

Nos. 17-1149, 17-1171

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UNIVERSITY OF SOUTHERN CALIFORNIA

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 721, CTW, CLC**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

University of Southern California (“USC”) is the petitioner before the Court and was respondent before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. Service Employees

International Union, Local 721 is an intervenor before the Court, and was the charging party before the Board. Amicus in support of petitioner is the American Council on Education, et al.

B. Rulings Under Review

This case is before the Court on USC's petition to review a Board Order issued on June 7, 2017, and reported at 365 NLRB No. 89. The Board seeks enforcement of that Order. The Board's Order in the underlying representation case denying review of the Decision and Direction of Election and the denial of USC's motion to reopen the record and for reconsideration issued on December 30, 2016, and is reported at 365 NLRB No. 11.

C. Related Cases

The case on review was not previously before this Court and or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

/s/Linda Dreeben

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Dated at Washington, DC
this 21st day of December, 2017

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GLOSSARY

Order Denying Review (365 NLRB No. 11)	O
Transcript	Tr.
Employer Exhibit	EX
Union Exhibit	UX
Decision and Order (365 NLRB No. 89)	D&O
Motion for Summary Judgment Exhibit	MSJ Ex.
Opening Brief of USC	Br.
Amicus brief of American Council on Education, et al.	ACE Br.

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STATEMENT OF JURISDICTION

Finding that the University of Southern California (“USC”) unlawfully refused to bargain with the certified representative of its employees, the National Labor Relations Board (“the Board”) issued a Decision and Order against USC on June 7, 2017. This case is before the Court on USC’s petition to review, and the Board’s cross-application to enforce, the Board’s Order. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a), and the Court has jurisdiction

over this proceeding pursuant to Section 10(e) and (f), 29 U.S.C. § 160(e) and (f). The petition and cross-application were timely, as the Act provides no time limits for such filings. Service Employees International Union, Local 721 (“Local 721”) intervened in support of the Board.

Because the Board’s unfair-labor-practice order is based partly on findings made in the underlying representation-election proceeding, the record in that case is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d). Section 9(d) authorizes judicial review of the Board’s actions in a representation proceeding solely for the purpose of “enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board.” *Id.* The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court’s ruling in the unfair-labor-practice case. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUES

Whether USC’s refusal to bargain violated Section 8(a)(5) and (1) of the Act turns on the following issues:

- I. Is the Board’s standard for evaluating whether university faculty are managerial employees rational and consistent with the Act?
- II. Does substantial evidence support the Board’s finding that non-tenure track faculty at USC’s Roski School are not managerial employees?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions appear in the addendum to this brief.

STATEMENT OF THE CASE

In this test-of-certification case, USC refused to bargain in order to challenge the Board's finding that non-tenure track Roski School faculty are employees entitled to the protections of the Act, and not excluded from the Act's coverage as managers. In the underlying representation case, the Board concluded that the faculty at issue were non-managerial, and thus had statutory bargaining rights. Accordingly, the Board found in the unfair-labor-practice case that USC's refusal to bargain with the union they selected violated the Act. Before the Court, the legality of USC's refusal (and thus whether the Board's Order should be enforced) turns on the validity of the Board's finding in the representation proceeding. *NLRB v. Downtown BID Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012).

I. THE BOARD'S FINDINGS OF FACT

A. USC's Organizational and Administrative Structure

USC is a private university in Los Angeles, California, that offers undergraduate and graduate degrees. It encompasses 22 schools, including the Roski School of Art and Design. Student enrollment at USC is between 30-

40,000, making it one of the nation's largest private universities. (O 7; Tr. 42-46, 245.)¹

A self-selected board of trustees governs USC. The trustees delegate academic matters to the president, and all academic decisions are made in the name of the president or the president's delegate. Under the president are six senior vice presidents, with portfolios such as finance or administration. One of the senior vice presidents also serves as provost, the chief academic officer for USC. Reporting to the provost are several vice provosts. The various provosts convene weekly as the provost cabinet to discuss any important USC matters. Some university administrators also hold faculty appointments. (O 7; Tr. 43-44, 88, 178, EX 3 at 18-19, UX 16.)

Each school has a dean, who is appointed by the president and reports to the provost. Additional administrative positions within the schools include vice deans, assistant deans, associate deans, and department chairs. (O 7; Tr. 46, 48-49, 220, EX 3 at 20-21, UX 7.)

B. USC Employs Tenured, Tenure-Track, and Non-Tenure Track Faculty

USC employs approximately 6,600 faculty members. Depending on the nature of their appointment, faculty are classified as tenured, tenure-track, or non-

¹ References preceding a semicolon are to the Board's findings; cites following a semicolon are to supporting evidence.

tenure track. Tenured faculty can be removed for cause, but are otherwise guaranteed employment until retirement. Tenure-track faculty are candidates for tenure, and serve a probationary period of up to 6 years while they are being considered for that status. A tenure-track faculty member who has not received tenure after 6 years is given a terminal-year appointment. All tenured and tenure-track positions are full time. (O 7; Tr. 74-75, 153-54, EX 3 at 50-52, 59, UX 1.)

Non-tenure track faculty receive fixed-term appointments, ranging from a single semester to 1, 3, 5, or 10 years. At the end of their contract, they may or may not receive reappointment for another set term. Sometimes non-tenure track faculty do not know if they will be reappointed until a month or two before the next semester starts. They may be dismissed prior to the end of their contract based on poor performance, lack of funds, or substantial program change. A non-tenure track faculty member cannot be promoted to tenure-track, but must receive a separate appointment. Non-tenure track appointments can be either full-time or part-time. (O 7; Tr. 118-22, 136-37, 156, 332-34, 338-39, 385, 388-89, EX 3 at 59, 63-64.)

Non-tenure track faculty do not receive performance evaluations and have no or limited access to mentoring services or professional-development support such as funding for research, creative projects, or conferences. Unlike with tenured or tenure-track faculty, university service (such as committee work) is not

a required component of all non-tenure track faculty members' responsibilities. Full-time non-tenure track faculty receive the same benefits as tenure-track faculty, and part-time non-tenure track faculty who work more than fifty percent of a full-time workload receive all benefits except tuition assistance. Part-time non-tenure track faculty with less than a fifty-percent workload receive no benefits. (O 7-8; Tr. 138, 141, 334-37, 391-93, 648-51, 667, EX 3 at 32-33.)

Approximately 5,000 of USC's 6,600 faculty are non-tenure track. Around 1,100 faculty are tenured, and 300 are tenure-track. Slightly over half of USC's non-tenure track faculty (and thus around 40 percent of all USC faculty) are part-time. (O 7; UX 1.)

C. The Roski School

USC's Roski School of Art and Design offers undergraduate bachelor-of-arts and bachelor-of-fine-arts degrees, as well as a master of arts in curatorial studies and a master of fine arts. Courses include ceramics, painting and drawing, photography, printmaking, sculpture, design, and critical studies. Since 2015, the school has been divided into three areas—art, design, and critical studies. Along with those courses of study, Roski houses the Iovine and Young Academy for Arts, Technology, and the Business of Innovation, an interdisciplinary degree program funded in part by a gift from Los Angeles-native Dr. Dre (né Andre Young). Roski also offers an online degree program in collaboration with *Wired* magazine. Until

recently, the school was known as the Roski School of Fine Art. The school's name change, and the addition of the Iovine and Young Academy and the online-degree program, occurred without faculty input. Faculty learned about the changes from school administrators or when they were announced publicly. (O 7; Tr. 45, 48, 325, 461-62, UX 7.)

Roski was restructured in the 2014-15 academic year. Previously, the school had area heads for the various artistic disciplines in the master-of-fine-arts program, and faculty within that program determined the critical-studies component of the degree. A newly appointed dean replaced the area-head system, organizationally consolidated the various subject areas into the three current divisions (art, design, critical studies), and named a vice dean to lead each division. Critical studies became its own area. After the restructuring, the new vice dean of critical studies changed the curriculum and selected the faculty who would teach those courses, a responsibility that formerly sat with a group of faculty. Administrators presented the structural and curricular changes to the faculty as a settled matter; they were not subject to faculty input or put to a vote. Concurrent with the increased centralization of the administration was a decrease in faculty participation on school committees. (O 7; Tr. 400-02, 468-71.)

Approximately 60 percent of full-time non-tenure track faculty at Roski have 3-5 year contracts, with the remainder serving 1 year terms. The majority of

Roski's part-time non-tenure track faculty have 1 semester contracts. (O 7; Tr. 699, 703.)

D. USC's Governance Structure

USC's governance structure includes the Academic Senate and university-wide committees at the university level, as well as faculty councils and various ad hoc and standing committees at the school level.

