**Oral Argument Not Yet Scheduled**

# Nos. 07-1315, 07-1383

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

**CARROLL COLLEGE, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW**

**Intervenor**

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

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon the petition of Carroll College, Inc. ("Carroll") to review, and on the cross-application of the National Labor Relations

Board ("the Board"), to enforce, the Board's Decision and Order issued against Carroll. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW ("the Union") has intervened on the side of the Board. The Board's Decision and Order issued on July 20, 2007, and is reported at 350 NLRB No. 30. (A.199-202.)[1]

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§151, 160(a)) ("the Act"). The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. §160(e) and (f)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act. As the Board's unfair labor practice order is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding (Board Case No. 30-RC-6594) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. §159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d) of the Act, the Court has jurisdiction to review the Board's actions in the 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." (29 U.S.C. §159(d)). The Board retains authority under Section 9(c)

[1] "A." references are to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

of the Act (29 U.S.C. §159(c)) to resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999)(collecting cases).

The petition for review and the cross-application for enforcement were timely filed on August 8, 2007 and September 28, 2007, respectively; the Act places no time limit on the institution of proceedings to review or enforce Board orders.

## STATEMENT OF THE ISSUES PRESENTED

1. Whether Carroll failed to preserve for appellate review its claim that, under this Court's three-part test for determining whether a school is altogether exempt from Board jurisdiction as a religious institution under the Supreme Court's decision in *Catholic Bishop*, the Board lacked jurisdiction over this case.

2. Whether the Board reasonably found that Carroll failed to show that its faculty are managerial employees, and therefore properly found that Carroll violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

## APPLICABLE STATUTES

Relevant statutory and regulatory provisions are contained in the attached addendum.

## STATEMENT OF THE CASE

The Board found that Carroll violated the Act by refusing to bargain with the Union as the representative of its faculty. (A.201.) Before this Court, Carroll raises an argument that it failed to raise to the Board in both the representation proceeding and in the unfair labor practice proceeding--namely, that the Board lacks jurisdiction over it under this Court's test for determining whether a school is exempt from Board jurisdiction as a religious institution under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)("*Catholic Bishop*").[2] Alternatively, Carroll argues that it is relieved from any duty to bargain because its faculty are not statutory employees, but rather are managers who are not entitled to the Act's protection. As described below, Carroll's refusal to bargain followed the Board's certification of the Union as the faculty's representative.

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[2] In *Catholic Bishop*, 440 U.S. at 499-507, the Supreme Court held that Congress did not intend for the Board to have jurisdiction over teachers in church operated schools, so as to avoid having to decide whether such jurisdiction would be constitutionally permissible under the religion clauses of the First Amendment. In *University of Great Falls v. NLRB*, 278 F.3d 1335, 1339-40 (D.C. Cir. 2002) ("*Great Falls*"), this Court found that the Board had a practice of asserting jurisdiction over teachers at church-operated schools if the school in question did not have a substantial religious character or purpose. The Court concluded that the Board's "approach to determining jurisdiction under *Catholic Bishop* is flawed." *Id*. at 1347. In its place, the Court adopted a three-part test for applying *Catholic Bishop*, whereby a religious educational institution is exempt from the Board's jurisdiction if it (1) holds itself out to students, faculty and the community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is religiously affiliated. *Id*. at 1343-45.

# STATEMENT OF FACTS

## I. THE BOARD'S FINDINGS OF FACTS

### A. The Representation Case Procedural History

On November 17, 2004, the Union filed a petition with the Board, seeking certification as the representative of Carroll's faculty, whereupon the Acting Regional Director ("ARD") issued a notice of hearing. (A. 113; 1965,1975.)

In its posthearing brief, Carroll asserted, among other things, that the faculty were managers, rather than statutory employees. Carroll also stated as follows (p.8)(emphasis in original):

> Carroll is not claiming that the College is not an 'employer' within the meaning of Section 2(2) of the Act because of the institution's religious foundations [fn 27: NLRB v. Catholic Bishop of Chicago, 330 U.S. 490 (1979).]
>
> Rather, the position is that obliging Carroll College to negotiate a collective bargaining agreement with a trade union substantially burdens, without a counter compelling justification, the firm's free exercise of religion within the meaning of Section 2000 bb-2(4) of the Religious Freedom Restoration Act ("RFRA")[.][3]

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[3] RFRA provides that the government "shall not substantially burden a person's exercise of religion," unless it demonstrates that the burden furthers "a compelling governmental interest" by the "least restrictive means" available. 42 U.S.C. §2000bb-1. In *Great Falls*, this Court also held that RFRA presents a "separate inquiry from *Catholic Bishop*," and that "a ruling that an entity is not exempt from Board jurisdiction under *Catholic Bishop* may not foreclose" a RFRA claim that requiring an employer to engage in collective bargaining would "substantially burden" the employer's exercise of religion. *Great Falls*, 278 F.3d at 1347.

On January 13, 2005, the ARD issued his decision finding, among other things, that the Board could properly exercise jurisdiction over Carroll, that the faculty were not managers, and that a unit of full-time and regular part-time faculty, excluding administrators, deans, and adjunct faculty was appropriate. (A.17-50.) Accordingly, the ARD directed an election. (A.49-50.)

Carroll timely filed with the Board a request for review of the ARD's decision. In that document, Carroll stated that "The Board has 'jurisdiction'" over it, but argued that the Act "cannot be constitutionally applied" to it consistent with RFRA. (Request p.11.)[4] Carroll also repeated its managerial argument.

In mid-February, the election was conducted, and the ballots were impounded pending the Board's Decision on Review. (A.103.) On May 11, 2005, the Board granted Carroll's request for review solely with respect to the ARD's application of RFRA. (A.51.)

