty control over academic matters that drove the Court’s decision in *Yeshiva* need not be shown, *see, e.g., Lewis & Clark College*, 300 NLRB 155, 163 fn. 41 (1990), and *Lemoyne-Owen College*, 345 NLRB 1123 (2005), and that academic factors are generally more significant than non-academic factors in the analysis because “the ‘business’ of a university is education.” *Yeshiva*, 444 U.S. at 688.

However, this is largely where the decisions cease to agree. As Board Member Johanson noted in *University of Dubuque*, 289 NLRB 349 (1988), the Board “has failed to develop an integrated body of law” charting the point short of “absolute” control at which faculty members are “expressing and making operative the decisions of their employer”—thereby becoming managers—rather than acting in their own interests. *Id.* at 355 (member Johansen dissenting)

In a number of cases, however, the Board has given (in our view, appropriate) weight to significant “non-academic” factors going to the structure and overall direction of the institution—all of which have inevitable consequences for the academic enterprise even if they do not constitute “academic policy” in a narrow sense. For example, in *Cooper Union of Science & Art*, 273 NLRB 1768 (1985), *enforced* 783 F.2d 29 (2d Cir. 1986), the Board, in finding that the faculty were not managerial employees, gave considerable weight to the fact that the institution had engaged in major restructuring without faculty input. The Board stressed that the administration had, without consulting the faculty and over faculty objections, engaged in two restructurings: In the first, it “increase[ed] class size, increase[ed] the student-faculty ratio, increase[ed] teaching loads, severely limit[ed] grants of tenure, reduc[ed] the number of full-time faculty through attrition, and increase[ed] the proportion of adjunct faculty,” and in the second “eliminated the divisions and the division head positions, leaving the schools the primary structural academic units.” *Id.* at 1770-71. *See also University of Great Falls*, 325 NLRB 83, 83 (1997) (emphasizing that the administration was not only the driving force behind academic policy but also “unilaterally established a law school” and “eliminated entire degree programs” without faculty input).

Other cases suggest that that the locus of decision-making with regard to academic policies, narrowly construed as those relating to curriculum, course schedules, teaching methods, grading policies, admissions and graduation standards, student body size, and tuition rates—the

factors that, to be sure, primarily drove the *Yeshiva* decision—are perhaps the only factors of significance. See, e.g., *Livingstone College*, 286 NLRB 124 (1987) (“Given that the business of a university is education, it is the faculty members’ participation in formulating academic policy that aligns their interest with that of management. . .”).

In *New York Univ. Med. Ctr.*, 324 NLRB 887 (1997), the Board endeavored to succinctly explain its method for evaluating faculty bargaining cases where the managerial exception was at issue, but managed instead to underscore this tension in its case law. There, the Board concluded that “[w]here faculty members have been afforded protection under the Act, the Board has relied on the fact that the administration either unilaterally or effectively made the decisions essential to university operations.” At the same time, however, the Board noted that it had denied NLRA coverage to a group of faculty members in *University of Dubuque*, 289 NLRB 349 (1989), where faculty members were generally in the minority on committees that formulated academic policies,⁴ and where “the administration vetoed a majority of the faculty members’ recommended decisions.” *Id.* at 350, citing *New York Univ. Med. Ctr.*, 324 NLRB at 910.

As the dissent in *Dubuque* noted, denying the protection of the Act to employees is “a serious matter.” 289 NLRB at 354 (Member Johansen, dissenting). Implicit exclusions such as the managerial exclusion “must be narrowly construed to avoid conflict with the broad language of the Act, which covers ‘any employee,’ including professional employees.” *David Wolcott Kendall Mem. School*, 866 F.2d at 160 (citation omitted). The Supreme Court itself has agreed with this general principle, noting that “administrators and reviewing courts must take care to

⁴ For example, three faculty members were on the nine-member committee that set admission, retention, and student discipline policies; three faculty members sat on the seven-member committee that made policy related to the distribution of financial aid; and five faculty members sat on the sixteen-member committee on Educational Policies. In the cases of the admissions and financial aid committees, the faculty members were appointed by the university president rather than the faculty. *Dubuque*, 289 NLRB at 350.

assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

3. Underlying all this ferment in the case law is historical reality: While both *Yeshiva* and Board decisions after *Yeshiva* have rested on a strong a view of the “shared governance” university, the landscape of higher education is changing rapidly. Universities ever less frequently resemble the collegial institutions referenced in *Yeshiva*. As institutions of higher education have become increasingly similar to large businesses, power over both academic and non-academic decision-making has become more centralized in administrative bodies, with a corresponding reduction in faculty authority. See Benjamin Ginsberg, *The Fall of the Faculty: The Rise of the All-Administrator University and Why it Matters*, at 1-7 (Oxford University Press, 2011). These administrative bodies often contain large numbers of specialized personnel, such that faculty recommendations are not implemented in many areas deemed important in *Yeshiva*—if, indeed, professional advice in these areas is sought from faculty at all. *Id.* The result of these changes is that an increasing portion of universities are not “like *Yeshiva*,” 444 U.S. at 689, and faculty members at such institutions serve in an advisory role, at best, not a managerial role.

Universities also increasingly rely on contingent faculty, including part-time and adjunct employees. See Michael W. Klein, *Declaring an End to “Financial Exigency”? Changes in Higher Education Law, Labor, and Finance, 1971-2011*, 38 J. College & Univ. L. 221, 271-72 (2012) (“Between 1995 and 2007, contingent faculty came to outnumber tenured faculty. By 2007, the proportion of tenure and non-tenure faculty was reversed. Only 21.3% of faculty were full-time tenured, and 9.9% were full-time tenure-track.” (footnotes omitted)). Such contingent faculty members are truly confined to “the routine discharge of professional duties in

projects to which they have been assigned” and cannot reasonably be considered managerial. *Yeshiva*, 444 U.S. at 690. The advent of online distance learning is creating a sea change from real-time, in-person course offerings to virtual, online offerings. See Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 Ohio St. L.J. 783, 784 (2001) (noting that “[t]he number of distance education courses and degree programs offered in the United States grew by 72% from 1995 to 1998,” such that “[a]lmost 1,700 institutions offer about 54,000 online courses with a total student enrollment of approximately 1.6 million” (footnotes omitted)). This development also has the potential to create a disconnect between many faculty members and their employing institution’s governance structures. Particular care should be taken to ensure that the managerial exception is not applied too broadly in these settings.

Given the inconsistent application of the managerial exception and the realities of private university governance more than thirty years after *Yeshiva*, this case presents an important opportunity for the Board to clarify its interpretation of that case in a manner that remains true to the mandates of the NLRA. A rigorous analysis is needed that can serve as a blueprint for future cases in determining whether faculty members are managerial so that those who are properly covered as professionals under the act are not deprived of their statutory right to organize.

II. THE BOARD MUST DEVELOP A RIGOROUS ANALYSIS FOR DETERMINING WHETHER FACULTY MEMBERS ARE MANAGERIAL THAT IS CONSISTENT WITH BOTH *YESHIVA* AND THE PURPOSES OF THE NATIONAL LABOR RELATIONS ACT

The Board should develop an integrated theory of the application of *Yeshiva* to present-day institutions of higher education by honing the approach in *Yeshiva* in a way that ensures that only faculty members who exercise broad authority in areas critical to the university’s operations as an educational institution are classified as managerial—that is, only those faculty members who, like the faculty in *Yeshiva*, have *actual* control over “the product to be produced, the terms

upon which it will be offered, and the customers who will be served.” *Yeshiva*, 444 U.S. at 686 n.17. This will require a detailed analysis of which factors or areas of control “are significant and which less so, and why,” *Point Park*, 457 F.3d at 50, as well as what factors should be considered in determining whether the faculty members in question exercise an adequate *level* of control in each of these areas and in the institution as a whole that it “pervasively operate[s] the enterprise.” *Yeshiva*, 444 U.S. at 691.

As noted above, this case presents the Board with an opportunity both to clarify its application of *Yeshiva* in a way that is responsive to the D.C. Circuit’s remand order and to build on the *Yeshiva* factors, consistent with the Supreme Court’s admonition that the factors it identified “are a starting point only, and that other factors not present here may enter the analysis in other contexts,” 444 U.S. at 690 n.31. Consequently, it is eminently possible to keep faith with the Court’s teaching in *Yeshiva* while accounting for the substantial changes to the landscape of academia that have occurred in the decades since the Supreme Court issued its *Yeshiva* decision—changes that are evident in the record in this case.

