

**ORAL ARGUMENT NOT YET SCHEDULED**

Nos. 17-1149 and 17-1171

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

UNIVERSITY OF SOUTHERN CALIFORNIA,  
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent/Cross-Petitioner,

and

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

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

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**BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS IN SUPPORT OF RESPONDENT/CROSS-  
PETITIONER AND ENFORCEMENT OF THE ORDER ON REVIEW**

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the American Association of University Professors (“AAUP”) certifies the following:

**Parties and Amicus.** Except for the above-listed amicus, all parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in the brief of the Respondent/Cross-Petitioner (as a party herein “Respondent NLRB”). AAUP is not aware of any other amicus curiae briefs in support of Respondent NLRB. *See* D.C. Circuit Rule 29(d). AAUP is a professional association for purposes of D.C. Circuit Rule 26.1(b).

**Rulings Under Review.** The rulings under review are listed in Respondent NLRB’s brief.

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

/s/ Michael S. Wolly  
Michael S. Wolly

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Association of University Professors (“AAUP”), founded in 1915, is a non-profit organization of over 40,000 faculty, librarians, graduate students, and academic professionals, a significant number of whom are private sector employees. The mission of the AAUP is to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good. The AAUP’s policies have been recognized by the Supreme Court and are widely respected and followed in American colleges and universities. *See, e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). In cases that implicate AAUP policies, or otherwise raise legal issues important to higher education or faculty members, the AAUP frequently submits *amicus* briefs in the Supreme Court, the federal circuits, and the National Labor Relations Board (“NLRB” or “the Board”). *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980);

*Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000); *Columbia University*, 364 N.L.R.B. No. 90 (2016); *Pacific Lutheran University*, 361 N.L.R.B. 1404 (2014); *Brown University*, 342 N.L.R.B. 483 (2004); and *New York University*, 332 N.L.R.B. 1205 (2000). By participating as an *amicus* in this case, the AAUP seeks to assist the Court in evaluating the legal definition of employee status in a manner that accurately reflects employment relationships in universities and colleges and that respects the rights of college and university employees to exercise their rights to organize and engage in collective bargaining<sup>1</sup>.

### SUMMARY OF ARGUMENT

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court created a multi-factor test for determining whether university<sup>2</sup> faculty are managerial employees under the National Labor Relations Act (NLRA). 29 U.S.C. § 151 et seq. At the same time, the Court recognized that analyzing faculty employment status is a dynamic process. The factors the Court relied on provide “a

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<sup>1</sup> Pursuant to F.R.A.P. 29(4)(E) and Circuit Rule 29(b), all parties have consented to AAUP’s filing of this brief. Further, no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund the brief’s preparation or submission; and no person other than *amicus* contributed money intended to fund the brief’s preparation or submission.

<sup>2</sup> The term “university” is used in this brief to refer to colleges and universities.

starting point only, and...other factors not present here may enter into the analysis in other contexts.” 444 U.S. at 690, n. 31. As this Court has explained, “[C]ontext is everything.... The key inquiry is ‘how a faculty is structured and operates.’” *Point Park University v. NLRB*, 457 F.3d 42, 48 (D.C. Cir. 2006), quoting, *Yeshiva*, 444 U.S. at 690, n. 31.

In the case at hand, the NLRB followed its 2014 legal framework in *Pacific Lutheran University*, which provides “a more workable, more predictable analytical framework to guide employers, unions, and employees alike,” 361 N.L.R.B. 1404, 1419 (2014), to find that non-tenure track faculty in a bargaining unit at the University of Southern California (USC) are not managerial employees under the NLRA. Consistent with, and explicitly referring to *Yeshiva*, the Board’s framework examines “both the breadth and depth of the faculty’s authority at the university,” *Id.* at 1419, to determine whether faculty members “‘substantially and pervasively’ operated the university by exercising extensive control over decision-making and playing a ‘crucial role... in determining...central policies of the institution.’” *Id.*, quoting, *Yeshiva*, 444 U.S. at 679. The Board, therefore, places the greatest weight on three factors where “faculty exercise actual or effective decision making authority over policies for the university as a whole,” as areas where faculty “interests begin to align with management, thereby creating the

problem of divided loyalty that the managerial employee exception seeks to avoid.” 361 N.L.R.B. at 1419, *citing, Yeshiva*, 444 U.S. at 690.

The *Pacific Lutheran* factors are context-sensitive. The three primary and two secondary factors may be applied in the specific context of the university in a particular case. Further, the factors reflect the Board’s consideration of the context of the changing nature of higher education institutions in the almost four decades since *Yeshiva* was decided. As the NLRB explains, “Indeed, our experience applying *Yeshiva* has generally shown that colleges and universities are increasingly run by administrators, which has the effect of concentrating and centering authority away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself.” 361 N.L.R.B. at 1422. In this changing context, the Board appropriately emphasizes that the party asserting managerial status must prove that the breadth of faculty authority extends to policy making that affects the university as a whole and that the depth of faculty effective recommendations or control demonstrates “actual—rather than mere paper—authority.” *Id.* at 1421.