On August 26, 2005, the Board issued a Decision on Review and Order. The Board noted that Carroll had "expressly conceded that under *Catholic Bishop* it is subject to the Board's jurisdiction." (A.103.) The Board also stated that because Carroll "has not contested the Board's assertion of jurisdiction, we need not pass on the D.C. Circuit's rejection of the Board's test for determining whether

[4] Carroll's request for review was inadvertently omitted from the Appendix; relevant excerpts are contained in an addendum attached to this brief for the convenience of the Court.

an educational institution is exempt from the Board's jurisdiction under *Catholic Bishop*." (A.103n.8.) Thus, the Board framed the issue before it as whether Carroll is "nevertheless exempt from application of the Act by virtue of the Religious Freedom Restoration Act." (A.103.)

The Board adopted this Court's *Great Falls* analysis of RFRA, and accordingly disavowed Board precedent to the extent that it could be read to conflate the analysis of a RFRA claim with a *Catholic Bishop* jurisdictional exemption claim." (A.103.) After independently considering Carroll's RFRA claim, however, the Board concluded that application of the Act to Carroll did not violate RFRA, because Carroll "has not shown that application of the Act will substantially burden its ability to freely exercise its sincere religious beliefs in any way." (A.103,109.)[5]

On August 31, 2005, the impounded ballots were counted, revealing 57 votes in favor of the Union, 39 against, and 5 nondeterminative challenged ballots. (A.113-14.) On September 7, 2005, Carroll objected to the election, claiming that the Board had erred in rejecting its RFRA and managerial claims. (A.114.)

On September 30, 2005, the ARD issued a Supplemental Decision, in which he overruled Carroll's objections and certified the Union as the exclusive collective-bargaining representative of Carroll's full-time and regular part-time

[5] Carroll does not contest the Board's RFRA analysis before this Court.

faculty, excluding administrators, deans, and adjunct faculty. (A.113-119.) On October 11, 2005, Carroll filed exceptions to the ARD's Supplemental Decision, which the Board denied. (A.151.)

The evidence concerning Carroll's organization and administration is set forth below.

**B. Background; Carroll's Relationship with the Presbyterian Church**

Carroll is a private coeducational liberal arts college located in Waukesha, Wisconsin, and in 2003 had an enrollment of 2,968 students and 104 faculty members. (A.103; 211,229,1514.)

Soon after Carroll was established in 1846, it "affiliated" with the Presbyterian Church. Carroll and the Church are parties to a covenant that commits Carroll's trustees to, among other things, "recognize and affirm its origin and heritage in the concern of the Church for the intellectual and spiritual growth of its students, faculty, administration and staff." At the same time, the Covenant commits the trustees to be nondiscriminatory in its admissions and employment policies. (A.103-04; 1127,1129,1130.)

Carroll's mission statement provides in part that Carroll will provide "a superior educational opportunity ... grounded in the liberal arts tradition and focused on career preparation and lifelong learning, [and] will demonstrate Christian values by our example." (A.104; 1093.) Carroll's trustees have adopted

a statement of Christian purpose, which provides in part: "The Christian purpose of Carroll College is summarized in its motto 'Christo et Litteris'--for Christ and Learning. By means of a faculty dedicated to the Christian purpose and assured of the academic freedom necessary to the performance of its tasks, Carroll seeks to provide a learning community devoted to academic excellence and congenial to Christian witness. To this learning community, the college welcomes all inquirers." (A.104; 1091.)

Carroll's articles of incorporation prohibit the establishment of any requirements that limit the admission of students, election of trustees, or appointment of faculty to members of the Presbyterian denomination. (A.104; 1103-04.) There is no evidence that faculty are required to subscribe to the Christian faith or to teach or promote the goals or values of the Church or Christianity in general. (A.104.) According to the College's president, all are "free to speak their minds," and Carroll would not exclude from the faculty anyone who held a word view different from the Christian world view. (A.104; 287.)

There is no evidence that students are required to attend religious services or that the Church exercises any influence over course content or book selection. (A.104; 734.) While Carroll's articles of incorporation require students to take one religious course to graduate, students may satisfy that requirement by taking classes that deal with values and ethics but are not specifically within the religious

studies curriculum, such as "Bioethics," Literature in Black America," and "Playing Crazy: Cultural Constructions of Madness." (A.104; 434,521-22, 1103,1539.)

The Presbyterian Church does not exert any type of administrative control over Carroll. The board of trustees is self-selected, so the Presbyterian Church has no power to nominate or elect any trustees. (A.104; 226.) There was only one minister on the 33-member board of trustees at the time of the hearing, though there is supposed to be a minister in each of the 3 elected classes of trustees. (A.104; 226,330,332.)

Carroll is not financially dependent on the Church. Seventy percent of Carroll's revenue comes from student tuition; the remaining revenue is derived from fundraising and endowment draw. (A.105; 546-47,557.) There is no evidence that any of Carroll's revenue comes from the Church. Carroll owns the property on which it is located. (A.105; 557.)

### C. In 1993, Carroll Hires Frank Falcone as Its President; over the Next Several Years, the President's Administration Changes the Academic Calendar, Eliminates Majors, and Reorganizes Carroll Despite Strong Faculty Opposition

In 1993, Carroll fired its president in the wake of budget shortfalls and campus unrest, and hired Frank Falcone as its new president. (A.25; 223,1057.) Despite substantial faculty opposition, President Falcone proceeded to eliminate the 4-1-4 academic calendar, in which faculty taught a wide variety of courses and

led study abroad programs during the January term. (A.32,42; 255-58,606.) In 1994 or 1995, the president caused "great consternation" among the faculty when he eliminated German, Physics, and four other majors even though the faculty assembly had voted to retain all six majors. (A.30,40; 296-98,340,661.)