A. Which Factors Are Significant, Which Less So, And Why

We propose that the Board develop a decisional matrix for evaluating whether faculty members in a particular institution of higher education focusing on the locus of decision-making in broad areas, prioritized according to those that have the greatest impact on the creation and delivery of the institution’s product—educational services. This case is a particularly apt vehicle for developing such a decisional matrix both because the record here reflects the historical trends in academia and because the Regional Director’s Supplemental Decision on Remand and the earlier Decision and Direction of Election here go a long way toward providing the Board with an outline for “explain[ing] ‘which factors are significant and which less so, and why,’” *Point Park*, 457 F.3d at 50. As the court in *Yeshiva* observed, “the business of a university is

education” and its “vitality” depends on the academic policies the school chooses to implement. *Yeshiva*, 444 U.S. at 688. Based on this cogent observation, the Regional Director’s Supplemental Decision suggests that the most logical way to prioritize the *Yeshiva* factors is to place the most emphasis on those with the greatest and most direct impact on “the creation and delivery” of the “product” of that business. Supp. Dec. at 57. Hence, we provide a slightly modified and supplemented reiteration of the Regional Director’s analysis below.

1. The Institution’s Formal Governance and Administrative Structure

The analysis must begin with a careful consideration of the governance and administrative structures of the institution, with an eye to the question whether the overall structure suggests a hierarchical organization or a collection of collegial bodies with broadly shared authority between faculty and administration. To be sure, the formal structure of the institution is not the most significant factor in the analysis; rather, it is the actual operational decision-making within the institution that largely determines whether faculty can properly be considered either “managerial employees” or “professional employees.” But it is well-nigh impossible to analyze an institution’s actual operations without first getting a handle on the institution’s formal structure. *See Cooper Union of Science & Art*, 273 NLRB 1768, 1768 (1985) (“We review first the formal governance structure for faculty participation in institutional decision making and then actual governance practice.”).

In this regard, we believe that the following features of formal governance structures are the most important: (a) the degree of faculty representation, if any, on the governing board and governance committees; (b) the size of central administration relative to the faculty; (c) the number of layers of authority between the faculty and the institution’s governing board; and (d) the authority granted to administrators. *See generally Elmira College*, 309 N.L.R.B. 842 (1992);

Duquesne University, 261 N.L.R.B. 587 (1982); *Loretto Heights College*, 264 NLRB 1107 (1982).

In this case, these factors suggest that faculty at Point Park are not managerial employees: Faculty have no voting representatives on Point Park’s Board of Trustees, but only a single, non-voting representative, and they have only a small minority of voting members on one of the eight standing governance committees, the Curriculum Committee. The size of the central administration at Point Park, while not large in absolute terms, is certainly outsized in relation to faculty, as there is one administrator for every four faculty members. *Cf. Loretto Heights College*, 264 NLRB at 1121 (a cadre of three administrators for every faculty member provided an “effective buffer between the faculty and top management”). Since Point Park’s restructuring, there are multiple layers of administration between the faculty and the Board of Trustees (the department chairs, the deans of the schools, the Vice-President of Academic Affairs, and the President). Broad, unshared authority is committed to administrators regarding the university budget, tuition rates, and enrollment targets.

2. The Actual Operational Decision-Making of the Institution

As noted above, although an examination of the institution’s formal governing structures is a necessary and first step, and is not insignificant in its own right, it is hardly the most important part of the analysis. Rather the heart of the analysis should be, as *Yeshiva* and post-*Yeshiva* Board cases have recognized, a thorough consideration of the locus of actual, operational decision-making within the institution—“the law of the shop,” to borrow a phrase from the industrial context.

Although this much is clear, the Board’s challenge—as the D.C. Circuit’s remand order makes plain—has lain in articulating which types of decisions are the most significant and why. We believe that the path forward can be drawn from existing case law and the Regional

Director’s decisions in this case, provided that the Board eschews the case-by-case ‘laundry list’ approach—which, due to the peculiarities of each particular case and each particular institution does not always provide adequate guidance in other cases—and instead focus on three broad areas of decision-making, prioritized according to their effects on the delivery of educational services: (a) decisions as to the structure of the institution’s academic programs and/or the overall nature and direction of the institution; (b) decisions as to the institution’s academic policies; and (c) decisions as to the terms and conditions of faculty members’ employment. Needless to say, given the variation among institutions, the precise contours of decision-making in these broad areas will doubtless vary from case to case, but we believe that these three areas are critical to the determination whether faculty are, in fact, managerial.