AAUP believes that the NLRB's approach in this case led to the correct result, including the Board's analysis of the relationship between administration and faculty in deciding whether USC non-tenure track faculty are managerial

employees. This *amicus* brief addresses the structural and operational changes in universities that have altered administration-faculty relationships, resulting in reduced faculty authority in university policy making and a divergence in the interests of faculty and university administrations. These institutional changes are: increased top-down management of the university by the growing ranks of administrators; expansion of non-tenure track faculty positions and the corresponding reduction of tenure-track/tenured faculty positions; increased conflict between the university administration and faculty; and the influence of external market forces on university administrators' decision making.

## ARGUMENT

### **I. The NLRB's decision in *Pacific Lutheran* is consistent with *Yeshiva* standards.**

In *Pacific Lutheran University*, the NLRB was “guided by” the *Yeshiva* Court’s “overarching determination that the faculty in question ‘substantially and pervasively’ operated the university by exercising extensive control over decision-making and playing a ‘crucial role ... in determining ... central policies of the institution.’” 361 N.L.R.B. at 1419, *quoting*, *Yeshiva*, 444 U.S. at 679. Consistent with this standard, the Board examines “both the breadth and depth of the faculty's LN.L.R.B. at 1419. The Board places the greatest weight on three areas where “faculty exercise actual or effective decision making authority over policies for the



university as a whole,” as areas where faculty “interests begin to align with management, thereby creating the problem of divided loyalty that the managerial employee exception seeks to avoid.” *Id.*, citing, *Yeshiva*, 444 U.S. at 690. These three areas are: “academic programs,” including “the university's curricular, research, major, minor, and certificate offerings and the requirements to complete successfully those offerings”; “enrollment management,” including “the size, scope, and make-up of the university's student body”; and “finances,” which encompass “both income and expenditure,” including tuition rates. N.L.R.B. at 1420.

The NLRB’s framework places less weight on two secondary areas: “academic policy,” including “teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy”; and “personnel policy and decisions,” including “hiring, promotion, tenure, leave, and dismissal.” *Id.* Academic policy “does not demonstrate the same alignment with management interests as do the primary decision-making areas,” but are related more closely to faculty classroom and research activity than to institutional decisions about academic programs. *Id.* The Board notes that the *Yeshiva* Court considered faculty control of personnel policy and decisions, but did not rely primarily on this factor. The NLRB explains that this area “only indirectly

implicates the product to be produced, the terms in which it is offered, and the customers sought.” *Id.*

In examining the depth of faculty authority, the NLRB emphasizes that “the party asserting managerial status must demonstrate that faculty actually exercise control or make effective recommendations.” *Id.* at 1421. There must be proof of “actual—rather than mere paper—authority” which requires “specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision making area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation....” *Id.* Recommendations are “effective” recommendations if they are “almost always...followed by the administration” and “if they routinely become operative without independent review by the administration.” *Id.*

The Board explains, further, that evaluating actual control or effective recommendations entails an “inquiry into both the structure of university decision-making and where the faculty at issue fit within that structure, including the nature of the employment relationship held by such faculty (e.g., tenured vs. tenure eligible vs. non-tenure eligible; regular vs. contingent).” *Id.* at 1421-22. This inquiry is consistent with the *Yeshiva* Court’s observation that “a rational line could be drawn between tenured and untenured faculty members, depending upon

how a faculty is structured and operates." 444 U.S. at 866, n. 31. Although the NLRB does not draw a bright line between tenure and untenured faculty, it recognizes that status differences may reflect different levels of authority. 361 N.L.R.B. at 1422, n. 40.

## II. In deciding *Pacific Lutheran*, the Board properly considered nationwide changes in university structures post-*Yeshiva*.

*Yeshiva* contrasted the system of “‘shared authority’ in the typical ‘mature’ private university” with “the type of management-employee relations that prevail in the pyramidal hierarchies of private industry.” 444 U.S. at 680. The AAUP has long advocated for “shared governance” and collective bargaining as positive ways for faculty to participate in university policy making that affects the interests of the faculty.<sup>3</sup> The existence of shared governance is not, however, equivalent to a legal finding of managerial status under the NLRA. Faculty often engage in shared

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<sup>3</sup> See, AAUP, 1915 Declaration of Principles on Academic Freedom and Tenure, AAUP Policy Documents and Reports (11th ed. 2015); AAUP, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, AAUP Policy Documents and Reports (11th ed. 2015), *available at* <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm> ; AAUP, Statement on Government of Colleges and Universities, AAUP Policy Documents and Reports (11th ed. 2015), *available at* <https://www.aaup.org/report/statement-government-colleges-and-universities> ; AAUP, Statement on Collective Bargaining, AAUP Policy Documents and Reports (11th ed. 2015), *available at* <https://www.aaup.org/report/statement-collective-bargaining> .

governance as part of their non-managerial responsibilities as professional employees under Section 2(12) of the NLRA. 29 U.S.C. § 152(12). Under *Yeshiva*, faculty are considered managerial employees only when they “exercise discretion within, or even independently of, established employer policy and [are] aligned with management...by taking or recommending discretionary actions that effectively control or implement employer policy.” 444 U.S. at 683.

