**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| POINT PARK UNIVERSITY,<br><br>Employer,<br><br>and<br><br>NEWSPAPER GUILD OF PITTSBURGH / COMMUNICATIONS WORKERS OF AMERICA, LOCAL 38061, AFL-CIO, CLC,<br><br>Petitioner. | Case No. 6-RC-12276<br><br>July 6, 2012 |

# AMENDED BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, COUNCIL OF INDEPENDENT COLLEGES, ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES OF PENNSYLVANIA, COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES, AND ASSOCIATION OF AMERICAN UNIVERSITIES


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*Amici Curiae* American Council on Education, National Association of Independent Colleges and Universities, Council of Independent Colleges, Association of Independent Colleges and Universities of Pennsylvania, College and University Professional Association for Human Resources, and Association of American Universities (collectively, the "Higher Education *Amici*") respectfully submit this brief in response to the Notice and Invitation to File Briefs ("Notice") issued by the National Labor Relations Board ("Board") on May 22, 2012.

## INTEREST OF *AMICI CURIAE*

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

The National Association of Independent Colleges and Universities ("NAICU") serves as the unified national voice of private, nonprofit higher education in the United States. Founded in 1976, NAICU currently has nearly 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business and other professions. NAICU represents these institutions on policy issues primarily with the federal government, such as those affecting student aid, taxation and government regulation.

Founded in 1956, the Council of Independent Colleges ("CIC") is the major national service organization for small and mid-sized, independent, liberal arts colleges and universities in the United States. CIC has nearly 700 members and affiliates including liberal arts, comprehensive and international institutions, as well as higher education-related associations. CIC works to

support college and university leadership, advance institutional excellence and enhance private higher education's contributions to society.

The Association of Independent Colleges and Universities of Pennsylvania ("AICUP") is the only statewide organization that serves exclusively the interests of private higher education within the Commonwealth of Pennsylvania. AICUP provides its 88-member private colleges and universities with services and programs tailored specifically to the needs and situation of independent higher education.

The College and University Professional Association for Human Resources ("CUPA-HR") serves as the voice of human resources in higher education, representing more than 11,000 human-resources professionals at over 1,700 colleges and universities across the country, including 90 percent of all United States doctoral institutions, 70 percent of all master's institutions, more than half of all bachelor's institutions and nearly 500 two-year and specialized institutions. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 States.

The Association of American Universities ("AAU") is an organization of 59 United States and two Canadian major research institutions committed to developing strong national and institutional policies supporting research and both graduate and undergraduate education.

## PRELIMINARY STATEMENT

When this case began almost a decade ago, it presented a relatively straightforward question: are Point Park University's full-time faculty members "managerial employees" who fall outside the scope of the National Labor Relations Act ("Act"), 29 U.S.C. §§ 151-169? *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1973) (implying from the Act's structure and history that "Congress intended to exclude from the protections of the Act all employees properly classified as 'managerial'"). That question is relatively straightforward because the Su-

preme Court of the United States has instructed the Board to consider well-defined factors in making the managerial determination in the context of higher education. *See NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686-90 (1980). "The proper analysis, the Court held [in *Yeshiva*], turns on the type of control faculty exercise over academic affairs at an institution." *Point Park Univ. v. NLRB*, 457 F.3d 42, 46 (D.C. Cir. 2006).

The Regional Director and the Board originally determined that Point Park University's full-time faculty members do not fall within the judicially implied exclusion for managerial employees. Importantly, however, the United States Court of Appeals for the District of Columbia Circuit reversed the Board's determination nearly six years ago and remanded this matter for further proceedings consistent with the appellate court's opinion, explaining that "*Yeshiva* identified the relevant factors that the Board *must* consider." *Point Park Univ.*, 457 F.3d at 51 (emphasis added). As the Board's call for *amicus* briefs concedes, the D.C. Circuit instructed the Board to "identify *which* of the relevant factors set forth in *Yeshiva* . . . are significant and *which* less so . . . and to explain *why* the factors are so weighted." Notice, 2012 WL 1865034, at *1 (emphasis added).

Many of the Higher Education *Amici* have filed multiple *amicus* briefs during this case's lengthy history. The last of those briefs was filed on August 24, 2007, and supported Point Park University's request for Board review following the Regional Director's Supplemental Decision on Remand, which was issued on July 10, 2007. Although the Board granted Point Park University's request for review on November 28, 2007, the Board failed to take any further action in this matter for over four years until, on May 22, 2012, a narrow majority of the Board invited third parties to address the following eight questions:

(1) Which of the factors identified in *Yeshiva* and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?