In 1996, the board of trustees issued a document entitled "Statements on Roles and Responsibilities" to provide "a clear delineation of the respective roles and responsibilities of Carroll's trustees, administration and faculty." (A.1135-36.) In brief, the trustees assigned to themselves the responsibility of developing and approving Carroll's strategic direction, mission statement and vision statement. The trustees charged Carroll's administration with executing Carroll's strategic direction, mission statement, and vision statement, and with providing leadership for the daily operation of the college in such areas as curriculum, admission, and advancement. Meanwhile, the trustees charged the faculty with educating students and providing advice and counsel into campus decisions and issues, particularly in matters of curriculum and academic policy. (A.1135-36.)

More fully, the trustees set forth the following roles and responsibilities vis-a-vis the trustees, the administration (who are excluded from the unit) and the faculty:

Trustees

Develop and approve the Mission Statement, Vision Statement, and Strategic Direction document of the College.

Exercise responsibility and accountability for the success of the college, including the course of study, academic quality, and fiduciary responsibility.

Hire and evaluate the president; approve faculty appointments, tenure and promotion; grant degrees and honors.

Evaluate regularly all aspects of the college and recognize appropriately successes and failures.

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Administration

Execute the Mission Statement, Vision Statement, and Strategic Directions document of the College.

Provide leadership for the daily operation and activities of the college:

Curriculum
Admission
Advancement
Finance (including operating expenses)
Facilities
Staff
Faculty

Evaluate all aspects of the college regularly and recognize appropriately our successes and failures.

Consider faculty advice and counsel, particularly in matters of curriculum and academic policy.

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Faculty

Educate students by discharging the following responsibilities:

Determine course content
Determine teaching methods
Maintain standards of excellence in teaching
Maintain standards of excellence as scholars and active members of the academic community
Exercise peer review through tenure and promotion procedures
Provide students with the tailored, individualized counseling and advising, which will enable them to succeed
Provide advice and counsel into campus decisions and issues, particularly in matters of curriculum and academic policy
Ensure the success of the college in fulfilling the Mission, Statement, Vision Statement and Strategic Directions Document.

(A.1135-36.)

On November 8, 2001, the vice president for academic affairs ("VPAA") sent a letter to the Faculty, informing it that the "administration has decided that we will not seek reaccredidation of our **…** social work program." (A.30; 1935.) Carroll then eliminated the social work department and social work classes, because it would not be able to attract students to attend a program that lacked accreditation. (A.30-31; 925-29,963.)

In 2001 or 2002, the administration proposed reorganizing Carroll into two schools: a school of liberal arts and sciences and a school of graduate and professional studies. (A.37,44; 236,379,396.) Although the faculty assembly voted against the administration's plan by a two-to-one margin, the administration decided to proceed anyway. (A.37,44; 672,844,854.) The president then created a

task force to provide new governance for the reorganization, but the faculty strongly disagreed with the task force recommendation as well. (A.571,844-45,875-76,1836.)

### D. The President Acknowledges that the Faculty and His Administration Strongly Disagree with Respect to Governance Issues; the President Reminds the Faculty that It Merely Is Responsible for Teaching and for Providing Advice on Curricular Matters, and States that a Governance System Based on Consensus Is Not Appropriate for Carroll

On May 11, 2002, President Falcone issued a report to the trustees, which looked back at the changes he had made during his 9-year tenure, and addressed the controversy over his two-school reorganization plan. (A.1833.) The president acknowledged that he had made many changes despite faculty opposition, and that the administration and faculty strongly disagreed with respect to how the school should be governed. The president also noted that although the trustees had clarified that the faculty are merely responsible for teaching and for providing advice on curricular matters, the faculty believed that the trustees and the administration should not move forward on the school restructuring since the faculty opposed the plan. (A.1833-38.) President Falcone's report stated in part:

> "At each step along the way, faculty expressed concerns that their traditional powers and influence were being ignored, or by-passed. After a series of changes initiated by the Administration, and endorsed by the Board, the faculty asked the Board to clarify their role in setting the direction of the College.

In 1996, in response to the request of the faculty, the Board of Trustees issued a “Statement of Roles and Responsibilities” which clarified these questions. The Board bears ultimate responsibility (and therefore authority) for the operation and well-being of the College. The President (through his Administration) is responsible for implementing the policies set by the Board. The faculty are responsible for teaching, and for providing advice on curricular matters.

It has to be apparent to anyone who has spent any time at Carroll these past nine years that the question of the fundamental roles and responsibilities of the Board, the President and the faculty has never sat well with some, especially as the College has moved in a direction that generated debate.

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These past few years have been contentious as we have positioned the College for the future. *** We have tried to find a way to **…** move faster than the traditional pace of academic institutions. ***

The structure that we have considered is intended to reflect the increasing complexity of our academic programs **...**” *** This Spring, the faculty assembly rejected the proposed governance changes and in fact voted to express their lack of support for the reorganization--even though the Board had already approved it.

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After all of this discussion and debate and analysis, we are ready to move ahead with restructuring our academic programs around the clusters of liberal arts and professional programs. *** The general arguments against restructuring can be summarized in two types of responses:

--Faculty feel that they should make the decision about restructuring, and they are simply not convinced that this is the best course of action

--Some faculty are concerned that restructuring would mean a significant shift in internal resources that would negatively affect their programs

> This debate and faculty reluctance has translated into arguments about governance, and whether the Board and the President should move forward in spite of faculty expressions of opposition.

(A.1834-1837.)

Despite the faculty's objections, the trustees voted unanimously to reaffirm their earlier decision to proceed with the reorganization. (A.1837.)