In the thirty-seven years since *Yeshiva* was decided, there have been significant changes in the university structure and management model relevant to determining whether faculty are Section 2(12) professional employees with Section 7, 29 U.S.C. § 157, rights or whether they are managerial employees excluded from the protections of the NLRA. As the NLRB explains in *Pacific Lutheran*, major changes in the context of university administrative structures and employment practices have undermined the actual breadth and depth of faculty authority:

Over the 30-plus years since *Yeshiva* was decided, the university model of delivering higher education has evolved considerably.... Indeed, our experience applying *Yeshiva* has generally shown that colleges and universities are increasingly run by administrators, which has the effect of concentrating and centering authority away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself. Such considerations are relevant to our assessment of whether the faculty constitute managerial employees. 361 N.L.R.B. at 1422.

### **A. How universities have changed since *Yeshiva*.**

The following sections of this brief explain how the significant changes that universities have undergone have affected the legal determination of “how a faculty is structured and operates.” *Yeshiva*, 444 U.S., at 690, n. 31. Rather than relying on faculty expertise and recommendations, the growing ranks of administrators increasingly make unilateral decisions on university policies and programs, often influenced by considerations of external market forces and revenue generation. Administrators have become more top-down in managing the university faculty, 70 percent of whom are now non-tenure track contingent faculty. These structural changes in the distribution and exercise of authority in the university have altered the relationship between the administration and the faculty to one in which their interests are not aligned. The divergence between administration and faculty is captured by a statement in 2011 by Andrew Meyer, the chairman of Suffolk University’s Board of Trustees: “Suffolk has gone through a transition. This is a new chapter in the history of the university. We need people who understand that running an institution of higher education today means running a business.”<sup>4</sup>

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<sup>4</sup> Mary Carmichael, *New guiding hands at Suffolk: School set to add 12 trustees with business focus*, *The Boston Globe* (Oct. 4, 2011), available at <https://www.bostonglobe.com/metro/2011/10/04/new-guiding-hands-suffolk/OGrCp7CsUdrbaskT811PVL/story.html> .

**1. Universities' use of a corporate business model and the significant expansion of university administration have eroded faculty authority to control or make effective recommendations about university policy.**

**a. In the thirty-seven years since *Yeshiva*, the university model has evolved due to the expanded size and power of university administration.**

The influence of the corporate business model on universities has led to a major expansion of university administration, accompanied by greater top-down authority exercised by high-level administrators. Between the years of 1976 and 2015, the number of full-time executives and managers grew by 140 percent, while full-time faculty grew by 86 percent.<sup>5</sup> These positions include a proliferation of executive-level administrators in university administration. In addition to the Provost, now Vice Provosts, Associate Provosts, and Vice Presidents control decisions related to academic affairs and other university policies. The expansion of administration has occurred not simply in public university systems featuring multiple campuses throughout the state, but also in private universities with a single campus location. For example, at USC, in addition to the President and

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<sup>5</sup> Source: *Digest of Education Statistics 2001*, table 224 and *Digest of Education Statistics 2016*, tables 314.20, 314.30, compiled by Joseph Roy, Senior Researcher, AAUP, Washington, D.C. (December, 2017). See also, AAUP, *The Annual Report on the Economic Status of the Profession, 2013-14*, available at <http://www.aaup.org/our-work/research/annual-report-economic-status-profession>.

Provost, there are seven Senior Vice Presidents and nineteen Deans.<sup>6</sup> At the college level of universities, the administration has expanded through a proliferation of associate deans, assistant deans, and directors.

Along with the increased number of high-level administrators, the administrative apparatus has expanded. From 1976 to 2011, the number of full-time non-faculty professional positions increased by 366 percent overall, with growth of 558 percent in that category at private institutions.<sup>7</sup> Between the years of 1947 to 1995, while overall university spending increased by 148 percent, administrative spending increased by 235 percent, as compared with instructional spending increases at 128 percent.<sup>8</sup> A 2010 study reported that in the period 1998 to 2008, U.S. private colleges increased spending on administration and staff support by 36 percent, but increased spending on instruction by only 22 percent.<sup>9</sup>

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<sup>6</sup> About USC, <https://about.usc.edu/administration/>

<sup>7</sup> Source: *Digest of Education Statistics 2001*, table 224 and *Digest of Education Statistics 2012*, table 286, compiled by John W. Curtis, Director of Research and Public Policy, AAUP, Washington, D.C. (March 13, 2014). See also, AAUP, *The Annual Report on the Economic Status of the Profession, 2013-14*, available at <http://www.aaup.org/our-work/research/annual-report-economic-status-profession>.

<sup>8</sup> Benjamin Ginsberg, THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS 33 (2011) (calculated from National Center for Education Statistics (NCES), *Digest of Education Statistics*, 2006, Table 346).