(2) In the areas identified as "significant," what evidence should be required to establish that faculty make or "effectively control" decisions?

(3) Are the factors identified in the Board case law to date sufficient to correctly determine whether faculty are managerial?

(4) If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?

(5) Is the Board's application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context or (b) can the Board more closely align its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?

(6) Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?

(7) Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board's analysis? [and]

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

Notice, 2012 WL 1865034, at *1-2. *But see id.* at *2 (Members Hayes & Flynn, dissenting) (concluding that it is "unwise to further delay the processing of this case to solicit additional briefing").

As set forth below, many of the Higher Education *Amici* addressed the narrow issues raised by the D.C. Circuit's mandate in their submission four years ago. Therefore, while the

Higher Education *Amici* reiterate those arguments and refer the Board to the prior *amicus* brief, they will not burden the Board by repeating those arguments in detail in this brief.

Instead, the Higher Education *Amici* wish to emphasize that the breadth of the Board's call for argument and evidence from third parties and its very timing violates the D.C. Circuit's mandate. The D.C. Circuit did not remand this case for the Board to engage in *de facto* rulemaking outside the factual record presented by this case, let alone to conduct such rulemaking six years after the D.C. Circuit issued its mandate. Accordingly, the Board should comply with the D.C. Circuit's mandate without further delay and reverse the Regional Director's supplemental decision, which, as explained in detail by the 2007 *amicus* submission, misapplied *Yeshiva* and Board precedent under *Yeshiva*.

## ARGUMENT

### I. USING ADJUDICATION INSTEAD OF RULEMAKING TO PROMULGATE STANDARDS OF GENERAL APPLICABILITY BEYOND THE FACTS OF THIS CASE WOULD NOT ONLY CONSTITUTE AN ABUSE OF DISCRETION, IT WOULD VIOLATE THE D.C. CIRCUIT'S MANDATE

The "choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *Bell Aerospace*, 416 U.S. at 294. However, like all grants of discretion, there "may be situations where the Board's reliance on adjudication [instead of rulemaking] would amount to an abuse of discretion or a violation of the Act." *Id.*; *see, e.g.*, *Pfaff v. U.S. Dep't of Housing & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996) (finding agency abuses its discretion when, among other things, the "new standard, adopted by adjudication [instead of through rulemaking], departs radically from the agency's previous interpretation of the law" and "is very broad and general in scope and prospective in application"); *1st Bancorporation v. Bd. of Governors of Fed. Reserve Sys.*, 728 F.2d 434, 437 (10th Cir. 1984) (reversing agency orders because they were "merely a vehicle by which a general policy would be changed" by the

agency, which should have been accomplished, if at all, through rulemaking, not adjudication); *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981) (explaining "agencies can proceed by adjudication to enforce discrete violations of *existing* laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application").

The Board's recent use of calls for *amicus* briefs to conduct *de facto* rulemaking is both troubling and the subject of pending judicial proceedings. *See Specialty Healthcare & Rehab. Ctr. of Mobile*, 356 NLRB No. 56, at *2 (Dec. 22, 2010) (asking *amici* to address, among other things, whether a unit of all employees performing the same job is a presumptively appropriate bargaining unit), *cross-appeals pending sub nom. Kindred Nursing Ctrs. E., LLC v. NLRB*, Nos. 12-1027 & 12-1174 (6th Cir.). Calls for *amicus* briefs do not satisfy the procedural and substantive requirements imposed by the Administrative Procedure Act's rulemaking requirements, nor do they render harmless the agency's error in using adjudication instead of rulemaking. *See Specialty Healthcare*, 356 NLRB No. 56, at *4-6 (Member Hayes, dissenting).

More important, however, is the fact that the breadth of the Board's call for *amicus* briefs in this case violates the D.C. Circuit's mandate. "The decision of a federal appellate court," the D.C. Circuit explained long ago, "establishes the law binding further action in the litigation by another body subject to [the appellate court's] authority." *City of Cleveland, Ohio v. Fed. Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (footnote omitted). "The latter is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case, and the higher tribunal is amply armed to rectify any deviation through the process of mandamus." *Id.* (internal quotations, alteration and footnotes omitted). "These principles, so familiar in operation within the hierarchy of judicial benches,

*indulge no exception for reviews of administrative agencies*." *Id.* (emphasis added and footnotes omitted); *accord Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) ("Of course, we do not expect the Board or any other litigant to rejoice in all the opinions of this Court. When it disagrees in a particular case, it should seek review in the Supreme Court. . . . [T]he Board cannot, as it did here, choose to ignore the decision as if it had no force or effect. Absent reversal, that decision is the law which the Board must follow.").