(a) Decision-Making Regarding the Overall Nature and Direction of the Institution and the Structure of Departments and Academic Programs

It would be difficult to posit a set of decisions that have more impact on the delivery of educational services than fundamental decisions as to the overall nature and direction of an institution of higher education as well as more granular decisions about the structure of academic departments and programs. To be sure, such decisions were not part of the record in *Yeshiva*, and thus did not feature in the Court’s articulation of the factors driving its conclusion that Yeshiva faculty were managerial employees, but we believe that, where applicable, such decisions fall comfortably within the “other factors not present [at Yeshiva that] may enter into the analysis in other contexts.” 444 U.S. at 690 n.31.

Decisions as to the overall nature and direction of an educational institution—like the Point Park administration’s decision to transform the college into a university—are quintessential managerial functions. They are, in the higher education context, equivalent to the types of decisions that Justice Stewart, in his now-canonical concurrence in *Fibreboard Paper*

Products Corp. v. NLRB, 379 U.S. 203 (1964), identified as constituting “the core of entrepreneurial control,” in the industrial context—*i.e.*, “[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise.” *Id.* 223 (Stewart, J., joined by Douglas and Harlan, JJ., concurring). Just as such decisions “are fundamental to the basic direction of a corporate enterprise,” *id.*, so, too, decisions as to the nature and direction of an institution are fundamental to the educational enterprise conducted by higher education institutions.

Here, the Point Park administration’s unilateral decisions to restructure the institution and thereby transform from a liberal-arts college, with semi-autonomous departments reporting directly to the college’s top administrators, into a university in which departments are subordinate to schools and the school report up the administrative chain, were obviously fundamental to the academic enterprise. Consequently, the complete exclusion of faculty from any input into those fundamental decisions at Point Park points strongly toward the conclusion that Point Park’s faculty are not managerial.

But such fundamental restructuring and reorienting decisions are not the only types of decisions that fall into this category. Decisions regarding more modest structural changes—*e.g.*, the creation, merger, or elimination of academic programs, or the decision to contract out educational services to a private vendor, all of which occurred at Point Park without faculty involvement—also are inherently managerial. *Cf. Fibreboard*, 379 U.S. at 210-11 (“To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.”). And again, the Point Park administration’s unilateral actions in these areas also points strongly to the conclusion that the faculty are not managerial employees. *See Cooper Union of*

Science & Art, 273 NLRB 1768 (1985), *enforced* 783 F.2d 29 (2d Cir. 1986); *University of Great Falls*, 325 NLRB 83, 83 (1997); *St. Thomas Univ.*, 298 NLRB 280 (1990).

(b) Decision-Making Regarding Academic Policies

Of no less significance are decisions regarding academic policies—the types of decisions that form what the D.C. Circuit has aptly called “the heart of the Court’s decision in *Yeshiva*.” *Point Park*, 457 F.3d at 403. As these traditional *Yeshiva* factors are well-nigh universally considered of paramount importance in the Board’s post-*Yeshiva* case law, we need not elaborate on their significance to the delivery of educational services by the institution. To reiterate, the Court concluded that *Yeshiva*’s faculty were “clearly managerial” because their authority over the following academic policies was “absolute”:

They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served. [444 U.S. at 686.]

While there is no need to elaborate on the importance of these factors, the key question arising in most contemporary colleges and universities will turn on the degree of administrator or faculty control over these decisions. *See* David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 Colum. L. Rev. 1775, 1800 (1989) (“The crucial issue in distinguishing between professionals and managers ... is not whether professional work has a direct impact on company policy, but rather who makes the effective decision to accept or reject professional advice. This decisionmaker, who may or may not have professional training, is a manager.”). As the Board’s cases recognize, faculty need not have “absolute” authority over

such decisions to be considered managerial, but lines must be drawn where there are still vestiges of the “shared control” model.