<sup>9</sup> *Id.* at 27, citing, Sam Dillon, *Share of College Budgets for Recreation is Rising*, New York Times, July 10, 2010, A13 (describing the Delta Cost Project).

As expenditure on instruction has gone down, the ranks of lower-wage non-tenure track faculty have increased dramatically to the current national rate of 70 percent of all faculty positions.<sup>10</sup> This is nearly the reverse of the proportions in 1969, when 78 percent of faculty positions were tenured and tenure-track.<sup>11</sup> As the NLRB noted in *Pacific Lutheran*, “[T]he increasing use of contingent faculty, to the point where the faculty itself can be described as contingent, clearly comprises a major component of a fundamental change in the nature of higher education institutions and their role in a democratic society.”<sup>12</sup> Between 1976 and 2015, part-time faculty positions grew by 224 percent overall, with the rate of growth in private colleges and universities at 264 percent.<sup>13</sup> Currently, nearly 40 percent of full-time faculty positions and 70 percent of all faculty positions in post-secondary institutions are non-tenure track.<sup>14</sup>

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<sup>10</sup> See, note 14, *infra*.

<sup>11</sup> *Pacific Lutheran*, 361 N.L.R.B. at 1422, n. 43, *citing*, Adrianna Kezar & Daniel Maxey, THE CHANGING FACULTY AND STUDENT SUCCESS 1 (2012).

<sup>12</sup> *Pacific Lutheran*, 361 N.L.R.B. at 1422, n. 43, *quoting*, John W. Curtis & Monica F. Jacobe, *Consequences: An Increasingly Contingent Faculty*, AAUP CONTINGENT FACULTY INDEX 15 (2006).

<sup>13</sup> See sources cited *supra* note 5.

<sup>14</sup> Ernst Benjamin, *The Eroding Foundations of Academic Freedom and Professional Integrity: Implications of the Diminishing Proportion of Tenured Faculty for Organizational Effectiveness in Higher Education*, 1 AAUP JOURNAL OF ACADEMIC FREEDOM, at 4 (2010), *available at* <http://www.aaup.org/reports-publications/journal-academic-freedom/volume-1> (citing data through 2007). These proportions still held as of spring 2015. AAUP, *Visualizing Change: The*



The shift to a predominately non-tenure track workforce dilutes faculty authority and control over policy making in the areas identified by the NLRB in *Pacific Lutheran*. The vast majority of non-tenure track faculty are not included as full participants in faculty governance bodies.<sup>15</sup> Further, even where non-tenure track faculty participate in faculty governance, the precarity of their situations makes it difficult for them to act independently or to take positions contrary to the views of the administration. *Pacific Lutheran*, 361 N.L.R.B at 1423. The many contingent faculty in low-wage part-time positions face uncertain employment often from one semester to the next.<sup>16</sup> Full-time non-tenure track faculty face the precarity of contract renewals, many on a yearly basis.

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*Annual Report on the Economic Status of the Profession, 2016-17, available at [https://www.aaup.org/sites/default/files/FCS\\_2016-17\\_nc.pdf](https://www.aaup.org/sites/default/files/FCS_2016-17_nc.pdf) .*

<sup>15</sup> AAUP, *The Inclusion in Governance of Faculty Members Holding Contingent Appointments* (January 2013), available at <http://www.aaup.org/report/governance-inclusion>; Coalition for the Academic Workforce, *A Portrait of Part-Time Faculty Members: A Summary of Findings on Part-Time Faculty Respondents to the Coalition on the Academic Workforce Survey of Contingent Faculty Members and Instructors* (2012), at 2, available at <http://www.academicworkforce.org/survey.html>.

<sup>16</sup> See, AAUP, *Visualizing Change*, *supra* note 14, at 4 (average annual pay for part-time faculty at a single institution is \$20,508, and average pay on per course basis is \$7,066), available at [https://www.aaup.org/sites/default/files/FCS\\_2016-17\\_nc.pdf](https://www.aaup.org/sites/default/files/FCS_2016-17_nc.pdf)

**b. The expanded size and power of the university administration has decreased the ability of faculty to control or make effective recommendations about university policies.**

These fundamental changes in the employment model have created an increasingly stratified employment structure in the university. The highest level administrators (e.g. president, provost, senior vice-provosts) sit at the top of the hierarchy, with the next level occupied by an expanding number of high-ranking administrators (e.g. associate provosts, vice-provosts). The faculty are at the lowest levels, with tenure-track/tenured faculty positions steadily replaced by the growing ranks of non-tenure track/contingent faculty at the very bottom. This stratified system funnels authority over policy making away from the faculty. As the NLRB has found, “the presence of a large administrative staff...create[s] an effective buffer between the top management and the lowest echelon, eliminating the need for the institution’s administration to rely on the faculty for advice, recommendations, and the establishment and implementation of policies.”