1. Academic Senate

The Academic Senate studies and makes recommendations to the university president on matters pertaining to faculty well-being. It consists of 43 voting members, including the president of each school's faculty council and other delegates selected by the school councils. In the 2015 academic year, 19 of the Senate's 43 voting members were non-tenure track, including 1 from Roski. Within the Senate are numerous committees and subcommittees. The handbook committee proposes amendments to the faculty handbook, for example, which are sent to the president for approval. Upon its creation in summer 2015, the Senate's part-time faculty subcommittee requested information from the administration regarding the number of part-time faculty at each school, but was denied. (O 8, 12; Tr. 40, 51-53, 651-56, EX 3 at 22-23, EX 13.)

2. University-Level Committees

USC maintains a variety of university-wide committees that conduct studies and issue reports or recommendations to the provosts or the Academic Senate. All voting members on most committees are faculty, though some of those faculty also hold administrative appointments. In addition, the committees generally have one or more administrators who sit ex officio and assist the committee. Faculty can either nominate themselves for a committee or be nominated by others. From those nominations, committee members are appointed by the provost, university president, or Senate president. Many of the committees have 1 year terms, but others involve multi-year appointments. Membership often rolls over from year to year. (O 8-9; Tr. 57-58, 99-100, 116, 177-78, 248-49, 317-20.)

a. Academic Programs

Two university-wide committees address academic programs. The University Committee on Curriculum reviews proposals from the schools for new or modified courses and degree programs. Almost all proposals are handled by subcommittees, whose review consists of checking the proposals for technical accuracy and compliance with previously adopted formal requirements, such as listing the correct number of credit hours. Committee members do not necessarily have any expertise in the area of courses that they review. For example, Kate Levin, a non-tenure track lecturer in the writing program, reviewed proposals from

political science, law, and business. The Curriculum Committee's recommendations are forwarded to the vice provost for approval. In 2015, 8 of the 19 committee members were non-tenure track, none of whom were from Roski. (O 9, 15; Tr. 86-89, 93, 231, 304-05, 314-15, 661-66, 669-70, EX 19, UX 23, 24.)

Every year, the University Committee on Academic Review conducts in-depth studies of particular academic programs and issues reports on possible improvements. Once recommendations are made, the vice provost works with school-level administrators such as the dean and department chairs on how to implement them. The Academic Review Committee has 17 members, 2 of whom are non-tenure track; neither is from Roski. One of the committee members also holds an administrative appointment. (O 9-10; Tr. 94-96, 306-08, 318-19, EX 19.)

In 2013, the Academic Review Committee studied Roski's master-of-fine-arts program and issued recommendations. Roski faculty crafted a proposal to implement the recommendations, which the dean rejected. Without faculty input, one of the vice-deans crafted a different proposal for revamping the master-of-fine-arts curriculum and submitted it to the Curriculum Committee. The dean's proposal reduced the number of semesters for the graduate seminar, added a course on pedagogy, and required a second elective outside of Roski. Administrators announced the curriculum changes to faculty after they had been submitted for approval. (O 9, 16; Tr. 450-58, EX 22.)

b. Enrollment/Finance

In April 2015, USC created the Committee on Finance and Enrollment, a joint Senate-Provost committee that makes recommendations to the provost. Some of its recommendations are ultimately sent to the university president or the board of trustees for a final decision. In its brief history, the committee has made two batches of recommendations, on issues dealing with how much USC should withdraw from its endowment, the price of tuition, and whether new student housing should be used to increase enrollment. They also suggested that USC continue to use its existing holistic approach to admission decisions rather than focus on just standardized-test scores, and that it implement a pilot program for broader need-based financial aid. The provost and trustees accepted the proposals. (O 10; Tr. 109-11, 249-50, 262-68, EX 15, 17.)

A vice provost and the Senate president co-chair the Finance and Enrollment Committee. Of the 10 faculty members on the committee, 4 (including 1 from Roski) are non-tenure track. Along with the vice-provost who serves as co-chair, the Vice President of Finance and the Vice President of Admissions sit on the committee ex officio. Committee members serve 3 year terms, and are not required to have any background or experience in finance. (O 10; Tr. 106, 247-49, 260, EX 10.)

c. Academic Policy

USC has several committees that research and report on selected topics related to academic policy. The Committee on Teaching and Academic Programs addresses one issue per year and issues a report. Of its 12 members, 7 are non-tenure track and 1 is from Roski. (O 10; Tr. 309, EX 19.) Each year, the Research Committee studies one or two university-wide issues identified by the provost or the Senate. On that committee's recommendation after studying software and computing needs, USC purchased copies of Microsoft Word to supply to the entire campus. No one from Roski served on the committee in 2015, and 7 of the 12-20 members were non-tenure track. (O 10-11; Tr. 100-01, 277-78, 281, EX 10 at 3.) The Committee on Academic Policies and Procedures, which consists of faculty, staff, and students, looks into rules and regulations regarding academic activities, such as USC's grading policy. Seven of 16 members are non-tenure track, and none are from Roski. (O 11; Tr. 310-12, EX 19.)

d. Personnel Policy

Several university committees address personnel issues. The Committee on Appointments, Promotions, and Tenure evaluates whether tenure-track faculty should receive tenure and whether non-tenure track faculty should receive clinical-scholar appointments. Non-tenure track members of the committee are excluded from participating in any tenure-related decisions. The committee reviews a

dossier and recommendation on the candidate from his or her department and makes a recommendation to the provost, who then reviews the dossier and makes the final decision. The identity of the current members of the committee is not made known to the faculty. Committee members serve 2-4 year terms, and, in the 2015 academic year, 7 of the 25 members were non-tenure track; none were from Roski. (O 11; Tr. 68-69, 112-16, 193-94, 489-92, 506-07, EX 10 at 5.)

The Committee on Tenure and Privileges Appeals hears faculty grievances and makes recommendations to the university president. When the grievance involves a tenured faculty member, non-tenure track faculty do not participate. Eight of the 40 committee members are non-tenure track, and none are from Roski. (O 11; Tr. 69, 116-17, 197, EX 10 at 4-5.) The Committee on Non-Tenure Track Promotions is an all-non-tenure track body tasked with considering promotions for non-tenure track faculty in the event that a school's faculty and dean disagree. No one from Roski served on the committee in 2015. (O 11; Tr. 130-31, EX 19.)

3. School-Level Governance

Governance at the school level consists of a faculty council and various ad hoc or standing committees. The size, organization, and purpose of the faculty council is decided by the particular school. (O 12-13; Tr. 62.) Hiring decisions at the school level are made in the name of the dean, and the dean's permission is required for a school hiring committee to recruit, approve the job description, or

bring candidates to campus for interviews. After such a process in the College of Letters, Arts, and Sciences in 2014, the faculty recommended a candidate, but the dean selected someone else. The dean also can decline to follow a faculty hiring recommendation for budgetary reasons. Reappointment decisions for part-time non-tenure track faculty are made by a dean. (O 13; Tr. 128, 211, 388, 552-53, 680.)

The Roski faculty council is advisory, without the ability to implement its recommendations. Members serve 2 year terms. Part-time non-tenure track faculty are not always aware of the council's existence, and at least one did not have an opportunity to vote for its members until she became full time. Roski has six or seven school-level committees, whose members are appointed by the dean or vice dean. A vice dean sits on every committee. (O 12; Tr. 341-42, 398-99, 435-37, 458-59, 582-85.)

In spring 2015, the Roski faculty council wrote to the dean expressing its support for the current system of awarding teaching-assistant positions to second-year students in the master-of-fine-arts program, a position that provides full tuition and a stipend. The council unanimously objected to a proposed change that would institute a system in which teaching assistants were selected on an as-needed basis based on application, rather than the current merit-based system of awarding the positions based on an all-faculty review of the student's work. The

dean rejected the council's objections and implemented the new system. As a result, all of the rising second-year master-of-fine-arts students left the program and withdrew from USC. (O 12-13; Tr. 438-45, UX 12-14.)