The D.C. Circuit instructed the Board to "identify *which* of the relevant factors set forth in *Yeshiva* . . . are significant and *which* less so . . . and to explain *why* the factors are so weighted." Notice, 2012 WL 1865034, at *1 (emphasis added); *see also Point Park Univ.*, 457 F.3d at 49-50. However, all of the questions posed by the Board's call for *amicus* briefs, save for the first, suggest that the Board intends to use this case as a vehicle to address issues that far exceed the scope of the D.C. Circuit's mandate. For example, the Board's call for third parties to submit their views as to whether there are "useful distinctions to be drawn between and among different job classifications within a faculty," Notice, 2012 WL 1865034, at *2, injects a completely new issue into this case that none of the parties asked the Board to decide and is not presented by the record.

Accordingly, the Board should comply with the D.C. Circuit's mandate without further delay and without conducting *de facto* rulemaking well outside the scope of the D.C. Circuit's mandate and the factual record presented by this case.[*]

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[*] The act of asking third parties to answer the first question regarding the relative weight of the *Yeshiva* factors itself violates the D.C. Circuit's mandate given the extraordinary delay in posing the question. *See In re Core Commc'ns, Inc.*, 531 F.3d 849, 857 n.7 (D.C. Cir. 2008) (explaining "timeliness [of an agency's response] is implicit in every remand by this court" and issuing writ of mandamus because agency failed to respond to mandate in a timely manner); *In re People's Mojahedin Org. of Iran*, --- F.3d ---, No. 12-1118, 2012 WL 1958869, at (continued)

## II. EVEN IF THE BOARD'S CALL FOR *AMICUS* BRIEFS DOES NOT VIOLATE THE D.C. CIRCUIT'S MANDATE, THE ANSWERS TO THE QUESTIONS POSED DO NOT ALTER THE CONCLUSION THAT POINT PARK UNIVERSITY'S FULL-TIME FACULTY MEMBERS ARE MANAGERIAL EMPLOYEES

### A. Effective Authority in Matters of Curriculum and Course Selection Are of Paramount Importance Under *Yeshiva*

In question 1, the Board asks: "Which of the factors identified in *Yeshiva* and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?" Notice, 2012 WL 1865034, at *1. The 2007 *amicus* submission explained that *Yeshiva* and subsequent Board decisions "reflect a hierarchy of academic factors relevant to managerial status: (i) faculty authority over the curriculum and course offerings is paramount among the factors relevant to managerial status; (ii) authority relating to course scheduling, grading, graduation, student admission and retention policies, matriculation standards, and teaching methods are important, but not determinative; and (iii) authority regarding such other factors as tuition or faculty hiring and tenure are of lesser significance." 2007 *Amicus* Br. at 2. In other words, "faculty authority in matters of curriculum and course selection is, for all practical purposes, a *sine qua non* of managerial status." *Id.* at 12. "[G]raduation policies, course scheduling, grading, student admission and retention policies, matriculation standards and teaching methods are also important and relevant considerations, and faculty should ordinarily have authority in a majority of these areas to be considered manage-

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*6 (D.C. Cir. June 1, 2012) (per curiam) (issuing writ of mandamus where agency failed to comply with appellate court's mandate in less than two years). As Board Members Hayes and Flynn noted in their dissent from the Board's call for *amicus* briefs, it is "unwise to further delay the processing of this case to solicit additional briefing" where, among other things, the Board already has the 2007 *amicus* submission and the union voluntarily chose not to file a brief after the Board granted Point Park University's request for review almost five years ago. Notice, 2012 WL 1865034, at *2 (Members Hayes & Flynn, dissenting).

ment." *Id.* "[O]ther considerations, ranging from the academic calendar and course enrollment levels to faculty status matters, remain relevant considerations but were not central to the Supreme Court's holding in *Yeshiva* and should not be determinative." *Id.*

Nothing in the intervening years has altered the above conclusions, nor has the passage of time affected the validity of *Yeshiva* itself. Given the breadth of the Board's questions, it bears emphasizing that *Yeshiva* remains the law of the land until the Supreme Court overturns *Yeshiva* or Congress amends relevant provisions of the Act. Neither has occurred.