*University of Great Falls*, 325 N.L.R.B. 83, 94 (1997), *aff’d*, 331 N.L.R.B. 1663 (2000), *rev’d on other grounds*, 278 F.3d 1335 (D.C. Cir. 2002); *see also*, *Loretto Heights College v. NLRB*, 742 F.2d 1245, 1254 (10th Cir. 1984). As a result, faculty authority over decisions about university policies and programs has diminished, often placing faculty in the position of simply providing input to the

administration or merely being notified of decisions unilaterally reached by the administration. Further, unilateral decisions about academic programs have a direct impact on faculty control over their courses and curriculum, as top-down administrative changes in academic programs force faculty to alter their course offerings to fit the new shape of academic programs.

In *Pacific Lutheran*, the NLRB cites post-*Yeshiva* cases that exemplify the loss of faculty authority due to increased administration control over decision-making that excludes faculty or overrides their recommendations. 361 N.L.R.B. at 1422, n. 42, citing, *Puerto Rico Junior College*, 265 N.L.R.B. 72 (1982); *Cooper Union of Science & Art*, 273 N.L.R.B. 1768 (1985); *St. Thomas University*, 298 N.L.R.B. 280 (1990). *Amicus* AAUP has documented similar effects of the increasing layers of university administrators that ignore or override faculty governance. A recent example was at National Louis University, where the administration, with almost no consultation with faculty representatives, discontinued nine degree programs and five non-degree certificate programs, closed four departments in the College of Arts and Sciences, and terminated the

appointments of at least sixty-three full-time faculty members, sixteen with tenure.<sup>17</sup>

The stratified employment structure that has evolved in universities since 1980 is a far cry from the collegial shared governance model that the *Yeshiva* Court imagined. The proliferation of high-level administrators has solidified a class of career university administrators who could be called “managerial professionals,” in contrast to the rest of the faculty, who remain “practicing professionals.” David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 Colum. L. Rev. 1775, 1834 (1989). The “managerial professionals” in the administration “have positions of bureaucratic power within [the university’s] formal hierarchy,” while the faculty as “practicing professionals” do

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<sup>17</sup> In June, 2013, the AAUP placed the administration of National Louis University on its list of censured administrations for its failure to adhere to generally recognized principles of academic freedom and tenure. AAUP, *Academic Freedom and Tenure: National Louis University*, available at <http://aaup.org/report/academic-freedom-and-tenure-national-louis-university>. See also, Nota Bene, *Board Overrides Faculty Recommendation on Curriculum at George Mason University*, ACADEME, Vol. 86, No. 5 (Sep. - Oct., 2000) at 8. (George Mason University Governing Board acted unilaterally in derogation of faculty handbook provision giving the faculty the “primary role” in “the university’s academic offerings”); Larry G. Gerber, *College and University Government: Adelphi University (New York): A Special Report from Committee T*, ACADEME, Vol. 83, No. 3 (May - Jun., 1997), pp. 69-71 (Adelphi University’s board of trustees unilaterally created a confidential academic plan, despite university governance documents that provide faculty with broad rights to participate in university matters).

not. *Id.* Although many of the individuals holding bureaucratic managerial positions were originally in faculty positions, their entry into the central administration removes them from the normal professional faculty activities of teaching and research. They may be separated from the classroom and research for a period of years or even move permanently into the university administration and an upwardly mobile career path in administration at other universities.<sup>18</sup>

In this increased stratification, the growing number of “managerial professionals” in the administration possess enhanced authority and power over policies and programs in ways that erode control or effective recommendations by the “practicing professionals” in the faculty. While “managerial professionals” in the university administration would be excluded from the NLRA as managerial employees, faculty serving as “practicing professionals” should be protected professional employees under Section 2(12) of the NLRA. Further, “[e]xcluding [only the] managerial professionals would reflect the key concern about divided loyalties that generated the unwillingness to allow protected bargaining by managers and supervisors.” Rabban, *supra*, at 1855. As the Tenth Circuit explained, “The availability of this expertise within the ranks of the administration obviates the College’s need to rely extensively on the professional judgment of its

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<sup>18</sup> Gaye Tuchman, *WANNABE U: INSIDE THE CORPORATE UNIVERSITY* 69-82 (2009).

faculty in determining and implementing academic policy. Under these circumstances while significant faculty input undoubtedly remains beneficial to the College, it is not necessary that the faculty be ‘aligned with management’ ... [and] presents no problem of divided loyalty equivalent to that found in *Yeshiva*.”

*Loretto Heights College v. NLRB*, 742 F.2d 1245, 1254 (10th Cir. 1984).

The expanded scope and authority of bureaucratic “managerial professionals” in university administrations has reduced faculty participation from “effective recommendation” to an advisory capacity in many instances. In *Pacific Lutheran*, the NLRB concluded that the faculty at issue were not managerial, based in part on the “purely advisory” nature of university committee recommendations to the president’s council on issues such as long-range planning, budgets, and strategic enrollment management. 361 N.L.R.B. at 1424.

A conclusion that faculty are non-managerial does not depend on evidence of the most extreme loss of faculty authority over academic and other policy matters. In enforcing the Board’s decision finding Loretto Heights College faculty to be non-managerial, the court noted that the faculty did “play a substantial role in College governance, participating in decision making and implementation in a wide range of areas,” but “their role does not...rise to the level of ‘effective recommendation or control’ contemplated in *Yeshiva*.” 742 F.2d at 1252. The

faculty did not, therefore, “in effect, substantially and pervasively operat[e] the enterprise.” *Id.* at 1255, *quoting, Yeshiva*, 444 U.S. at 679.