II. PROCEDURAL HISTORY

A. The Representation Proceeding: Roski's Non-Tenure Track Faculty Vote for Union Representation

In November 2015, Local 721 petitioned to represent a unit consisting of all full-time and part-time non-tenure track faculty at Roski. Administrators were excluded from the unit, even if they had teaching responsibilities. After a hearing, the Board's Regional Director for Region 31 issued a Decision and Direction of Election rejecting USC's argument that the employees in the unit were managerial, and therefore excluded from the Act's protections, and scheduling a mail-ballot election for January 13-29, 2016. Employees voted for representation by a margin of 31-6. On February 10, the Regional Director certified Local 721 as the exclusive collective-bargaining representative of the petitioned-for unit of employees. (D&O 1-2; MSJ Ex. 1, 4, 5.) USC filed a request for review of the Regional Director's decision, again arguing that the employees in the unit were managerial, and thus not covered by the Act.²

² Local 721 also petitioned to represent separate units of non-tenure track faculty in USC's International Academy and Dornsife College of Letters, Arts, and Sciences. The parties agreed at the hearing that non-tenure track faculty in the International Academy were not managerial. (Tr. 714-15.) The Regional Director

In March, USC filed a motion to reopen the record and for reconsideration, which the Regional Director denied. USC filed a request for review of that decision. The Board (Chairman Pearce and Member McFerran; Member Miscimarra, dissenting) denied both of USC's requests for review on December 30.

B. The Unfair-Labor-Practice Proceeding: USC Refuses To Bargain

Local 721 wrote to USC on April 7, 2016, to request bargaining. USC refused. (D&O 2; MSJ Ex. 11.)

On February 9, 2017, the Board's General Counsel issued an unfair-labor-practice complaint alleging that USC violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with Local 721. In response, USC admitted that it had refused to bargain with Local 721, and reasserted its contention that the employees in the unit were managerial.

III. THE BOARD'S CONCLUSIONS AND ORDER

On June 7, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran) issued a Decision and Order finding that USC violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 721. The Order directs USC to cease and desist from that unfair labor practice. Affirmatively, the Order

found that non-tenure track faculty at Dornsife were not managerial, though that unit voted against representation. Accordingly, the only issue before the Court is the managerial status of non-tenure track faculty at Roski.

requires USC to bargain with Local 721 on request, embody any understanding the parties reach in a written agreement, and post a remedial notice.

STANDARD OF REVIEW

The Board “has the primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786 (1990). Accordingly, courts will defer to a Board rule so long as it is “rational and consistent with the Act.” *Id.* at 787. When the rule at issue goes to whether a group of workers is covered by the Act, that level of deference is premised on the principle that questions involving “definition of status ... are precisely of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole.” *Iron Workers v. Perko*, 373 U.S. 701, 706 (1963) (internal quotations omitted); *see also NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (noting that “defining the term ‘employee’ is one that has been assigned primarily to the agency created by Congress to administer the Act” and that “the Board’s construction of that term is entitled to considerable deference” (internal quotations omitted)).

The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). The Court also “applies the familiar substantial evidence test to the Board’s ... application of law

to the facts” and “accords due deference to the reasonable inferences that the Board draws from the evidence.” *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Whether employees are managerial is reviewed for substantial evidence. *Evergreen Am. Corp. v. NLRB*, 362 F.3d 827, 830, 838 (D.C. Cir. 2004); *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1550-51 (D.C. Cir. 1984). The Court reviews the Board’s denial of a motion to reopen the record for abuse of discretion. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999).

SUMMARY OF ARGUMENT

Consistent with its congressional mandate to interpret the scope of the Act and the Court’s instruction to provide greater clarity in the area, the Board in *Pacific Lutheran* recently revised its standard for determining whether university faculty are excluded from the Act’s coverage as managerial employees. Under that standard, the Board looks to whether faculty exercise actual control or make effective recommendations in five areas of decisionmaking, characterized as primary or secondary based on the extent they impact the university as a whole. The Board’s standard is reasonable and consistent with the Act, provides greater clarity and guidance, and gives effect to the principles articulated by the Supreme Court in *Yeshiva* and underlying the managerial exception. It ensures that employees are excluded as managerial only if they have an active role in policymaking beyond their own courses and their proposals carry significant

weight. Moreover, it recognizes that faculty are not a monolithic body and renders managerial-status decisions based on actual practice and the facts at hand rather than speculation. USC's various challenges to *Pacific Lutheran* rely largely on misunderstandings of the Board's standard or unwarranted attempts to substitute its view for the Board's.

Substantial evidence supports the Board's finding that, under *Pacific Lutheran*, USC failed to meet its burden of proving that non-tenure track faculty in the Roski School are managerial. It has not shown control or effective recommendation at the university level in any of the five areas set out by the Board, either because the committee work it points to is non-substantive, conditional, or vague, or because it failed to present evidence as to what type of independent review those committees' recommendations receive. Even if the committees did exercise control or effective recommendation, moreover, it would not be attributed to the faculty at issue because they consistently constitute a minority on those committees. In addition, the record contains concrete examples within Roski of faculty being overruled or ignored by administrators. Because the faculty in the unit are statutory employees, and USC admittedly refused to bargain with the union they selected, USC violated the Act and the Board's unfair-labor-practice order should be enforced.

ARGUMENT

After non-tenure track faculty in the Roski School overwhelmingly chose union representation, USC seeks to deprive them of their choice by arguing that they are excluded from the Act's coverage altogether. Applying the Act to the university context is a task committed primarily to the Board, and its recently revised standard for determining the managerial status of faculty both clarifies the analysis and gives effect to the principles articulated by the Supreme Court, in accord with this Court's call for additional explanation. Under that standard, USC has not shown that Roski's non-tenure track faculty sufficiently control or effectuate its policies so as to exclude them from the rights and protections of the Act and deny them their selected bargaining representative. Because the Board properly certified Local 721, USC's admitted failure to bargain violates the Act's prohibition on an employer "refus[ing] to bargain collectively with the representatives of [its] employees." 29 U.S.C. § 158(a)(5).³

I. The Board's Standard for Determining Whether University Faculty Are Managerial Employees Is Rational and Consistent with the Act

A. The Board Looks to Faculty Decisionmaking Authority in Applying the Managerial Exception to the University Context

Employers have a duty under the Act to bargain with the representative of their employees, including "professional employees" whose work is

³ A refusal to bargain in violation of Section 8(a)(5) also derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

“predominantly intellectual.” 29 U.S.C. § 152(12). But the Act does not cover employees who are considered managerial. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). Managerial employees “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682 (1980) (internal quotations omitted). A manager “represents management interests” and is “involved in developing” or “effectively control[s] or implement[s] employer policy,” including by “exercis[ing] discretion within, or even independently of, established employer policy.” *Id.* at 682-83. At bottom, such employees are excluded from the Act’s grant of bargaining rights because they are “aligned with management,” and an employer “is entitled to the undivided loyalty of its representatives.” *Id.*⁴

In *Yeshiva*, the Supreme Court applied those principles to the university context. It contrasted faculty who play a “crucial role ... [in] central policies of the institution,” who likely would be managerial, with those who “merely ... determine the content of their own courses, evaluate their own students, and

⁴ In determining that Congress intended to exclude managers, the Supreme Court explained that the Act “was designed to protect ‘laborers’ and ‘workers,’ not vice presidents and others clearly within the managerial hierarchy,” and noted Congress’s emphasis that the Act was “‘concerned ... with the welfare of workers and wage earners, not of the boss.’” *Bell Aerospace*, 416 U.S. at 281-82, 284 n.13 (quoting H.R. Rep. No. 245, at 13 (1947)). Moreover, it observed that such individuals are “‘much higher in the managerial structure’ than those explicitly mentioned by Congress” as excluded, such as supervisors. *Yeshiva*, 444 U.S. at 682 (quoting *Bell Aerospace*, 416 U.S. at 283).

supervise their own research,” who would not. *Id.* at 679, 690 n.31 (internal quotations omitted). On the facts of that case, the Court found the faculty to be managerial because they “substantially and pervasively operat[ed] the enterprise.” *Id.* at 679 (internal quotations omitted). They decided “what courses will be offered, when they will be scheduled, and to whom they will be taught,” and had determined “teaching methods, grading policies, and matriculation standards” as well as “the size of the student body, the tuition to be charged, and the location of a school.” *Id.* at 686. If education is analogized to industry, such faculty are managerial because they “determine[] ... the product to be produced, the terms upon which it will be offered, and the customers who will be served.” *Id.* By its terms, *Yeshiva* was a statement of principles rather than an analytical blueprint, with the Court describing its decision as “a starting point only.” *Id.* at 690 n.31.