### B. In Determining Effective Authority, the Board Should Continue to Evaluate All Relevant Evidence and Avoid Imposing an Evidentiary Burden That Undermines *Yeshiva*

In question 2, the Board asks: "In the areas identified as 'significant,' what evidence should be required to establish that faculty make or 'effectively control' decisions?" Notice, 2012 WL 1865034, at *1. *Yeshiva* itself establishes the legal framework on this issue. The "relevant consideration is *effective* recommendation or control rather than final authority." *Yeshiva*, 444 U.S. at 683 n.17 (emphasis added). For example, the fact that the faculty's authority in certain areas may be circumscribed by fiscal or other long-range policy concerns does not diminish the faculty's effective power in policymaking and implementation. *See id.* at 683 n.17, 688 n.27. Moreover, the Board has consistently rejected a "mechanical application of *Yeshiva*, i.e., counting and comparing the number of areas in which faculty have input with the number of such areas in *Yeshiva*." *LeMoyne-Owen Coll.*, 345 NLRB 1123, 1128 (2005) ("*LeMoyne-Owen II*"), *on remand from LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004) ("*LeMoyne-Owen I*"); *see also Univ. of Dubuque*, 289 NLRB 349, 353 (1988) (explaining that a mechanical application of *Yeshiva* "fails to take into account the many different combinations and permutations of influence that render each academic body unique"). Therefore, it would likewise be improper for the Board to set rigid standards for determining effective recommendation, espe-

cially in an environment such as higher education, where the prevalence of collegial decision-making requires an institution-specific inquiry rather than a wooden application of bright-line rules.

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

### C. The Factors Identified By Existing Precedent Are Sufficient to Accurately Determine Whether Faculty Are Managerial Employees

In question 3, the Board asks: "Are the factors identified in the Board case law to date sufficient to correctly determine whether faculty are managerial?" Notice, 2012 WL 1865034, at *1. Question 4, in turn, asks: "If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?" *Id.*

The Supreme Court in *Yeshiva* identified the factors the Board is to consider. As the D.C. Circuit explained in applying *Yeshiva* to this case, the Board "*must* consider the degree of faculty control over academic matters such as curriculum, course schedules, teaching methods,

grading policies, matriculation standards, admission standards, size of the student body, tuition to be charged, and location of the school." *Point Park Univ.*, 457 F.3d at 49 (emphasis added). Even if one assumed for the sake of argument that the *Yeshiva* factors are not exclusive, the Higher Education *Amici* are aware of no evidence that the *Yeshiva* factors are insufficient, nor are they aware of any request by the parties for the Board to identify additional factors. That Congress has not amended relevant provisions of the Act in the 32 years since *Yeshiva* was decided provides compelling evidence that *Yeshiva* is consistent with congressional intent and cannot be altered in the absence of congressional action. *See, e.g.*, *Bell Aerospace*, 416 U.S. at 275 (citing congressional acquiescence as evidence previous interpretation of Act satisfied congressional intent).

### D. *Yeshiva* Recognizes That Higher Education Is Unique

In question 5, the Board asks if its "application of the *Yeshiva* factors to faculty [is] consistent with [the Board's] determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context or (b) can the Board more closely align its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?" Notice, 2012 WL 1865034, at *1.

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

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

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

**E. The Board's Professional-Status Question Is Misdirected**

In question 6, the Board asks: "Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?" Notice, 2012 WL 1865034, at *2. One of the central lessons of *Yeshiva*, however, was that merely being a professional employee does not preclude one from being a managerial employee. The Supreme Court specifically rejected the Board's argument that the judicially implied exclusion for managerial employees cannot be applied to professional employees. *Yeshiva*, 444 U.S. at 683-84. Furthermore, in light of the fact

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

### F. There Have Been No Significant Developments in Private Universities' Decision-Making Models Since *Yeshiva*

In question 7, the Board asks: "Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board's analysis?" Notice, 2012 WL 1865034, at *2. As outlined below, research supports the conclusion that faculties continue to exert the same amount of influence and control, if not more, over the aspects of institutional governance identified in *Yeshiva* and subsequent Board decisions as being indicative of managerial status.

For the past 150 years, starting with Harvard University in 1826, the decision-making model of shared governance has been utilized at most private colleges and universities. Due to the development of the research institution, increased professionalism of faculty, rapid enrollment growth, the changing composition of the student body, and the volatile political climate of the 1960s, the model of shared governance has developed to increase faculty voice in various areas of institutional governance. *See* Willis A. Jones, *Faculty Involvement in Institutional Governance: A Literature Review*, 6 J. Professoriate 117, 119-35 (2011). Shared governance was utilized at Yeshiva University, which prompted the Supreme Court to conclude that the university's full-time faculty were managerial employees. *See Yeshiva*, 444 U.S. at 680.