Managerial status should be assessed within the context of the current reality of the structure and operation of the university. This is why the Board’s emphasis on *actual* control and *effective* recommendations is so crucial. As university restructuring shifts power and authority upward to the administration, the legal principles of employee status, as defined in *Yeshiva*, must be applied to evidence of “authority in practice.” *University of Great Falls*, 325 N.L.R.B. at 93.

**c. Increased conflict between administration and faculty resulting from the new corporate model demonstrates that their interests are not aligned.**

The corporate business model of top-down management and the corresponding erosion of faculty authority has led to increased conflict between university administrations and faculty. Faculty governance bodies, including committees, senates, and councils, have protested administrative failures to consult with them or administrative decisions overriding faculty governance recommendations. In *NLRB v. The Cooper Union for the Advancement of Science and Art*, 783 F.2d 29, 32 (2d Cir. 1986), the Second Circuit considered “faculty-administration conflict arising out of the [administration’s] unilateral changes” in concluding that the faculty were not managerial. The court stated: “[W]e would

have to ignore the extensive evidence of conflict and of broad administrative authority to implement changes over faculty opposition in core academic areas such as curriculum to find that the Cooper Union faculty is ‘aligned with management.’” *Id.*

*Amicus* AAUP has documented conflicts resulting from administrators’ failure to respect faculty governance. For example, at Bennington College, the Bennington Academic Freedom Committee and the AAUP protested the administration’s unilateral actions in 1994 to abolish its “presumptive tenure” system.<sup>19</sup> At Rensselaer Polytechnic Institute, in 2006, the Provost unilaterally suspended the Faculty Senate for failing to comply with the Board of Trustees’ order to revoke its amendment to expand Senate membership to include clinical faculty. The administration also took control of the election process for faculty committees (including the curriculum committee) and for the responsibility over the contents of the Faculty Handbook.<sup>20</sup>

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<sup>19</sup> Joan Wallach Scott, *The Critical State of Shared Governance*, *ACADEME*, Vol. 88, No. 4 (Jul.-Aug., 2002), 41, 46-48.

<sup>20</sup> Nancy D. Campbell and Jane F. Koretz, *The Demise of Shared Governance at Rensselaer Polytechnic Institute*, 1 *AAUP JOURNAL OF ACADEMIC FREEDOM*, at 5-8 (2010), available at <https://www.aaup.org/JAF1/demise-shared-governance-rensselaer-polytechnic-institute#.WjbHhqJWJLR> .



Faculty perceptions reflect the conflict resulting from the increased use of a corporate business model. The results from a 2007 international survey reveal that most U.S. faculty perceive that they have little influence over key academic policies at the level of their college and in the central university administration. Seventy-three percent of faculty responded that they are very or somewhat influential in helping to shape key academic policies at their departmental level.<sup>21</sup> That percentage drops at the school/college-level to 37 percent and even further at the university level, where 21 percent responded that they are very or somewhat influential in shaping key academic policies.<sup>22</sup> Sixty-four percent of faculty agreed that “there is a top-down management style” in their university, while only 31 percent agreed that “there is collegiality in decision-making processes” and only 30 percent agreed that “there is good communication between management and academics.”<sup>23</sup> These data support a conclusion that the shifts toward top-down management contribute to faculty perceptions that faculty and administrative interests are not aligned.

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<sup>21</sup> William K. Cummings and Martin Finkelstein, *Global Trends in Academic Governance*, *ACADEME*, Vol. 95, No. 6 (Nov.-Dec. 2009) 31, 32 (Table 3), available at

<http://www.aaup.org/AAUP/pubsres/academe/2009/ND/Feat/Cumm.htm>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 33, Table 4.

## **2. External market forces have supplanted faculty interests in university managerial decision-making.**

In applying the corporate business model, university administrators have relied increasingly on external market forces to make decisions based on revenue-generating potential of academic programs. This has eroded shared governance and faculty authority by shifting control and influence over academic policy and programs from the faculty to the administration. In the competition for market position, university administrators have turned to public relations firms to develop the university's "brand" in a way that will appeal to students as "customers" purchasing education as a product.<sup>24</sup> This commercial image of education has been one of the bases for expanding the administration, with a multiplicity of new supposedly "nonacademic" units to address administrative areas such as finance, student affairs, and housing.<sup>25</sup> Yet these "nonacademic" units are closely related to academic programs, including setting budgetary priorities. The interrelated nature of budgetary policies and academic programs demonstrates that the NLRB, in *Pacific Lutheran*, appropriately included "finances" in the primary areas

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<sup>24</sup> See, Susan C. Aldridge, *Strategy Matters More Than Budget in Student Recruiting*, Chron. of Higher Education (Oct. 31, 2010), available at <https://www.chronicle.com/article/Strategy-Matters-More-Than/125113> ; Lloyd Thacker, *Confronting the Commercialization of Admissions*, Chron. of Higher Education, Vol. 51, Issue 25: B26 (Feb. 25, 2005).