Recognizing that its post-*Yeshiva* caselaw had relied on a variety of factors and “never specifically addressed the relative significance of particular” ones, the Board recently undertook to “develop a more workable, more predictable analytical framework.” *Pacific Lutheran University*, 361 NLRB No. 157, 2014 WL 7330993, at *21-22 (2014). Under *Pacific Lutheran*, the Board considers faculty’s decisionmaking role in five areas: (1) academic programs, including degree and course offerings, curricula, and the university’s structure and organization; (2) enrollment management, which deals with the size, scope, and

make-up of the student body; (3) finances, which covers both income (including tuition) and expenditures; (4) academic policy, including teaching or research methods and grading, syllabus, and academic-integrity policies; and (5) personnel policy and decisions, which covers areas such as hiring, promotion, and dismissal. *Id.* at *23-24. The first three areas are considered primary and the latter two secondary. *Id.*

For their role in a particular policy area to support managerial status, faculty must “actually exercise control or make effective recommendations” within that area. *Id.* Hypothetical or paper authority is not enough; faculty must exercise such authority in practice. *Id.* Faculty recommendations are “effective” for purposes of bestowing managerial status if they are “almost always ... followed by the administration” and “routinely become operative without independent review by the administration.” *Id.* at *25. Further, the record must contain “specific evidence ... regarding the nature and number of faculty decisions or recommendations in a particular decisionmaking area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation.” *Id.* at *24. Accordingly, “conclusory assertions that decisions or recommendations are generally followed” are insufficient to show managerial status. *Id.* When decisionmaking authority is exercised by a committee, the Board will attribute that authority to the faculty at issue only if they

constitute a majority of the committee. *Id.* at *24 n.36, 33. Finally, the Board considers the “nature of the ... employment” held by the faculty at issue, and whether it “prevents those affected from helping shape the academy as a whole.” *Id.* at *27.

The burden of proving managerial status is on the party asserting it. *Id.* at *23 n.33; *Montefiore Hosp. & Med. Ctr.*, 261 NLRB 569, 572 n.17 (1982); *cf.* *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001) (burden on party seeking to exclude employees from the Act). The burden is exacting, given that the consequence of a finding of managerial status is exclusion from the rights and protections of the Act. As the Court has instructed, “the Board must guard against construing [an exception] too broadly to avoid unnecessarily stripping workers of their organizational rights.” *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); *see also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (warning that “exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach”).

B. The Board’s Standard Is Reasonable, Provides Clarity, and Gives Effect to *Yeshiva* and the Principles Underlying the Managerial Exception

The Board’s standard for determining managerial status warrants deference because it is reasonable, provides guidance and clarity to the analysis, and, as the Board explained in *Pacific Lutheran*, is “guided by *Yeshiva*,” 2014 WL 7330993,

at *22. USC critiques various elements of the test, but its arguments are premised largely on mischaracterizations of the Board's standard or attempts to substitute its view for the Board's on an issue "wisely entrusted ... to the agency," *Perko*, 373 U.S. at 706.

1. The Board Reasonably Identified and Assigned Weight to the Factors in the Managerial-Status Analysis

In identifying the five areas of consideration and the relative weight they receive, the Board heeded the Court's instruction to articulate "which factors are significant and which less so, and why." *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004). Following *Yeshiva's* distinction between faculty with a role in determining central institutional policies and those who influence only their own courses or research, the Board explained that it will "give more weight to those areas of policy making that affect the university as a whole." *Pacific Lutheran*, 2014 WL 7330993, at *23.

As the Board detailed, the first three areas are considered primary because their impact extends beyond any particular classroom. *Id.* Drawing on *Yeshiva's* analogy, decisions regarding what academic programs are offered clearly go to "the product to be produced," and enrollment addresses "the customers who will be served." *Yeshiva*, 444 U.S. at 686. Decisions about finances have a similarly direct influence on those matters—tuition is a significant factor for would-be students (i.e. the university's "customers") in selecting a college, and expenditures

affect what “product” the university is able to produce. Moreover, *Yeshiva* looked to factors in each of the three primary areas when determining managerial status. The Court noted that *Yeshiva* faculty had determined what courses were offered, determined matriculation standards, and decided questions related to tuition, as well as that their budget requests received “perfunctory” approval and had never been rejected. *Id.* at 675 n.3, 677, 686. USC’s claim (Br. 39) that financial decisions are often the domain of the administration or trustees does not undercut any of those reasons for including finances as a primary area. Moreover, if finances are beyond faculty’s traditional role in the academic sphere (ACE Br. 22), that is precisely why a role for faculty in that area is probative evidence of managerial status. As *Yeshiva* explained, faculty are more likely to be aligned with management where their activities “fall outside the scope of the duties routinely performed by similarly situated professionals.” *Id.* at 690.

The secondary categories are similarly reasonable classifications. Academic policy fits comfortably as a secondary category because matters such as syllabus policy or research methods do not go as directly to the “product to be produced,” *id.* at 686, as actually deciding which courses are offered or topics researched. Also, they do not have as great an impact on the university as a whole, because they tend to be more generalized and adaptable to an individual classroom—even with university-wide guidelines on grading policy, for example, grading tends to

have a subjective element, especially in a field like fine arts.⁵ Similarly, personnel decisions can have more of an indirect impact on product and customers than do decisions in the primary areas. Although *Yeshiva* observed in a footnote that the faculty in that case had a role in matters such as hiring, promotion, and tenure, the Court concluded that it “need not rely primarily on these features of faculty authority” as markers of managerial status. *Id.* at 686 n.23. Decisionmaking authority in a secondary area is still important in the analysis, of course, just not to the same degree as in a primary area. Given the Board’s explanation and the link with *Yeshiva*, USC has given no sound reason to accept its effort (Br. 38-40) to reorder the factors and create its own test, usurping the Board’s role as the agency tasked with crafting rules to effectuate the Act.

2. The Board Reasonably Required and Defined Effective Recommendation

a. The Board’s Effective-Recommendation Standard Aligns with *Yeshiva*’s Understanding of Managerial Status

Similarly appropriate is the Board’s requirement that, to have managerial authority in a particular area, faculty must either exercise “actual control” or make “effective recommendations” in that area. *Pacific Lutheran*, 2014 WL 7330993, at

⁵ USC’s and amicus’s argument (Br. 38; ACE Br. 23) that all matters dubbed “academic”—both programs and policy—should be considered as one undifferentiated whole not only ignores those distinctions but also would provide less guidance by lumping together a wider array of factors at the same level of importance.

*24-25. And its explanation that recommendations are effective if they are “almost always ... followed” and “routinely become operative without independent review,” *id.*, is reasonable and reflects the facts and principles of *Yeshiva*.

The “effective recommendation” criterion appears in *Yeshiva* itself, where the Court described it as “the relevant consideration” for managerial status. 444 U.S. at 683 n.17. The Board’s standard gives meaning to the phrase in line with the principles articulated in that decision. In order to “formulate and effectuate management policies,” *id.* at 682, a manager must do more than make recommendations—those recommendations must carry significant weight. Nor is the administration’s agreement with recommendations by itself sufficient. Otherwise, employees who recommend action will be excluded from the Act’s protection any time their employer happened to reach the same result, regardless of how much weight the recommendation was actually given or whether it was modified or revised along the way. Faculty in that situation cannot be said to “effectively control or implement employer policy.” *Id.* at 683. And because managers “mak[e] operative” employer decisions, *id.* at 682, mere participation in the decisionmaking process is not enough. Moreover, as *Pacific Lutheran* demonstrated, 2014 WL 7330993, at *25, that standard has been applied in past cases involving the managerial status of faculty. *See, e.g., Univ. of Great Falls*, 325 NLRB 83, 93 (1997) (faculty managerial where “recommendations are

routinely approved by the administrative hierarchy, without independent review”), *reversed on other grounds*, 278 F.3d 1335 (D.C. Cir. 2002); *Florida Memorial College*, 263 NLRB 1248, 1249 (1982) (faculty not managerial where administration “may or may not adopt a recommendation depending upon its own evaluation of ... the recommendation”), *enforced*, 820 F.2d 1182 (11th Cir. 1987).⁶

The effective-recommendation standard is also consistent with the facts of *Yeshiva*. The Board’s requirement that faculty recommendations must “almost always” be followed or receive a “substantial level” of approval, *Pacific Lutheran*, 2014 WL 7330993, at *25 & n.38, recalls the Court’s finding of managerial status where the “overwhelming majority of faculty recommendations are implemented,” *Yeshiva*, 444 U.S. at 677. The “almost” and “substantial” qualifiers also make clear that, as in *Yeshiva*, 444 U.S. at 688 n.27, “infrequent administrative

⁶ In the supervisory-status context, from which *Yeshiva* took the effective-recommendation criterion, 444 U.S. at 683 n.17, the Board’s position long has been that “authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed,” *Children’s Farm Home*, 324 NLRB 61, 61 (1997). This Court likewise has found supervisory status where recommendations were followed “without independent investigation by superiors.” *Allied Aviation Serv. Co. v. NLRB*, 854 F.3d 55, 66 (D.C. Cir. 2017) (quoting *DirectTV U.S.*, 357 NLRB 1747, 1749 (2011)). Because managers are “much higher in the managerial structure” than supervisors, *Yeshiva*, 444 U.S. at 682, a requirement for the latter naturally should apply also to the former.

reversals” or “occasional vetoes of faculty action” would not necessarily preclude a finding of managerial status under the Board’s standard.