While the degree of faculty control over matters related to programs of study and curriculum is of signal importance, it must be emphasized that “professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research” still stands. *Yeshiva* at 690 n.31. Rather, it is control of overall educational policy that is significant. By the same token, where the administration has established a pattern of overriding faculty members on basic pedagogical matters, the inference may be drawn that faculty power is extraordinarily weak.⁵

In this regard, Point Park is an instructive case. While it certainly cannot be said that Point Park’s faculty members are excluded from decision-making on all matters of educational policy to the same degree that they are from restructuring decisions, the record nevertheless discloses a pattern of unilateral actions by the administration on matters ranging from course offerings to individual students’ grades.

As explained above, decisions regarding admissions, enrollment targets, and tuition levels, as noted above, are structurally committed to the administration, and are effected by the administration without faculty input in actual practice. And the administration’s unilateral restructuring of programs and departments resulted in the elimination of more than twenty academic courses, the elimination of the International MBA degree program, and the contracting out and consequent reduction in ESL offerings.

In those instances in which the administration did consult with the faculty concerning changes to existing academic programs or the creation of new programs, the administration

⁵ In *St. Thomas Univ.*, for example, the fact that faculty members were severely constrained in drafting syllabi, selecting course materials, and changing course grades was seen as an indication that they were not managers. 298 NLRB at 283.

frequently acted contrary to the faculty's recommendations: The administration rejected approximately 29 percent of the faculty's recommendations as to undergraduate programs nearly 17 percent of the faculty's graduate program recommendations.

The administration unilaterally established new policies concerning online courses, "special delivery courses," independent study courses, and faculty-led study abroad programs, created grading policies tied to student absences, and established a model syllabus. The administration's interference in academics even reached the arena of individual student grades, with the Vice President of Academic Affairs ordering the alteration of numerous individual students' grades.

(c) Decision-Making Regarding the Terms and Conditions of Faculty Members' Employment

Finally, the Board should also take into account decisions concerning the terms and conditions of faculty members' employment. Although this factor relates to subjects that are critical in bargaining and of obvious importance to faculty members *qua* employees, it should receive the least weight in the consideration of managerial status. That is because according these factors greater significance would run the risk that the judicially created "managerial exception" would become redundant of the statutory exemption of supervisors. And the weeding out of supervisory employees can be accomplished by application of the proper exception. That said, a similar pattern of unilateral action by Point Park's administration is evident in this decision-making area as well.

The administration, for instance, repeatedly flouted the Faculty Handbook's guidelines by directly appointing tenure-track faculty, and in one instance promoting an existing faculty member to chair a department, without convening a search committee of faculty member, and by directed the award of tenure despite Faculty Handbook requirements mandating that a

departmental review committee be established to review tenure requests. The administration also routinely ignored faculty input in the selection of deans and department chairs.

And, in 2002, amidst the overall restructuring of the institution, the administration began the process of drafting and implementing university-wide personnel policies without involving faculty in the decision to adopt such new policies. And, perhaps most importantly, the administration implemented a merit pay system despite the fact that the Faculty Assembly voted the proposal down twice, and also implemented a corresponding evaluation system for that purpose.

Thus, even though these decisions are not entitled to the same weight as the classes of decisions discussed above, they likewise point decidedly toward the conclusion that the faculty members at Point Part are *not* managerial employees.

B. The Board Should Issue Broad Guidelines as to the Level of Control Necessary for Faculty to be Considered Managerial

Once the Board identifies and prioritizes the subject areas as described above, it is faced with what is perhaps an even more important—and more daunting—task. Existing decisions have often failed to articulate factors to be considered in determining the *level* of control exercised in each of these areas, as well as how to determine the overall balance of power between the faculty and the administration. This is understandable; given the Court’s finding of “absolute” control in *Yeshiva*, no further analysis was apparently seen by the Court as necessary. However, as existing decisions seem to agree that something less than “absolute” control can indicate managerial status, it is critical that the Board identify factors to be considered on the “level of control” issue as well as the weight given to the various *areas* of control as explained above.

Existing cases on faculty bargaining and the Regional Director’s Supplemental Decision on Remand allow us to draw out a number of factors that ought to be considered in determining control, some of which overlap with the analysis of the areas of control discussed above. These are: (1) the institution’s governing documents, (2) the size and sophistication of administration and closeness of its relationship to the faculty (3) which party prevails in the event of a conflict, (4) the specific makeup and power of faculty committees, (5) whether the administration makes important decisions that impact academics without consulting the faculty or in circumvention of regular processes, (6) what has changed in the overall balance of power between the faculty and the administration, and how the changes were implemented.