In March 2003, a faculty "Ad Hoc Committee To Investigate Presidential Leadership" issued a report claiming that Carroll's "administrative leadership [has] usurp[ed] authority over the College's curriculum and its implementation" and has "claimed authority that is properly and historically vested in the Faculty of the College." (A.1875,1878.) The faculty report complained that there was no "shared governance" at Carroll. In support of that complaint, the committee pointed to several administration actions, including the president's approval of proposals that the faculty had voted against; the president's rejection of programs the faculty had approved; the president's repeated use of task forces that circumvented existing faculty committees; the president's changing the academic calendar against the faculty wishes; the president's elimination of various majors; and the president's creation of two schools over the faculty's objections. (A.1878-79.) The faculty report also noted that the president had undermined the tenure process by overriding faculty tenure recommendations, and that the president had hired a provost and a VPAA over the strong objections of faculty who wanted

Carroll to undertake nationwide searches before filling those positions. (A.1886,1887.)

The faculty sent a message of "no-confidence" in President Falcone to the trustees, but the trustees rejected the faculty's no-confidence vote, and reaffirmed their support of Falcone. (A.37; 299,340-41.)

On August 29, 2003, President Falcone sent a memo on institutional accreditation to the faculty, acknowledging that a higher learning commission evaluation team had concluded that Carroll was "'severely in need of addressing the issue of shared governance.'" (A.1869.) According to President Falcone, the team report had implied "that Carroll should adopt a consensus-based governance system rather than a consultative model." (A.1871.) Falcone reported to the faculty that Carroll had "argued [to the evaluation team] that a consultative model was more consistent with our practice and more appropriate for our situation." (A.1871.)

In a May 2004 state of the college report, President Falcone noted that a group of faculty members was advocating the formation of a faculty collective bargaining unit, and that "[t]he core issue seems to be our model for institutional decision-making. While the Trustees favor a consultative model of governance, some advocate a consensus model." (A.1515.) The report acknowledged disputes between faculty and the administration over a number of issues, including tenure,

governance and collective bargaining." (A.1515.) The president then announced a revised administrative structure, including the appointment of the VPAA to the new position of provost "to reflect [her] expanded span of control and responsibility; the creation of a humanities and social sciences division, a professional and graduate studies division, and a natural and health sciences division; and the replacement of the 23 department-chairmen positions with a handful of area-coordinator positions. (A.37; 1516-18.) The report stated that the provost, vice provost, deans, and area coordinators would be charged with implementing the new academic administrative structure, and have the responsibility of bringing Carroll's academic program to a new level of excellence. (A.1519.) Carroll made these changes without faculty input and over the objections of a faculty committee. (A.37; 235,860,1919,1921.)

**E. Carroll's General Organization**

Carroll's current organizational structure was implemented in the Spring of 2004, shortly before the hearing. (A.25,37; 234-35.) President Falcone is responsible for overseeing Carroll's operation and ensuring that Carroll fulfills its mission. (A.25; 227.) The provost is Carroll's chief academic officer, and reports to the president, as does the vice president of enrollment and admissions, who is responsible for recruiting students. (A.25; 227-28.) The vice president of finance is Carroll's chief business officer and reports to the president as well. (A.228.) He

prepares the budget for review by the president and the senior staff for presentation to the trustees. (A.228.) Several other administrators report directly to the provost. (A.228.)

As a result of the president's reorganization, Carroll is divided into the school of liberal arts and science, and the school of graduate and professional studies (A.26; 379,396.) The two schools are further divided into three divisions: graduate and professional studies; humanities and social sciences; and health and natural sciences. (A.26; 396,508,1287.) Each division is headed by a dean; the three division deans report to the provost, and are responsible for managing the academic programs within their division. (A.26; 234.) There are 27 academic disciplines within the 3 divisions. (A.26; 229,309.)

The seven area-coordinator positions (which replaced the two-dozen departmental chairs) serve as the lowest level of administration, and act as intermediaries between the faculty and deans. Only two of the seven newly created area-coordinator positions were occupied at the time of the hearing, because Carroll could not find enough faculty interested in serving. (A.26&n.5; 239-40,308,1063-64.) The area coordinators report to the deans, who report to the provost, who reports to the president, who reports to the trustees. (A.25-26; 307.) The parties stipulated that the president, provost, vice provost, deans, area coordinators, the vice president of enrollment and admission, the vice president of

finance, and certain others officials are excluded from the bargaining unit as administrators. (A.255; 221-22,355-56.)

Carroll has a number of faculty committees with various jurisdictional scopes. Some of the faculty committees, such as the faculty executive committee, which nominates and/or appoints faculty members to certain committees, are composed solely of faculty members; others, such as the admissions committee, are composed of faculty and administrators. (A.26-28; 230,232,384-85,477.) The faculty's involvement in various matters is set forth below.

**1. curriculum**

The trustees' roles and responsibilities statement provides that the faculty "[p]rovide advice and counsel ...particularly in matters of curriculum," while the Administration "[p]rovides leadership" concerning curriculum. (A.1135-36.) A faculty academic steering committee in each school makes recommendations to the faculty on majors and minors, but cannot change academics on its own. (A.29; 231,303,582,897.) The general education committee, composed of faculty, administrators, and students, reviews the core requirements that students must meet for graduation. (A.28; 232,303,1168.) In 1994 or 1995, a faculty adhoc committee made recommendations regarding the core curriculum, which the administration implemented. Since then, there have been no changes. (A.31-32; 425-26.) The committee does not possess the power to change the core curriculum on its own,

and ultimately it is the trustees who determine what is required to graduate. (A.32; 303,336-37.)

The faculty cannot eliminate majors without trustee approval. (A.29; 340.) However, the president can take a curriculum proposal that has been rejected by an academic steering committee to the faculty assembly for a vote, and can also enact the proposal even if the faculty assembly votes against the proposal. (A.30; 897.) The administration may eliminate majors--and the courses connected with those majors--over the faculty's objections. In 1994 or 1995, the president caused "great consternation" among the faculty, when he eliminated six majors even though the faculty assembly had voted to retain all six majors. (A.30,40; 296-98,340,661.) The administration also decided not to seek reaccredidation of the social work program, which led to the elimination of that program and related courses because all recognized it would be impossible to attract students to take courses in an unaccredited program. (A.30,31; 925-29,963,1935.)