Contrary to USC’s assertion (Br. 26), the Board does not require that employees exercise “ultimate authority” to be managerial. The qualifications discussed above belie any such suggestion. Nor does the Board’s standard replicate, as USC claims (Br. 25-26), the argument rejected in *Yeshiva* that faculty are not managerial if “final authority rests with the board of trustees,” 444 U.S. at 684-85. *Pacific Lutheran* contains no such per se rule that the very existence of a higher level of authority precludes managerial status. USC’s argument (Br. 27-32, 36-37) that those requirements would be contrary to *Yeshiva* or the Act is thus beside the point.

USC’s contention to the contrary is premised on a series of misunderstandings or misrepresentations. For example, the Board does not require, as USC insists, that “there be no independent review” (Br. 28) by administrators in any instance. The Board’s more qualified criterion that recommendations “routinely become operative without independent review” allows room for administrative review in some circumstances.⁷ USC and its amicus likewise mischaracterize (or, at best, misread) the Board’s decision in this

⁷ Given USC’s failure to show what kind of review its administrators give faculty proposals, pp. 42-50, there was no occasion in this case to define precisely how much independent administrative review is consistent with managerial status for faculty.

case as requiring that administrators “must sign off without second thought” (Br. 30; ACE Br. 21) on faculty proposals for faculty to be managerial. Context makes clear that the Board’s expression of incredulity that trustees would adopt financial recommendations of the newly formed Finance and Enrollment Committee “without second thought” was made in the course of its finding that USC had failed to produce evidence as to what type of independent review or investigation that committee’s proposals received. (O 17.) The Board was rejecting as unwarranted any inference that the trustees’ approval by itself constituted such evidence. That is, the Board was not saying that an employer must show automatic approval of every faculty proposal, just rejecting any suggestion that USC had made such a showing here.

Amicus engages in a similar subterfuge by claiming that the Board will not find managerial status if faculty “exchang[e] in a back and forth with the administration.” (ACE Br. 21, 25-26.) The Board has no such rule. It discounted testimony in this case that the Curriculum Committee worked back and forth with the School of Public Policy on a proposal because the record did not reveal “whether [the committee] rejected certain aspects of the proposal or simply asked clarifying questions” (O 15-16)—that is, whether the back and forth involved a substantive role for the committee in shaping the proposal. Thus, it was lack of evidence as to the nature of the interaction, not the fact of the interaction itself, that

cut against managerial status. USC likewise obscures the point of that passage (Br. 30-31) by characterizing it as a requirement that faculty committees disapprove proposals. The Board's observation that the testimony was unclear whether the Curriculum Committee had rejected aspects of the proposal was a context-specific example of the lack of "evidence about the actual work the committee does" (O 15), not a broad principle that an employer always must show faculty disapproval.⁸

b. The Board Reasonably Held That Effective Recommendations by a Committee Are Ascribed Only to the Majority of the Committee

The Board also reasonably determined that any control or effective recommendation exercised by a committee is attributed to the type of faculty at issue only if they constitute a majority on the committee. *Pacific Lutheran*, 2014 WL 7330993, at *24 n.36, 33; (O 1 n.1, 16). Its approach takes into account that

⁸ USC's misunderstandings are not limited to the Board's definition of effective recommendation. It also mistakenly insists (Br. 37-38) that the Board will find managerial status only if the purported managers hold elected positions. The Board mentioned the lack of elections in a single sentence, and did so in the context of describing the structural barriers to access to university committees for USC's non-tenure track faculty. (O 18.) Specifically, it listed the subjective appointment process along with evidence that some part-time faculty were not even aware of the committees as possible reasons why they had such minimal committee presence. Although USC reads this observation as a broadly applicable requirement, context makes clear that it is not. In any event, the ability to decide the makeup of policymaking committees has long been a relevant factor in analyzing managerial status. *See, e.g., NLRB v. Fla. Mem'l College*, 820 F.2d 1182, 1185 (11th Cir. 1987) (committee decisionmaking not attributable to faculty where "faculty does not select which members will sit on these ... committees").

faculty are a diverse body, and renders managerial-status decisions based on actual practice rather than speculation.

The Board's position recognizes that faculty are not monolithic, as did the Court in *Yeshiva*. The Court explained that some members of a university's faculty could have collective-bargaining rights under the Act even if others did not. Although the Court determined that the group of full-time Yeshiva faculty at issue were managerial, it noted that "[t]here also may be faculty members at Yeshiva ... who properly could be included in a bargaining unit." 444 U.S. at 690 n.31. It also reflected on the possibility that, for example, "a rational line could be drawn between tenured and untenured faculty members." *Id.* As at USC, pp. 51-53, not all faculty have the same status, responsibilities, or employment relationship. Because not all faculty's interests are necessarily aligned with each other, it cannot be said that all faculty are "aligned with management," *id.* at 683, even if some are.⁹

Because faculty are not all the same, the Board has not automatically aggregated faculty in the minority of a committee with faculty in the majority for purposes of determining managerial status. For example, the decisionmaking authority of the faculty assembly in *Pacific Lutheran* was not ascribed to

⁹ In this case, even USC acknowledges distinctions among different groups of faculty. It agreed at the hearing that non-tenure track faculty at the International Academy were not managerial, even as it argued that other non-tenure track faculty were. (Tr. 714-15.)

contingent faculty for managerial-status purposes because they constituted only 20 percent of the membership. 2014 WL 7330993, at *33; *cf. Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 131-32 (1993) (finding employees who owned minority of employer's shares non-managerial even though all shareholders were employees). And in *Cooper Union*, full-time faculty were not managerial even though full-time and adjunct faculty together constituted a voting majority on decisionmaking committees. 273 NLRB 1768, 1769-70 (1985), *enforced*, 783 F.2d 89 (2d Cir. 1986).

The focus is also properly on the type of faculty at issue, because the question ultimately is whether those individuals are covered by the Act. Their ability to invoke the rights or protections of the Act should not hinge on whether some *other* group of faculty control or effectively recommend university policy.

Further, because faculty who are in the minority on a committee are not in a position to enact their views, the Board's position also is consistent with *Yeshiva's* description of managerial authority as an active endeavor. Faculty members who are forever outvoted necessarily cannot "implement," "effectuate," or "mak[e] operative" policies, or otherwise "tak[e] ... discretionary actions" or "exercise discretion," *Yeshiva*, 444 U.S. at 682-83. One does not "substantially and pervasively operat[e] the enterprise" simply by sitting on a committee. *Id.* at 679. The Board's position also aligns with the longstanding principle that service on a

majority non-faculty committee does not impart managerial status on faculty. *See, e.g., Great Falls*, 325 NLRB at 95 & n.39 (citing cases). In that situation, “it is apparent that ... a faculty member ... could not effectively formulate and effectuate the Employer’s policies.” *Id.* (internal quotations omitted).

Also reasonable is the Board’s focus on majority status on committees “as their membership is currently structured,” because it looks to the authority that faculty actually hold and are able to exercise, not what they hypothetically “could one day have.” *Pacific Lutheran*, 2014 WL 7330993, at *32-33; *cf. Sci. Applications Int’l Corp.*, 309 NLRB 373, 376 (1992) (“It is not the mere potential ... for a voice or control that is significant.”) As this Court has explained, the focus of the managerial analysis is on the “*actual* role of the faculty.” *Point Park Univ. v. NLRB*, 457 F.3d 42, 48 (D.C. Cir. 2006) (emphasis added). For example, the fact that the contingent faculty in *Pacific Lutheran* had the right to join university committees did not make them managerial when they had not actually done so. 2014 WL 7330993, at *30 n.64, 32. That position is in line with the bedrock principle that the Board makes decisions on the record before it rather than conjecture as to what might happen at some future point. *See Lewis & Clark College*, 300 NLRB 155, 161 & n.31 (1990) (rejecting as “speculative” argument that managerial status should be decided based on “unfinished” new governance plans rather than “current ... faculty governing structures”); *College of*

Osteopathic Medicine & Surgery, 265 NLRB 295, 298 (1982) (“[O]ur determination that ... faculty members are managerial employees ... is dependent on the particular facts of the current situation.”); *see generally USW v. NLRB*, 294 F.2d 256, 260 (D.C. Cir. 1961) (emphasizing that an “argument must be evaluated ... upon the facts as they are in this case, not upon a hypothetical or theoretical basis”).