<sup>25</sup> See, Ginsberg, *supra* note 8, at 27-36.

considered in determining managerial status. As universities face continuing financial pressures, administrators control decisions about finances and the budget, with a marked reduction of faculty participation in setting budget policies that affect academic matters.<sup>26</sup>

The erosion of faculty governance over academic programs has occurred, in part, through changes in budget models that universities have adopted. The traditional model was incremental budgeting where only new revenue is allocated. However, more and more universities are moving to models like Responsibility Center Management, which “exemplifies the attempt to introduce business principles into higher education” by making each college within the university a profit center.<sup>27</sup> The central administration maintains control by imposing a tax on the colleges to carry out “strategic initiatives.” At the same time, colleges receive most of the revenue but also have all expenses, including space, police and administrative costs, allocated to them. Each college receives revenues based on student credit hours and research funding. Colleges receive higher revenue for their

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<sup>26</sup> Scott, *supra* note 19, at 44.

<sup>27</sup> David L. Kirp, *The Corporation of Learning: Nonprofit Higher Education Takes Lessons from Business*, Research & Occasional Paper Series: CSHE.5.03, Center for Studies in Higher Education, at 4-5 (May 2003), available at <https://cshe.berkeley.edu/publications/corporation-learning-nonprofit-higher-education-takes-lessons-business>

own majors, giving them an incentive to offer as many courses as they can within their own colleges. Thus, engineering schools have an incentive to teach English and mathematics as well as engineering; business schools have incentives to teach writing, philosophy, mathematics and statistics. This budgetary model encourages deans to make unilateral decisions to create, develop, or eliminate programs based on their revenue generating potential regardless of the faculty's academic concerns. This budgetary model also changes the communal academic culture of the university by discouraging collaboration between faculty across colleges for research and in formulating interdisciplinary programs.<sup>28</sup>

Other budgetary decisions by university administrations have also invaded faculty control over academic programs. The market potential in the sciences has led to budgetary priorities favoring expansion of the science disciplines as compared to the humanities. Since the enactment of the Bayh-Dole Act of 1980, 35 U.S.C. §§ 200–212, which encourages commercialization of federally funded research, there has been an expansion of university technology transfer offices,

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<sup>28</sup> See, John D. Hummell, *Financing Higher Education: Approaches to Funding at Four-Year Public Institutions*, Working Paper Series: CHEWP.1.2012, Center for Higher Education, at 2-4, 9-13 (March 2012), available at <https://www.ohio.edu/education/centers-and-partnerships/centers/center-for-higher-education/news.cfm#2012> ; Leroy W. Dubeck, *Beware Higher Ed's Newest Budget Twist*, THOUGHT & ACTION 81-91 (Spring 1997), available at [http://www.nea.org/assets/img/PubThoughtAndAction/TAA\\_97Spr\\_07.pdf](http://www.nea.org/assets/img/PubThoughtAndAction/TAA_97Spr_07.pdf)

directed and operated by non-faculty administrators to provide the infrastructure and personnel to “scour [university] labs”<sup>29</sup> for commercially profitable discoveries.<sup>30</sup> Between 1998 and 2003, U.S. patents awarded to universities quadrupled, from about 800 to more than 3,200 per year.<sup>31</sup> From 1991 to 2000, licenses granted by universities increased by 158 percent.<sup>32</sup>

Faculty control has been reduced, as well, by the growth of university agreements giving corporate donors unprecedented access to university departments in exchange for large-scale corporate funding. Such access includes corporate representatives on panels making decisions about whether to fund faculty research proposals, a function which had traditionally been reserved for faculty peer review.<sup>33</sup> Corporate donors also influence the dissemination of research results through arrangements for non-exclusive or exclusive licensing of patented

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<sup>29</sup> DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 141 (2003).

<sup>30</sup> *See*, AAUP, *RECOMMENDED PRINCIPLES TO GUIDE ACADEMIC-INDUSTRY RELATIONSHIPS* 61 (2014); Blumenthal, *Academic-Industrial Relationships in the Life Sciences*, 349 *NEW ENGLAND JOURNAL OF MEDICINE* 2452, 2454-55 (2003); Sheldon Krinsky, *The Profit of Scientific Discovery and Its Normative Implications*, 75 *CHICAGO-KENT LAW REVIEW* 15, 22 (1999).

<sup>31</sup> Josephine Johnston, *Health Related Academic Technology Transfer: Rethinking Patenting and Licensing Practices*, 9 *INTERNATIONAL J. BIOTECHNOLOGY* 156, 162 (2007).

<sup>32</sup> David Blumenthal, *supra* note 30, at 2455 (2003).