Faculty members can propose new majors. The provost is involved at a very early stage in faculty efforts to develop new majors, and has preliminary discussions with faculty members about whether their proposals are academically sound and financially viable before their proposals ever go to a committee vote. The vice president of enrollment is also involved with faculty efforts to develop new majors. (A.29,39;413-17.) The provost testified that she can prevent a faculty

proposal from going to a vote. (A.40; 418.) Because of the provost's intimate involvement with the proposal before it goes to a faculty vote, Carroll's administration has generally approved faculty proposals for new majors. (A.31,39-41; 413-19,551-52.) However, the administration did not implement a 1998 faculty task force's recommendation to create a Latin American Studies program. (A.40; 856-59.)

Unlike proposals to add new courses in connection with preexisting majors, proposals to add new courses as part of a new major must be approved by the trustees after they are approved by the faculty. (A.423.) A history professor testified that an area coordinator or dean must approve faculty course proposals emanating from his department before the academic steering committee can even consider them. (A.29,31,41; 836-37,839-40.) The provost is involved in the faculty's efforts to create new courses long before they are presented to the academic steering committee for a vote. (A.31,41; 518-19.) The provost testified that, because she has so much interaction with faculty concerning new course proposals from the very beginning, it has "never happened" that a faculty member demanded that a committee implement a course proposal that the provost disfavored. (A.519.) The provost also testified that it was "inconceivable" to her that faculty would vote in favor of adding a new course that she disagreed with,

and that she could prevent the addition of a new course to the curriculum. (A.31,41; 519,552.)

**2. academic calendar and course schedules**

The administration determines the academic calendar, including when the school year begins and ends, and the administration eliminated the 4-1-4 academic calendar over the faculty's objections. (A.32,42; 254-58,318-19,606.) The administration determines the final exam schedule; a faculty member cannot deviate from it without the registrar's and VPAA's approval. (A.401,1261-62.)

Since the reorganization, the division deans and area coordinators, not the faculty, determine when specific courses are offered and the times they are offered. The administration has rejected faculty attempts to reschedule class times. (A.32,42; 846,850-52,972-73.) Deans have told faculty that certain courses can be offered only once a year. (A.846.) Deans have cancelled classes because of low enrollment. (A.947-48.)

**3. enrollment levels & admissions**

The administration determines the enrollment levels, and the faculty has no input into the overall size of the student body. (A.32; 476,834-35.) Carroll uses an admissions formula that was originally designed by a faculty member to determine whether to admit applicants. (A.28; 232.) The vice president of enrollment adjusts the formula and sets the range of scores that will automatically admit students.

Applicants who meet the admission formula are automatically admitted; applicants who do not meet the formula are reviewed by the admission committee, which includes four faculty members and two members of the admissions administration. (A.28; 232,474-75,531-32.)

In 1995, the administration directly admitted more than 20 students who did not qualify for admission under the admissions formula and who were not considered by the admission committee. (A.28n.7; 586.) According to the provost, there have also been a few occasions when the admissions committee has voted to reject a candidate, but the vice president for enrollment has taken the matter up with the president, who can still admit applicants notwithstanding the admissions committee's position. (A.533.)

**4. teaching loads and class size**

Prior to President Falcone's appointment, the trustees approved the faculty's recommendation concerning faculty teaching loads. (A.251-52,398.) The administration ultimately determines the number of students who may take a particular class, taking into account the physical size of the available class space, financial considerations (i.e., the cost of breaking one large class into two smaller classes), and faculty educational concerns. (A.32,42; 252-53,316.) Faculty had no input into the administration's decision to raise the number of students in the history department's survey classes from 30 to 35. (A.835.)

**5. course content, teaching methods and grading**

Faculty members decide the content of their own classes, their own teaching methods, and their own student attendance policies. (A.33; 289,400,1136,1259.) The faculty manual contains a list of grades that students may earn. (A.1262.) It is unclear who was responsible for determining those grades. There is no school-wide grading curve that faculty must follow. (A.33;290,1262.) Each faculty member initially decides his students' course grades. (A.33;290.) However, a dissatisfied student can grieve the grade awarded by the faculty member to the department chair or area coordinator, and then to VPAA. If the faculty member still refuses to change the grade, the student may grieve it to Student/Faculty Ethics Committee, which includes four faculty members, four students, and a faculty chairperson, who votes only in the event of a tie. (A.1175-76,1263-64.) Carroll's VPAA then makes the final decision whether to change the student's grade. (A.1264.)

**6. student discipline and graduation requirements**

The College Appeal Board, composed of three students, the president of the administrative staff, and two facility members, hears appeals of nonacademic disciplinary sanctions. (A.1175.) The Student/Faculty Ethics Committee hears student appeals of sanctions for academic misconduct. (A.1175-76.)

The faculty recommend degree requirements, subject to the approval of the president and trustees. (A.31-32; 290,303,336-37.) Outside accreditation agencies and the administration also impose degree requirements for certain programs. (A.337,658.)

**7. tenure**

The six faculty members who constitute the tenure and promotion committee evaluate candidates for tenure, but cannot grant tenure on their own. (A.29; 231,302, 321,1172.). The provost testified that if a department chair (or now area coordinator or dean) chooses not to nominate a faculty member for tenure, the faculty member cannot be considered for tenure by the tenure and promotions committee. (A.33; 463,467-68,527-28.) The faculty members on the committee judge a tenure candidate based on his teaching performance, service to the institution, and scholarly and professional activities. (A.231,264.) The provost speaks to the committee before it retires to deliberate. (A.33; 464.) The committee then recommends to the provost whether the candidate should be awarded tenure. (A.33; 464-65.)