USC attempts (Br. 32-33) to shoehorn its challenge to the majority-status requirement into an argument about consistency with *Yeshiva*, but the Board’s position bears no resemblance to the “collective-authority” argument rejected in that decision. What *Yeshiva* rejected was the idea that authority exercised collectively could not serve as evidence of managerial status. 444 U.S. at 684-85. The Board’s *Pacific Lutheran* standard erects no such barrier. Faculty who constitute the majority of a committee can be managerial based on their service on that committee, even though the authority they exercise there is collective. If anything, the problem where the faculty at issue constitute a minority of a decisionmaking committee is that they have *insufficient* collective authority. The reason that their service on that committee does not “count” (Br. 37) for managerial status is because it is ineffective, not because it is collective. Likewise, the Board will not automatically aggregate faculty in the minority and majority of a

committee not because the authority they would exercise is collective, but because the Board does not assume that their interests align, pp. 33-34.¹⁰

Further, USC's and amicus's apparent suggestion that faculty in the minority on a decisionmaking committee are managerial would either treat all faculty as a monolithic body with undifferentiated interests or confer managerial status based on the *possibility* of majority status. USC contends (Br. 37) that the Board's position could result in managerial status changing from year to year based on changes to a committee's composition. But speculation as to the possibility of different facts in the future cannot be the basis for excluding employees from the coverage of the Act and depriving them of their choice of representative. Deciding managerial status on such speculation also would undermine the otherwise unchallenged principle that service on a committee with a non-faculty majority does not render faculty managerial. So long as the numbers could one day change, faculty could be deemed managerial based on service on a committee dominated by administrators. Amicus's proposition that committee service should impart managerial status even on faculty in the minority because university decisionmaking is "collegial" and "dialectic" (ACE Br. 6, 26) could lead to a similar result; it would be enough for managerial status if the outnumbered faculty

¹⁰ Contrary to USC's suggestion (Br. 37), the relevant faculty's minority status on a committee does not "necessarily ... render the[m] ... non-managerial"; faculty who serve in the minority on a committee can still be managerial based on other evidence, of course, just not by virtue of their service on that committee.

could govern through “compromise” (ACE Br. 26) with the administrators in the majority.

3. The Board’s Standard Addresses This Court’s Request for a Fuller Explanation

Finally, the Board’s standard expressly responds to the Court’s call for greater explanation in the managerial-status analysis. In identifying the five areas of consideration and explaining why some were primary and others secondary, the *Pacific Lutheran* Board did precisely what the Court instructed—articulate “which factors are significant and which less so, and why,” *LeMoyne-Owen*, 357 F.3d at 61. The Board gave further clarification in the present case, explaining (O 17-18) that evidence of decisionmaking authority in a secondary area is insufficient to show managerial status absent such authority in a primary area. USC fails to acknowledge that development.

USC contends (Br. 40-41) that the Board should have gone further and stated a bright-line rule as to how many decisionmaking areas must be established to prove managerial status. The Court has recognized that managerial-status cases require a “fact-intensive inquiry,” *Point Park*, 457 F.3d at 51, however, and such analysis does not lend itself to ex ante line drawing or a mathematical exercise in box checking. *See also Bell Aerospace*, 416 U.S. at 294 (noting that case-by-case adjudication “is especially appropriate” for managerial status). Nor has the Court required such an approach. What it sought was for the Board to explain the

significance of factors when “applying the test to varied fact situations,” *LeMoyne-Owen*, 357 F.3d at 61. It is through such application that “relevant distinctions between different factual configurations ... emerge.” *Id.* (internal quotations omitted); *cf. UFCW, Local No. 150-A v. NLRB*, 1 F.3d 24, 32-33 (D.C. Cir. 1993) (explaining that the Court “does not require that the Board establish standards devoid of ambiguity at the margins” that “will in time be narrowed through future adjudications”). As the Court thus recognized, the analysis requires some flexibility in its application. It is not necessary to fix for all time how many areas must be met when the evidence of authority in one area may be greater in one case or more marginal in another; weak evidence of authority in enrollment and finances combined with weak evidence in academic programs might warrant a different result than weak evidence in enrollment and finances and strong evidence in academic programs, for example. USC’s approach would cut short the development of the law in this area.

Moreover, given that the Board found no evidence of managerial authority in any area in either *Pacific Lutheran* or this case, the Board has not yet faced the question of whether managerial status can be proven with evidence of decisionmaking authority in some but not all primary areas. Even if that question were susceptible to a one-size-fits-all answer, it is best resolved when actually presented, as opposed to in the abstract.

II. USC Has Not Shown That Roski's Non-Tenure Track Faculty Are Managerial

Substantial evidence supports the Board's finding, in applying *Pacific Lutheran* to the facts of this case, that USC failed to meet its burden of showing that the petitioned-for non-tenure track faculty at Roski are managerial. USC has not shown that they exercise control or make effective recommendations in any of the five decisionmaking areas, and evidence from across the categories further shows the absence of such authority.

A. Primary Areas

USC has failed to show that Roski's non-tenure track faculty have decisionmaking authority in any of the three primary areas. At the university level, the record demonstrates a substantive decisionmaking role by administrators either before or after (or both) faculty involvement in some areas, and USC has not provided sufficient evidence to show the extent to which that role is exercised in others. And at the school level, the record contains concrete evidence of Roski faculty's views being overlooked or overruled.

1. Academic Programs

USC contends (Br. 8-9) that faculty have a decisionmaking role in academic programs through the Curriculum Committee. But substantial evidence supports the Board's finding (O 15) that, in most cases, faculty's role on that committee is non-substantive. They do not recommend courses or programs themselves, but

review the recommendations of others. Professor Levin described her work on the committee verifying that proposals meet predetermined criteria as “technical and clerical” or “mathematical,” and noted that her review of three proposals outside her area of expertise took a total of 45 minutes. (Tr. 663-65, 669.) Likewise, the guidance provided to committee members emphasizes checking a proposed syllabus for consistency with set policy, including on matters such as how much of a course’s grade can be based on participation (15%) or when midterm standing is assessed (week 8). (UX 23.) Vice Provost Levine explained similarly that the usual cases involve applying previously adopted guidelines and are approved by a subcommittee as “a routine matter.” (Tr. 231.) Such work hardly constitutes the “exercise [of] discretion within, or even independently of, established employer policy.” *Yeshiva*, 444 U.S. at 683. USC’s critique (Br. 45) of Levin’s testimony does not account for that corroborative evidence, nor has USC shown that her experience was unrepresentative.

Although more complicated cases go to the full committee, almost everything is handled at the subcommittee level, and the record evidence is sparse as to what work the full committee actually does. USC points (Br. 9) to the Curriculum Committee’s approval of a master’s program in the public-policy school, but, as the Board explained (O 15-16), the record does not detail the nature of the interaction between the committee and the proposing school, and thus

whether faculty on the committee had substantive input or instead acted mostly as a conduit to the provost for a decision that had already been made.

In addition, USC failed to produce specific evidence as to what type of review the vice provost gives to Curriculum Committee recommendations, such that it did not meet its burden of showing that those recommendations were “effective” for purposes of managerial status. Without “specific evidence or testimony regarding ... the subsequent review of [faculty] decisions or recommendations, if any, by the university administration,” *Pacific Lutheran*, 2014 WL 7330993, at *24, the Board cannot evaluate what role faculty on the Curriculum Committee play in setting policy.¹¹ Given that failure, USC’s claim to have “uncontroverted” evidence (Br. 46-48) that the administration reached the same result as a committee is not determinative—that evidence does not demonstrate effective recommendation. Moreover, in faulting the Board for considering the sufficiency of USC’s evidence (Br. 44-48), USC ignores that it bears the burden of proof as the party alleging managerial status; it is not “improper” (Br. 46) to hold USC to its burden.