Shared governance is still the general rule at institutions today. Approximately 90 percent of four-year institutions currently have faculty governing boards that participate in institu-

tional governance. Jones, *supra*, at 120. Recent research studies and articles confirm that faculties still have influence over areas such as curriculum, the establishment of teaching standards, academic performance, and standards for promotion and tenure. *See id.* at 124 (collecting and discussing recent studies on faculty influence on institutional governance). "Faculty appear to be given great decision-making authority over the areas in which they presumably have the most expertise." *Id.* at 129-30. Setting budget priorities and evaluating presidents and vice presidents are areas where faculty sometimes had the least control. However, one study found that even where faculty had little overall control or influence over budgeting, they were often consulted on specific areas such as salaries and the merger or discontinuation of programs. *Id.* at 125. Such findings align with *Yeshiva* and subsequent decisions holding that faculty need not play an exclusive role in governing the institution.

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

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

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

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

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

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

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

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

### G. The Use of Faculty Job Classifications Would Be Neither Sound Policy Nor Factually Supportable Given the Lack of Standardization Throughout Higher Education

Finally, in question 8, the Board asks if there are "useful distinctions to be drawn between and among different job classifications within a faculty—such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty—depending on the faculty's structure and practices." Notice, 2012 WL 1865034, at *2.

It is well established that job classifications are an inaccurate guide for determining an employee's status under the Act. *See, e.g.*, *Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007) (rejecting use of job classifications as means to determine supervisory status); *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 590 (7th Cir. 2012) (same); *NLRB v. ADCO Elec. Inc.*, 6 F.3d 1110, 1117 (5th Cir. 1993) ("In determining whether someone is a supervisor, job titles reveal very little, if anything."). Using job classifications would be particularly unwise in this context because there is no set definition in academia used to describe a particular job title. Academic titles, and the policies that govern them, vary widely among different institutions. "[T]erminology varies, making it difficult, in some cases, to define clearly who may be included in a generalization and who may not." David W. Leslie, *Part-Time, Adjunct and Temporary Faculty: The New Majority?, A Report of the Sloan Conference on Part-Time and Adjunct Faculty* 21 n.1 (May 1998) (unpublished manuscript). Because of this inconsistency, attempts to

create useful distinctions between and among different job classifications is neither sound policy nor factually supportable.

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

There are also significant practical distinctions between adjunct professors at different institutions. For example, adjunct faculty may or may not be salaried depending on the institution. At some institutions adjunct faculties are given fixed-length appointments, while at others they can be given an indefinite appointment. Policies regarding benefits for adjunct faculty also vary among institutions. Some institutions provide no benefits for adjunct faculty while others provide adjunct faculty the same benefits as they do for TT faculty. There are similar distinctions for the titles of "Lecturer" and "Senior Lecturer," which represent 0.5 percent of TT faculty and 46 percent of NTT faculty, and "Instructor," which represents 0.3 percent of TT faculty and 10

percent of NTT faculty with regard to such things as length of appointment and benefits. *See id.* (discussing variations at different institutions).

A survey conducted by Hart Research Associates on behalf of the American Federation of Teachers ("AFT") also found that part-time/adjunct faculty members vary considerably in the extent of their participation in institutional governance. Am. Fed'n of Teachers, *A National Survey of Part-Time/Adjunct Faculty*, 2 Am. Academic 3 (Mar. 2010). The AFT survey confirms findings from an earlier study in which 42 percent of the adjunct faculty surveyed "reported that part-time faculty had either a full or proportional vote in departmental decisions. A quarter of institutions reported that they extended institutional-level voting privileges to part-time faculty." Judith M. Gappa, *Employing Part-Time Faculty: Thoughtful Approaches to Continuing Problems*, Am. Ass'n Higher Educ. Bull. 3, 5 (Oct. 1984) (citation omitted).

There are also personal accounts from part-time professors attesting to the difference in treatment of part-time faculty at different institutions. For example, at Ventura College, "adjuncts can control their own courses, participate in curriculum revisions, and vote in departmental meetings." Scott Smallwood, *United We Stand?*, Chron. of Higher Educ., Feb. 21, 2003, at A10. However, the same professor teaching part-time at College of the Canyons "can't choose [his] own books, and taking part in curriculum discussions is unheard of." *Id.* Therefore, at some institutions, an adjunct faculty member will be more like a full-time TT employee.

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

457 F.3d at 48. Moreover, the union has petitioned to represent *all* of Point Park University's full-time faculty, not some subset of that group based on job classification. Therefore, the job-classification issue is not presented by this case.

## CONCLUSION

For the foregoing reasons, the Board should comply with the D.C. Circuit's mandate without further delay and reverse the Regional Director's supplemental decision.

Dated: July 6, 2012

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that on this sixth day of July, 2012, he caused the foregoing Amended Brief of *Amici Curiae* to be filed using the National Labor Relations Board's E-Filing Program. The foregoing brief was also served by e-mail upon the following counsel:

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