The provost then independently evaluates whether the candidate should be granted tenure. (A.33; 465,499,548-49.) The provost makes her own assessment of the candidate's teaching performance, service, and scholarly and professional activities. (A.231,465,548-49.) The provost also considers other factors such as

student demand for the courses the candidate teaches, departmental balance, and the financial impact an award of tenure would have on Carroll. (A.264,465,548, 549.) The provost then forwards to the president her recommendation along with the committee's recommendation. (A.33; 465.)

The president is not bound by the committee's recommendation. (A.33-34; 321.) The president testified that he considers enrollment patterns and the financial implications of granting tenure. (A.33-34; 264,267-68.) If Carroll can only grant tenure to some of the qualified candidates, the president refers the matter to the provost, who, as chief academic officer, discusses the matter with the department chair (or now area coordinator or dean), and the president then makes his recommendation based on the provost's recommendation. (A.322-24.) The president then furnishes his own recommendation, along with the two previous recommendations, to a trustee academic committee, which makes a recommendation to the full board of trustees. (A.33; 264-65,302,465.)

The trustees have approved all of the president's 35 tenure recommendations. (A.34; 261.) However, the trustees and president have not followed all the recommendations of the faculty tenure and promotions committee. The trustees denied tenure to six professors whom the faculty recommended should be granted tenure after the president forwarded his negative recommendations. (A.34; 261-62,1523.) The trustees also granted tenure to one professor whom the

faculty recommended should be denied tenure, after the president forwarded his positive recommendation. (A.34; 263,1523.) The president has also told the faculty--in advance of the tenure and promotions committee's deliberations--that he had no intention of granting tenure to librarians, and then refused to grant them tenure despite the faculty's positive recommendation. (A.990-91.)

In 2003, the faculty launched a board of inquiry after certain faculty claimed that Carroll's decision to deny them tenure violated their academic freedom. The administration did not reverse its decision even though the faculty board of inquiry recommended that it do so. (A.587,708-12,1020-32.) In September 2004, the provost complained that the faculty tenure and promotions committee was not properly constituted. Faculty members did not wish to serve because some of the tenure denials had made them skeptical of the process. (A.484-85, 825,1923.) The provost notified the faculty that if it refused to constitute the committee, Carroll was "prepared to take the steps necessary to insure that each tenure candidate receives a timely and thorough tenure evaluation." (A.1926.)

**8. promotions other than tenure**

The faculty tenure and promotions committee also recommends additional promotions for tenured professors to the provost, who forwards her recommendation to the president, who forwards his recommendation to the trustees. The provost testified that she always follows the recommendations of the

committee with respect to whether faculty members, who have already been tenured, warrant additional promotion. (A.34; 244-46,549-50.)

**9. retention of non-tenured faculty**

The provost testified that she discusses with the area coordinators whether to renew the contracts of non-tenured faculty. (A.34; 448-49,451.)

**10. hiring**

When faculty members believe there is a need to hire additional faculty, they make their case to the provost. The provost and president then determine whether to authorize hiring based on their assessment of the need for the position and the budget. They also decide whether the position will be tenure track or nontenure track. (A.35; 247,436-37,1939-40.)

Once the administration grants permission to hire, the faculty generates a job description with the assistance of the area coordinator or dean, and forwards it to the provost for review. The faculty then posts the job description and reviews applications. (A.313,437-38,522-23.) The faculty then gives a list of the individuals they want to interview to the area coordinator who forwards it to the provost, who asks for an explanation of the choices and then authorizes interviews. In most cases, the candidate interviews with the entire faculty in the discipline, the human resources director, and the dean, provost and faculty president. (A.35; 438-40.) The faculty members then meet and recommend to the department chair (or

now area coordinator) who should be hired. The area coordinator then passes the choice to the provost. (A.35; 524.) The provost testified that, while it is unlikely, the chair or area coordinator can override the faculty's choice. (A.35; 524.) The provost then calls the successful candidate with an offer and negotiates his salary. (A.35; 249,440.)

Carroll has transferred faculty members from one department to another without faculty input, and has hired four nontenured faculty for the education department without faculty input. (A.35; 986-87,1003-04,1888.) The faculty is not involved in the decision to hire deans, area coordinators, or the provost. (A.36; 986,1146,1147,1517,1518,1887.)

**11. budget & sabbaticals**

The faculty has no control over the budget, which is prepared by the vice president of finance for review by the president and his senior staff for presentation to the trustees. (A.36; 228,504,995,997-98.) The administration has denied faculty requests for detailed budget information. (A.682,758-60,872-73.)

Carroll's faculty manual indicates that the VPAA and president recommend faculty sabbatical candidates to the trustees for final action. (A.1240.)

**12. tuition and location of School**

There is no evidence that the faculty play any role in determining Carroll's tuition or location.

**F. The Unfair Labor Practice Proceeding**

By letter dated November 10, 2005, the Union requested that Carroll bargain with it. (A.201; 155(¶ 8),159(¶ 8).) Since about November 23, 2005, Carroll has failed and refused to bargain with the Union. (A.201; 155(¶¶9,10),159(¶¶9,10).)

Pursuant to the Union's unfair labor practice charge, the Board's General Counsel issued a complaint alleging that Carroll violated the Act by failing and refusing to bargain with the Union. (A.199; 152,153-56.) In its answer, Carroll admitted its refusal to bargain, but claimed that the faculty were managers and that the College was exempt from application of the Act by virtue of RFRA. (A199; 157-69(¶¶ 5-7,¶¶ 9-12).) Carroll did not claim that the Board lacked jurisdiction over it under *Catholic Bishop*.