USC also points to the Academic Review Committee (Br. 10-11), but the recommendations of that committee are passed on to the provost to work with

¹¹ Although Vice Provost Graddy testified that she does not independently investigate Curriculum Committee recommendations, she did not speak to what kind of review she gives them other than noting that she could come back to the committee with questions. (Tr. 304-05.)

school-level administration to decide how to implement them. Administrators thus retain a discretionary and substantive role after the faculty have offered their views; as the Board noted, the “actual actions taken ... are devised and decided upon at the school level.” (O 15.) In the case of Roski’s master-of-fine-arts program, for example, the dean submitted her own plan for implementing the Academic Review Committee’s recommendation, overruling the faculty’s proposal. Given the ongoing active role for administrators, the Academic Review Committee does not “effectively control or implement employer policy.” *Yeshiva*, 444 U.S. at 683; *see also Loretto Heights College v. NLRB*, 742 F.2d 1245, 1253-54 (10th Cir. 1984) (committee’s work not managerial where its “review is merely one intermediary step in a long process that requires approval both at the program level ... and by the Academic Dean”).¹²

Substantial evidence also supports the Board’s finding that USC “fail[ed] to establish that nontenure track faculty in ... Roski School have any involvement in decision-making about academic programs within their school[.]” (O 16.) In addition to the example of the dean overruling faculty views regarding changes to the master-of-fine-arts program, Roski faculty had no input as to the restructuring of the school, the replacement of area heads with vice deans, the new master-of-

¹² USC proves nothing by noting (Br. 45) that the Board found it unclear whether Roski’s dean rejected master-of-fine-arts recommendations from the faculty council, a school committee, or the Academic Review Committee. Under any of those alternatives, the dean unilaterally substituted her view for the faculty’s.

arts curriculum, the school's renaming, and the adoption of new programs such as the Iovine & Young Academy and the online degree. Those changes were presented to faculty once the decisions already had been made. *Cf. Cooper Union*, 273 NLRB at 1770-71, 1775 (administrators' unilateral actions, including restructuring school and creating new degree programs, show lack of faculty control).

In another example, school administrators regularly ignored non-tenure track faculty member Alexis Disselkoen's suggestions that Roski offer courses that were already in the course catalogue but not currently taught. (Tr. 348-51.) If a non-tenure track faculty member cannot convince the administration to offer existing classes, she is unlikely to successfully have a say in "developing" new courses or programs. *Yeshiva*, 444 U.S. at 682. Indeed, Disselkoen has never been asked about curricula other than her own (Tr. 347-48), and input into one's own classroom is not evidence of managerial status. *Id.* at 690 n.31. Noura Wedell, a non-tenure track lecturer in critical studies, likewise described having no involvement in what majors, minors, degrees, or programs are offered in Roski. (Tr. 402-03.) With their input overlooked or rejected, Roski faculty cannot accurately be described as "aligned with management." *Id.* at 683. USC all but ignores that evidence from Roski itself, involving the particular faculty at issue here.

2. Enrollment

Evidence of effective decisionmaking authority for faculty in enrollment management is similarly lacking. Although USC points to recommendations of the Finance and Enrollment Committee (Br. 11-14), the Board noted (O 16) that the small sample size of proposals from that newly created committee is insufficient to establish that they “routinely become operative,” *Pacific Lutheran*, 2014 WL 7330993, at *25. The committee had existed barely eight months at the time of the hearing in this case, and had submitted only two batches of recommendations. Nor is there specific evidence as to what level of review or investigation those recommendations received from the provost prior to approval. Moreover, three university administrators sit on the committee itself, which is co-chaired by a vice provost. *Cf. Cooper Union*, 273 NLRB at 1769-70, 1775 (presence of nonvoting administrators on committee cut against managerial status for faculty).

In addition, several of the examples USC points to (Br. 12) do not reflect a substantive, discretionary role for faculty. The committee recommended that USC establish a master plan for graduate-student enrollment, but did not develop the plan itself. As to the use of standardized-test scores as admissions criteria, the recommendation was simply to continue an existing policy, rather than the exercise of discretion to implement policy. And as the Board explained, neither example

“actually determin[ed] the size of the student body or the make-up of the student body.” (O 17.)

Again contrasting with the lack of evidence of effective faculty authority at the university level is concrete evidence of Roski administrators overruling faculty on enrollment at the school level. The faculty recommended admitting a certain number of students to the master-of-arts program, but the administration accepted more applicants. Among the additional students that the administration decided to accept were applicants whom the faculty had deemed unworthy of admittance. (Tr. 403-04, 423.)

3. Finances

Likewise supported is the Board’s finding that there “is not a sufficient record to evidence that the faculty is aligned with management” on finances. (O 17.) As with its role regarding enrollment, the Finance and Enrollment Committee’s financial recommendations are of recent vintage (all within a month of the hearing) and limited sample size. And although USC asserts that those recommendations “regard[ed] crucial ... financial matters” (Br. 13), the record is vague as to what the recommendations were, and what evidence there is suggests that they were lacking in specifics. For example, the committee’s task regarding endowment was to recommend whether the next year’s draw should be “approximately the same as last year, substantially lower, or substantially higher.”

(EX 17.) With tuition, the committee's choices were similarly limited to "about the same as in recent years, substantially more, or substantially less." (EX 17.) Those options are broad, and appear to leave the administration with significant discretion as to the actual decision. Faculty cannot fairly be said to "formulate and effectuate management policies," *Yeshiva*, 444 U.S. at 682, through such open-ended guidance. And again, USC has failed to show what kind of independent review, if any, the administration conducts.

Continuing a pattern, USC also ignores the dispute between Roski administration and faculty regarding teaching assistantships, an area that, as the Board explained (O 17), impacts the school's finances. Over the faculty's objections, the dean changed how such positions would be awarded, and thus how school resources would be spent in the area of graduate-student tuition and stipends. Likewise, both non-tenure track and tenured faculty testified that they have no role in Roski's budget. (Tr. 352-53, 405, 463-64.)

B. Secondary Areas

Without evidence of decisionmaking authority in any of the primary areas, USC has failed to show that Roski's non-tenure track faculty are managerial. (O 17-18.) In any event, USC likewise has not shown actual control or effective recommendation in either of the secondary areas.

1. Academic Policy

As the Board found, evidence as to faculty involvement in university-wide academic policy is “too vague and undefined to conclude that the faculty’s role ... amounts to actual or effective control” in that area. (O 17.) Although various committees study issues related to academic policy, USC offers little evidence of action resulting from those discussions. For example, USC discusses studies by the Research Committee (Br. 9-10), but provided only one concrete outcome of that committee’s work—the provision of Microsoft Word to faculty and students. Further, providing word-processing software does not directly impact pedagogy or policy.¹³

The Board detailed (O 17) how there is likewise only one example in the record of completed work by the Teaching and Academic Programs Committee (a report on residential colleges) and Academic Policies and Procedures Committee (an examination of grading policy). (Tr. 309-12.) The record contains little specific evidence as to what the two committees recommended in those areas or what policies, if any, were implemented as a result. Although USC notes (Br. 14-15) that Teaching and Academic Programs was looking into academic-integrity

¹³ Although USC departs from the Board’s analysis and includes the Research Committee under the “academic programs” area (Br. 9-10, 46), that committee’s work does not go to curricula or degree offerings. It does not make decisions about substantive areas of university research, but studies auxiliary matters like the computing needs of existing programs.

policy at the time of the representation hearing, the evidence does not indicate whether the committee would actually craft such a policy or just recommend whether one should exist.

In addition to the limited evidence as to what those committees actually do, USC also has failed to show what review or investigation the administration conducts when considering their recommendations. (O 17.) Conclusory statements that recommendations are approved (Br. 14-15) does not suffice to show managerial status absent evidence as to what those recommendations were or what review preceded the approval. USC highlights (Br. 15) the ultimate acceptance of handbook-committee proposals, for example, but the university president once sent a proposal back for revisions before approval, suggesting some level of independent review. Finally, like with academic programs, non-tenure track faculty testified as to a lack of input into academic policy at the school level outside of their own classrooms. (Tr. 407-08, 678-79.)

2. Personnel Policy and Decisions

As with academic policy, USC presented insufficient evidence of actual or effective control regarding faculty's role in the area of personnel policy and decisions. The Board noted (O 17), for example, that USC offered no evidence of any action actually taken by the Non-Tenure Track Promotions Committee. Although Vice Provost Levine testified that the committee "can" make

recommendations about promotion policies (Tr. 130), there is no evidence that it has ever done so. Nor is there evidence as to what type of review is given to recommendations of the Tenure and Privileges Appeals Committee. Moreover, as the Board emphasized (O 17), non-tenure track faculty are expressly excluded from any role on either that committee or the Committee on Appointments, Promotions, and Tenure dealing with tenure issues.

Further, rather than providing specific examples of non-tenure track faculty playing a role in hiring or reappointment decisions, USC offers only conclusory statements that all faculty are involved (Br. 6). And those statements are contradicted by non-tenure track Roski faculty themselves, who testified that they had no such role. (Tr. 367, 429-30.) To the extent that some faculty are involved, the record shows that deans maintain a significant oversight role in the process. And in the case of hiring part-time non-tenure track faculty, the dean acts alone. (Tr. 388.)