It bears reiteration at the outset that, like the areas-of-control analysis, this analysis must focus on the level of control that the faculty *in fact* exercises. The institution’s governing documents serve again as an entry point, but they should not be taken at face value. In *Yeshiva*, the Court looked to the actual authority exercised by the faculty and whether its actions were “regard[ed] as binding,”⁶ not to the “rarely exercised veto power” that governing documents gave to the administration. *Yeshiva*, 444 U.S. at 683 n.17 (1980). “The relevant consideration”, said the Court, is not some theoretical “final authority”, but “effective recommendation or control”—that is, whose decisions were implemented. *Id.* This distinction is important regardless of whether it is the faculty or the administration that appears to hold official final authority. In *Bradford College*, 261 NLRB 565 (1982), for example, the Board found that the

⁶ In *Yeshiva*, the Court noted that some witnesses in the case could not recall a single occasion when a faculty recommendation was overruled. *Yeshiva*, 444 U.S. at 677 n.4-5. *See also University of Great Falls*, 325 N.L.R.B. 83 (1997) (stating that there must be “clear evidence that faculty recommendations [a]re generally followed.”); *Florida Mem’l College*, 263 NLRB 1248 (1982) (no managerial status where faculty recommendations were frequently overruled and were nothing more than “a sophisticated version of the familiar suggestion box.”), *overruled in part on other grounds, Detroit College of Bus.*, 296 NLRB 318 (1989).

faculty were non-managerial where governance documents indicated they had substantial authority, but in practice they had little.⁷

In determining the level of credence to give to governing documents, the Board should consider whether the policies and procedures contained therein are followed in practice. Even where the policies are followed, it is important to consider who initially drafted the documents, who has the right to revise them, and whether this revision right has been exercised. If the governing documents favor faculty power, but that power has been reduced by the administration's unilateral revision of the documents, it may be a sign that the faculty does not truly serve in a managerial capacity.

The size and sophistication of the administration should be a primary consideration in any analysis of control. In *Yeshiva* there were deans at each of the university's subsidiary schools, but the faculty committees were much larger by comparison, the deans were not experts in academic policy, and the administration therefore depended on faculty expertise in order to make policy. *Yeshiva*, 444 U.S. at 689. By contrast, in *Loretto Heights College*, 264 NLRB 1107 (1982), the college had roughly one administrator for every three faculty members, and this created an "effective buffer between the faculty and top management" that supported a finding that unit members were non-managerial. The Tenth Circuit enforced the Board's ruling, further noting that, unlike in *Yeshiva*, "[t]he availability of this expertise within the ranks of the administration obviates the College's need to rely extensively on the professional judgment of its faculty in determining and implementing academic policy." *Loretto Heights College v. NLRB*,

⁷ "In sum, while the faculty and division chairs have the written right to make recommendations, the record shows that such recommendations were often ignored or reversed by the president, by the academic dean, or by both with respect to curriculum, admission policies, graduation of students, course loads, course scheduling, grading of students, faculty hiring or retention, tuition, and faculty salaries." *Bradford College*, 261 NLRB at 566-67. *But see University of Dubuque*, 289 NLRB 349 (1989).

742 F.2d 1245, 1254 (10th Cir. 1984). This “effective buffer between the faculty and top management” also proved to be important in assessing the level of authority in *St. Thomas Univ.*, 298 NLRB 280 (1990).

The authority and membership of decision-making bodies should also be considered in great detail. Formerly, in “mature universities” like *Yeshiva*, such committees held considerable sway. In today’s “big business” university, this may not be the case. If faculty members do not comprise a majority of the group, “control” over any policies made by the group cannot fairly be considered probative of faculty managerial status. In addition, it is important to consider whether the administration has the power to reorganize or dissolve such committees, to set their agendas, *see Kendall Sch. of Design*, 279 NLRB 281 (1986), or prevent them from meeting—and whether it has exercised this power, either directly or indirectly by reorganizing committees’ parent departments, *see Cooper Union of Science & Art*, 273 NLRB 1768, 1770 (1985) (holding that faculty members were employees where trustees restructured academic organization over strong faculty opposition), *enforced*, 783 F.2d 29 (2nd Cir. 1986). Finally, if important decisions that would ordinarily fall within the committee’s jurisdiction are decided by the administration before the committee is consulted or entirely outside of the committee system, this would be a strong indicator that the committees are “merely advisory,” *Yeshiva*, 444 U.S. 672, 683 n.17, and thus non-managerial. *See St. Thomas Univ.*, 298 NLRB 280 (1990) (holding that faculty were not managerial where a faculty committee was established to make recommendations on academic matters, but its recommendations were seldom implemented, and the administration often made academic policy on its own without consulting the committee).