On January 23, 2006, the General Counsel filed a motion for summary judgment, and thereafter the Board issued an order transferring the proceeding to itself and a notice to show cause why the General Counsel's motion should not be granted. (A.199; 185-91.) In its response, Carroll repeated its RFRA and managerial arguments, but did not claim that the Board lacked jurisdiction over it under *Catholic Bishop*. (A.199.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On July 30, 2007, the Board (Chairman Battista, and Members Liebman and Schaumber) issued its Decision and Order granting the General Counsel's motion for summary judgment. (A.199-201.) The Board concluded that all issues pertaining to the validity of the Union's certification were, or could have been, litigated in the prior representation proceeding and thus could not be relitigated in the unfair labor practice proceeding. (A.201.) Accordingly, the Board found that Carroll violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §158(a)(5) and (1)) by failing and refusing to bargain with the Union. (A.201.)

The Board's Order requires Carroll to cease and desist from the unfair labor practices found. It also requires Carroll to bargain upon request with the Union, to embody any understanding that is reached in a signed agreement, and to post an appropriate notice. (A.202.)

## SUMMARY OF ARGUMENT

This Court is precluded from considering Carroll's claim that the Board lacks jurisdiction over it under this Court's three-part test for determining whether a religious school is exempt from Board jurisdiction under *Catholic Bishop*. Carroll failed to preserve its claim for appellate review by failing to raise it to the Board in both the representation and unfair labor practice proceedings.

Carroll's admitted refusal to bargain with the Union plainly violated the Act unless Carroll carried its burden of showing that its faculty are managerial employees. Carroll failed to meet that burden. Carroll does not even claim that its faculty are aligned with management, and its faculty do not control, or effectively control, academic affairs beyond their own classrooms. Thus, Carroll does not consider itself bound by the faculty's views on academic matters; Carroll does not have a consensus-based governance system; and Carroll does not give systematic deference to, or routinely implement, its faculty's recommendations.

Carroll failed to preserve for appellate review its argument that the ARD erred in failing to explain which of the many factors discussed in *NLRB v. Yeshiva University*, 444 U.S. 672, 676-77, 686 & n.23 (1980) ("*Yeshiva*") are significant, and which less so, and why. In any event, the ARD did explain that faculty control over academic affairs beyond their own classrooms is more significant than faculty control over academic matters inside their own classrooms, and that faculty authority in the academic policy sphere is more significant than faculty authority in nonacademic areas. Nothing in the Act, or this Court's precedent, requires the Board to assign precise weights to each of the *Yeshiva* academic factors.

## ARGUMENT

### I. CARROLL FAILED TO PRESERVE FOR APPELLATE REVIEW ITS CLAIM THAT, UNDER THIS COURT'S THREE-PART TEST FOR DETERMINING WHETHER A SCHOOL IS ALTOGETHER EXEMPT FROM BOARD JURISDICTION AS A RELIGIOUS INSTITUTION UNDER THE SUPREME COURT'S DECISION IN *CATHOLIC BISHOP*, THE BOARD LACKED JURISDICTION OVER THIS CASE

Carroll first claims (Br.20-30) that the Court must deny enforcement of the Board's Order, because the Board lacks jurisdiction over it under this Court's three-part *Great Falls* test for determining whether a school is "'altogether exempt'" from Board jurisdiction as a religious institution under *Catholic Bishop*.

The short answer is that this Court is precluded from considering this argument under Section 10(e) of the Act (29 U.S.C. §160(e)), because Carroll never raised it to the Board, even though this Court had decided *Great Falls* nearly 2 years before the Union filed its petition here. *See Detroit Edison Co. v. NLRB,* 440 U.S. 301, 311 & n.10 (1979)(Section 10(e) "precludes a reviewing court from considering an objection that has not been urged before the Board," absent extraordinary circumstances); *Exxel/Atmos, Inc. v. NLRB,* 147 F.3d 972, 978 (D.C. Cir. 1998) (employer waived its claim--that the Board failed to comply with in-circuit precedent--by failing to raise it to the Board).

Indeed, far from claiming in the representation proceeding that the Board lacked jurisdiction over it under this Court's test for applying *Catholic Bishop*,

Carroll, as shown, actually disclaimed any reliance on a *Catholic Bishop* defense and explicitly conceded that the Board had jurisdiction over it.[6] Instead, as it concedes (Br.21-22), Carroll merely raised to the Board the *separate* argument that the NLRA cannot be constitutionally applied to Carroll consistent with RFRA. *See Great Falls*, 278 F.3d at 1347. Carroll's failure to raise its *Catholic Bishop* argument to the Board in the representation proceeding precludes this Court from considering it now. *See Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1150-52 (D.C. Cir. 2000) (court will not consider employer's statutory challenges because they are not properly before the court as a result of the employer's failure to raise them to the Board in the representation proceeding); *NLRB v. Carry Companies of Illinois, Inc.*, 138 F.3d 311, 313 (7th Cir. 1998) (when an employer has a complaint regarding the certification of a union, the employer must raise that objection in the underlying certification proceeding or else it is waived).

Carroll admits (Br.20-22,26-30) that it never raised its argument to the Board and that Section 10(e) of the Act ordinarily precludes a reviewing court

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[6] Thus, as shown, Carroll expressly stated in its post-representation hearing brief (p.8) that it was "not claiming that the College is not an 'employer' within the meaning of **…** the Act because of [its] religious foundations." (Addendum p.2.) Carroll then admitted to the Board in its request for review (p.11) that the "Board has 'jurisdiction'" over it. (Addendum p.8.) And, Carroll never argued to the Board in its request for review that the ARD had erred in concluding (A.24-25n.3) that the Board had jurisdiction over Carroll even under this Court's *Great Falls* test for applying *Catholic Bishop*.

from considering a new argument. Nevertheless, Carroll seeks to avoid application of Section 10(e) by claiming (Br 26-30) that it is making a jurisdictional argument that cannot be waived. However, well-settled precedent requires rejection of Carroll's argument.