C. The Nature of Non-Tenure Track Employment at USC Cuts Against Managerial Status

The Board's finding that Roski's non-tenure track faculty lack control or effective recommendation is further supported by evidence that cuts across the five areas of consideration, such as minority status on most committees and other limits that follow from the "nature of the[ir] employment," *Pacific Lutheran*, 2014 WL 7330993, at *27.

Because non-tenure track faculty constitute a minority of almost every university committee, the Board concluded (O 16-18) that they would not have the power of effective recommendation even if any of those committees did. Despite constituting roughly 75 percent of the faculty at USC, non-tenure track faculty are less than half (and sometimes significantly less) of the membership on every university-wide committee USC mentions except Teaching and Academic Programs and Non-Tenure Track Promotions. In addition, none of those committees have more than one non-tenure track faculty member from Roski, and most do not have any. Because membership “often” rolls over from year to year (Tr. 319), the likelihood that those numbers would change dramatically is small. Moreover, USC offered no evidence of non-tenure track majorities on those committees, even though it had both the incentive (as the party arguing managerial status) and the means (as the party with access to records) of providing that evidence if it existed.

Further, the fact that non-tenure track faculty are not only consistently in the minority on university committees but also disproportionately underrepresented indicates that their minority status in the 2015 academic year was not happenstance but the result of deeper structural issues that are likely to persist from year to year. As the Board found, their participation in governance roles is “limited by the very nature of their employment relationship.” (O 18). For example, a non-tenure track

faculty member who does not know from year to year, or even semester to semester, whether she will still have a position at USC is unlikely to volunteer to serve on a committee with a year-long commitment, let alone committees like Finance and Enrollment or Academic Promotions and Tenure where members serve multi-year terms.¹⁴ Regardless of the length of their appointment, moreover, university service is not required for non-tenure track faculty the way it is for tenured and tenure-track. In addition, multiple non-tenure track faculty testified that they had only very recently learned of the committees or the work they did in any detail—often in the weeks leading up to the hearing in this case. (Tr. 343-46, 398, 415-16, 628-29.) The fact that they hypothetically could have served on the committees does not make them managers when the evidence is that they did not.

Other limitations in the nature of non-tenure track employment at USC further cut against managerial status. As the Board detailed (O 18), non-tenure track faculty receive little guidance, feedback, or support for professional development, and sometimes are not told until shortly before a new semester whether they will be reappointed. Some part-time faculty, who constitute the majority of non-tenure track faculty at USC, do not receive any benefits. Such treatment suggests that USC views non-tenure track faculty as something less than full members of the university community, let alone as USC's own

¹⁴ USC cites to nothing in the record in support of its assertion (Br. 7) that faculty can serve partial terms.

“representatives,” *Yeshiva*, 444 U.S. at 682. If USC intended such employees to “formulate and effectuate management policies,” *id.*, it likely would do more to keep them in the fold.

The nature of their employment also suggests that, to use the Supreme Court’s comparison, such faculty are closer to the “laborers” of the university than the “boss,” *Bell Aerospace*, 416 U.S. at 282, 284 n.13. Indeed, under USC’s view of its faculty that “all are managerial” (Br. 37), USC would have over 6,000 managers and apparently no employees involved in directly providing its “product” of education. Given the realities of their employment, Roski’s non-tenure track faculty simply do not match the Supreme Court’s description of managerial employees as so “clearly within the managerial hierarchy,” *id.* at 284 n.13, and “high[] in the managerial structure,” *Yeshiva*, 444 U.S. at 682, to warrant exclusion from the rights and protections of the Act.

D. The Board Did Not Abuse Its Discretion in Denying USC’s Motion To Reopen the Record and for Reconsideration

Finally, the Board did not abuse its discretion in denying USC’s motion to reopen the record and for reconsideration in light of Professor Levin’s testimony regarding the Curriculum Committee in a post-election hearing. A party seeking such relief must show “extraordinary circumstances,” 29 C.F.R. § 102.65(e)(1), and must establish that the evidence was previously unavailable and “would have changed the result,” and that the motion was promptly filed upon its discovery.

Manhattan Ctr. Studios, Inc., 357 NLRB 1677, 1679 (2011). As the Board explained (O 1 n.1), Levin’s post-election testimony would not have changed the result in this case. Accordingly, the Board held that it would not have granted USC’s motion “even assuming the ... motion was timely and that the postelection testimony constitutes newly discovered evidence.” (O 1 n.1.)

Levin’s post-election testimony was not, as USC contends (Br. 43-44), “contradictory” to her statements in this case that Curriculum Committee work is non-substantive. Much of the testimony that USC cites describes the process or practical impact of the Curriculum Committee’s work, not the nature of the committee members’ contributions. For example, Levin’s post-election testimony that the Curriculum Committee “make[s] recommendations about whether new courses ... should go through” (Br. 42-43) is simply a description of the process, and is not contrary to her testimony in this case that those recommendations were based on whether the proposal met predetermined technical criteria. Similarly, committee members “hav[e] a say in ... what courses are offered” (Br. 43) by virtue of their approval of proposals, even if those approvals are routine and clerical.

USC also selectively quotes Levin’s later testimony to give the appearance of contradiction. Levin did not state, as USC claims, that “[Curriculum Committee] service afforded her ‘a window into how university curricula are

shaped” (Br. 43), but rather that she joined the committee because she “was interested in getting a window into how university curricula are shaped” (MSJ Ex. 9 at 28-29). In other words, she was describing her hope before she joined for what committee service would be, not what it actually was. And even if Levin had stated that she actually saw how curricula are shaped, it would have been by reading proposals submitted by others, not substantively shaping the curricula herself.

In addition, Levin’s subjective views on the importance of her work on the committee, which USC now emphasizes (Br. 43), are not relevant to the question of managerial status. *See Freehold AMC-Jeep Corp.*, 230 NLRB 903, 907 n.8 (1977) (explaining that “[m]anagerial status ...[is] not susceptible to findings based upon the subjective understandings” of the parties). Indeed, USC itself argued as much during the hearing in this case, objecting to questions regarding Levin’s sense of the committee’s work on the grounds that they called for her subjective opinion. (Tr. 668.)

Moreover, other evidence besides Levin’s testimony supports the Board’s finding that faculty’s role on the Curriculum Committee is largely non-substantive. USC’s own witness, Vice Provost Levine, explained that Curriculum Committee cases typically involve applying previously adopted guidelines and that proposals are approved by subcommittees as “a routine matter.” (Tr. 231.) And Vice

Provost Graddy added that “almost all” work is done by those subcommittees. (Tr. 315.) Documentary evidence, in the form of the syllabus checklist provided to committee members, is in line with that testimony. It does not matter that Levin’s testimony was “the only testimony [Local 721] presented” on the nature of Curriculum Committee work (Br. 43), because the burden to show managerial status is on USC, not Local 721. The Board’s finding that USC did not show managerial status by virtue of Curriculum Committee service is also supported by the lack of evidence as to the type of administrative review of committee recommendations, which undercuts USC’s case independent of Levin’s testimony. Accordingly, even if Levin’s later testimony had contradicted her earlier statements, the Board’s finding still would find support in the record. Because the Board would have reached the same result regarding managerial status, it appropriately exercised its discretion in denying USC’s motion.

USC’s effort to cast non-tenure track Roski faculty as managerial thus fares no better than its challenge to the Board’s *Pacific Lutheran* standard. Like the standard itself, the Board’s application in this case both tracks *Yeshiva* and the principles underlying the managerial exception in the university context. Having failed to carry its burden for excluding non-tenure track Roski faculty from the

rights and protections granted employees, USC violated the Act by refusing to bargain with Local 721 as their chosen representative.

CONCLUSION

The Board respectfully requests that the Court deny USC's petition for review and enforce the Board's Order in full.

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December 2017

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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)	
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)	Nos. 17-1149, 17-1171
v.)	
)	Board Case Nos.
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)	31-CA-192125
Respondent/Cross-Petitioner)	
)	
SERVICE EMPLOYEES INTERNATIONAL)	
UNION, LOCAL 721, CTW, CLC)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,992 words of proportionally spaced, 14-point type, and that the word-processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 21st day of December, 2017

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)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/Linda Dreeben
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Dated at Washington, DC
this 21st day of December, 2017

STATUTORY ADDENDUM

Section 8(a) of the NLRA (29 U.S.C. § 158(a)):

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

...

(5) to refuse to bargain collectively with the representatives of his employees

29 C.F.R. § 102.65(e)(1):

A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules, except that the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.