A related consideration is whether it is the opinion of the faculty or the administration that tends to prevail in the event of a conflict. In the absence of conflict, it is likely that the administration will rely on the informed recommendations of professional educators. If the

administration acts contrary to this advice when issues that are most significant to the academic interests of the school arise, it may be that it sees faculty power as a privilege that it can choose to deny. *See, e.g., Kendall Sch. of Design*, 279 NLRB 281, 293 (1986) (“Where faculty views are known to conflict with the Administration’s, it is the latter’s views which predominates.”).

This factor is not limited to decisions directly concerning academics. Contrary to the assertions of the American Council of Education and others in their *amicus* brief, structural changes should not be divorced from an analysis of faculty control. As explained above, there may be numerous academic consequences to such decisions, especially where academic departments are restructured, as in the instant case. The level of faculty control over the growth of the administration and the appointment of key administrative heads—such as presidents, vice-presidents, provosts, deans, and department chairs—is relevant for similar reasons. Particular attention should be paid to these factors where they result in a change in faculty power *vis-à-vis* the administration.

Finally, in every case, the Board should also consider the dynamic nature of university governance. This includes an inquiry into how the faculty obtained whatever power it possesses, as well as whether, why, and to what extent that power has changed. There may be cases where universities that had small administrations and large and influential faculties at one time, but have since changed dramatically.

III. Given the Existing Inconsistencies in Board Law, Decisions that have Strayed from the Principles of *Yeshiva* Ought to be Overruled.

The Court of Appeals remanded this case to the Board because the university made “a significant showing that analogous cases have been decided differently” and the Board did not rebut that showing to the Court’s satisfaction. *Point Park Univ. v. NLRB*, 457 F.3d 42, 49 (D.C. Cir. 2006). Given the inconsistencies between Board decisions to date as explained *supra*, this

problem is likely to recur even if NEA’s recommended analysis—or any other analysis that comports with *Yeshiva*—is applied. Accordingly, it is essential that the Board overrule decisions that directly conflict with the limited application of the managerial exception articulated in *Yeshiva*.

Most notably, in *Dubuque*, 289 NLRB 349, the faculty exercised partial control in less than half of the areas mentioned in *Yeshiva*, and were generally in the minority on policymaking committees. In *Lewis and Clark College*, 300 NLRB 155 (1990), the Board assigned managerial status to the faculty in spite of its observation that the administration had unilaterally created “umbrella committees” within the institution’s governance structure. These committees implemented new programs into the curriculum over faculty objection. And in *Livingstone College*, 286 NLRB 1308 (1987), faculty members were excluded on the basis of managerial status due to their influence in academic matters, even though they possessed no authority in non-academic matters. While non-academic matters may not always command the same importance as purely academic matters in some settings, as this case demonstrates, non-academic matters can and should be highly significant, particularly where an institution engages in restructuring that affects the delivery of educational services.

Those decisions quite simply cannot be squared with a proper understanding of the Court’s holding in *Yeshiva*, and indeed cannot be squared with many of the Board’s own precedents. See *St. Thomas Univ.*, 298 NLRB 280 (1990); *University of Great Falls*, 325 NLRB 83, 83 (1997); *Cooper Union of Science & Art*, 273 NLRB 1768, 1773 (1985), enforced 783 F.2d 29 (2d Cir. 1986); *Florida Mem’l College*, 263 NLRB 1248 (1982). Accordingly, the *Dubuque*, *Lewis and Clark College*, and *Livingstone College* decisions are due to be overruled.

CONCLUSION

NEA hopes that this *amicus* brief proves helpful to the Board's deliberations in this case and respectfully requests that it adopt the recommendations herein.

Respectfully submitted,

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