<sup>33</sup> AAUP, *RECOMMENDED PRINCIPLES*, *supra* note 30, at 194-200.

academic research results. Examples include the 1994 MIT-Amgen agreement for \$30 million of corporate funding to the Department of Biology and the Department of Brain and Cognitive Sciences over a ten-year period in exchange for resulting patents to be owned jointly by MIT and Amgen;<sup>34</sup> and a 2008 Harvard-GlaxoSmithKline five-year \$25 million agreement for stem cell research, including joint projects, Glaxo first rights to non-exclusive licensing, and a research consortium to be “overseen by a steering committee made up of equal numbers of Harvard and GSK personnel.”<sup>35</sup>

The university’s growing identity as a business and market actor has altered the unique academic culture of the university. The extent to which the administration makes academic decisions based on market potential or an external industry partner’s interests reduces faculty authority to make “effective recommendations” about university market ventures, including university-industry agreements.

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<sup>34</sup> Risa L. Lieberwitz, *Confronting the Privatization and Commercialization of Academic Research: An Analysis of Social Implications at the Local, National, and Global Levels*, 12 IND. J. GLOBAL LEG. STUD. 109, 123-124 (2005).

<sup>35</sup> AAUP, RECOMMENDED PRINCIPLES, *supra* note 30, at 196.

**B. The NLRB correctly applied *Pacific Lutheran* to find that USC non-tenure track faculty are not managerial employees.**

The NLRB's finding that USC non-tenure track faculty are not managerial demonstrates that the legal framework in *Pacific Lutheran* is a "workable" standard, 361 N.L.R.B. at 1419, that can be applied with "predictability and intelligibility." *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004). The *Pacific Lutheran* requirement of a close factual inquiry ensures that the evidence demonstrates both the breadth and depth of managerial authority. The Board's decision that the non-tenure track faculty are non-managerial carefully considered the evidence in the primary and secondary areas of decision-making within the context of how a faculty is structured and operates. In the primary area of "academic programs" the evidence showed that much of the University Committee on Curriculum entailed non-substantive reviews of curriculum and programs. In the area of "enrollment management" the evidence did not demonstrate a pattern of effective decision-making by the newly created Committee on Finance and Enrollment; and in the area of "finances" the evidence showed that several of their recommendations were approved by the administration. *University of Southern California*, 365 N.L.R.B. No. 11, slip op. at 15-18 (Dec. 30, 2016). For these and other committees, however the university did not provide evidence of the nature of the administration's review or investigation

prior to approval. *Id.* Such evidence is essential to ensure that the faculty bodies have a depth of authority that goes beyond making advisory recommendations that the administration simply considers as part of its own independent investigation of the matter. Further evidence showed that the Roski School of Art and Design administration made unilateral structural or programmatic changes that ignored or overruled the faculty. *Id.* at 15-17.

The Board considered secondary areas of decision-making, as well, finding that the evidence did not demonstrate managerial authority by non-tenure track faculty. Further, without evidence proving managerial authority in one of the primary areas, evidence of managerial authority in a secondary area does not establish managerial status. *Id.* at 17-18.

USC, therefore, did not meet its burden of proving that its faculty governance bodies exercise managerial authority. Although this evidence applies to all types of faculty at USC, only non-tenure track faculty employment status is at issue in the instant case. Here, the “inquiry into... where the faculty at issue fit within [the university decision-making] structure, including the nature of the employment relationship held by such faculty,” *Pacific Lutheran*, 361 N.L.R.B. at 1421-22, reinforces the finding that the USC non-tenure track faculty are not managerial. This inquiry shows how much context matters, reflecting the impact of



the structural changes created by the use of the corporate model since *Yeshiva* was decided.

Non-tenure track faculty make up 76 percent of the USC faculty (5,000 of the 6,600 faculty). *USC*, 365 N.L.R.B. No. 11, slip op. at 7. More than half of the non-tenure track faculty are part-time. *Id.* In the Roski School and the Dornsife College of Letters, Arts and Sciences, most part-time non-tenure track faculty have semester-long contracts. Forty percent of full-time non-tenure track faculty in those schools have one-year contracts, with the remainder on renewable multi-year contracts. *Id.* Part-time non-tenure track faculty are excluded from the Faculty Assembly and are almost absent from faculty committees. *Id.* at 8, 18. Full-time non-tenure track faculty are "consistently in the minority" of faculty governance committees. *Id.* at 18. This evidence demonstrates a reality that flies in the face of the administration's assertion that non-tenure track faculty participate meaningfully in faculty governance. As the Board concluded, the fact that the non-tenure track faculty constitute an overwhelming majority of the faculty but only a minority on faculty committees, together with their job insecurity, supports the conclusion that they are not managerial employees. *Id.*

## CONCLUSION

For the foregoing reasons, and those in the brief of the Respondent NLRB, the USC's petition for review should be denied, and the Respondent NLRB's cross-application for enforcement granted.

December 28, 2017

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed R. App. P. 32(g)(1) and Circuit Rule 32(e), I hereby certify that the foregoing brief was produced using the Times New Roman 14-point typeface and contains 6,447 words.

/s/ Michael S. Wolly  
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**CERTIFICATE OF SERVICE**

I certify that on December 28, 2017, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

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