Put simply, as this Court has observed, a party "cannot justify raising an argument for the first time on review merely by contending that it goes to the [agency's] jurisdiction." *Mitchell v. Christopher*, 996 F.2d 375, 378-79 (D.C Cir. 1993). Rather, "[t]he exception to the rule that an objection to an agency decision must be timely raised before the agency in order for the court to grant review is limited to jurisdictional challenges that 'concern the very composition or constitution of an agency.'" *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003)(citation omitted). Carroll's claim clearly does not concern the very composition or constitution of the Board, and it must therefore be rejected.

Contrary to Carroll's suggestion (Br.27), *Noel Foods v. NLRB*, 82 F.3d 1113 (D.C. Cir. 1996), does not advance its case. There, this Court merely stated there that "[a]s long as the Board [has not] 'traveled outside the orbit of its authority' [and] is not purporting to exercise an authority 'entirely foreign to and inappropriate for this particular agency,' we will regard even a challenge to the jurisdiction of the Board as a question of law to be raised first before the agency.

*Id.* at 1121 (citation omitted). *See Presque Isle TV Co. v. U.S.*, 387 F.2d 502, 506 (1st Cir. 1967). And, as the Ninth Circuit noted in rejecting the identical argument, where, as here, a labor controversy exists between a church related commercial enterprise and employees, that "is enough to bring the case within the 'orbit' of the [Board's] authority." *Polynesian Cultural Center, Inc. v. NLRB*, 582 F.2d 467, 472-73 (9th Cir. 1978).

Accordingly, the courts have consistently concluded that a First Amendment jurisdictional argument is indeed waived if the employer failed to preserve it by asserting it in a timely fashion to the Board. *See St Anthony Hospital Systems v. NLRB*, 655 F.2d 1028, 1029 (10th Cir. 1981)(employer's First Amendment claim--that it is exempt from Board jurisdiction because it is owned and operated by the Roman Catholic Church--is not properly before the court because it was not raised to the Board in the representation proceeding); *Polynesian Cultural Center, Inc. v. NLRB*, 582 F.2d at 472-73 (employer waived its argument--that Board lacked jurisdiction over it because it was religiously affiliated--by failing to raise it to the Board). *Cf. NLRB v. Lewis University*, 765 F.2d 616, 617 n.4, 620 n.8 (7th Cir. 1985) (finding *Catholic Bishop* issue waived when not raised by employer to court in enforcement proceeding).

## II. THE BOARD REASONABLY FOUND THAT CARROLL FAILED TO SHOW THAT ITS FACULTY ARE MANAGERIAL EMPLOYEES, AND THEREFORE PROPERLY FOUND THAT CARROLL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

### A. Introduction, Applicable Principles, and Standard of Review; College Faculty Are Managers if They Are Aligned with Management, and Control, or Effectively Control, Academic Affairs Beyond Their Own Classrooms

Section 8(a)(5) of the Act (29 U.S.C. §158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of [its] employees." In the present case, Carroll has admittedly (Br.3) refused to bargain with the Union that was selected by the majority of its faculty, claiming that its faculty are managers, rather than "employees" entitled to the Act's protection. Accordingly, if the Board reasonably rejected Carroll's claim, Carroll's admitted refusal to bargain plainly violated the Act. *Retail Clerks Int'l Ass'n v. NLRB*, 366 F.2d 642, 643-45, 649 (D.C. Cir. 1966).

The Supreme Court has observed that the Act's definition of the term "employee" is strikingly broad, and that it generally includes "'any person who works for another in return for financial or other compensation.'" *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 90-91 (1995) (citation omitted); 29 U.S.C. §152(3). "Professional employees" are those employees engaged in work which is predominantly intellectual, requiring advanced knowledge in a field of learning, and which involves the consistent exercise of discretion and judgment. *See* 29

U.S.C. §152(12). Professional employees "are specifically included" within the coverage of the Act, and "faculty members employed at institutions of higher learning have long been considered 'professional employees' protected by the Act." *David Wolcott Kendall Memorial School v. NLRB*, 866 F.2d 157, 160 (6th Cir. 1989)("*Kendall School*").

Although the Act does not expressly exclude managers, the Supreme Court has concluded that managers fall outside the protection of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974) ("*Bell Aerospace*"). The Court noted that when Congress passed the Act, it was concerned with the welfare of workers and wage earners, not the boss or employees clearly within the managerial hierarchy. *Id.* at 282-84. The Court concluded that Congress did not think a specific exclusionary provision for managers was necessary, because managers, by definition, are much higher in the employer's hierarchical structure than those such as supervisors who were explicitly excluded by Congress, and because managers are so clearly outside the intended scope of the Act. *Id.* at 283-84.

It is well settled that managers are those workers who are "aligned with management" and "who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" *Yeshiva*, 444 U.S. at 682-83 (citation omitted). A worker "may be excluded as managerial only

if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *Id.* at 683.

As the Supreme Court has explained, the difference between managerial employees and professional employees is that professional employees "are not defined in terms of their authority 'to formulate, determine and effectuate management policies.'" *Bell Aerospace*, 416 U.S. at 285 n.13 (citation omitted). Thus, "employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned" are not managerial. *Yeshiva*, 444 U.S. at 690. "Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *Id*. Thus, for example, "[i]t is plain . . . that professors may not be excluded [as managers] merely because they determine the content of *their own* courses, evaluate *their own* students, and supervise *their own* research." *Id.* at 690-91 n.31 (emphasis added).

It is settled that the "question whether particular employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management." *Bell Aerospace*, 416 U.S. at 290 n.19. Thus, to determine whether particular workers are managerial, the Board must examine the role of those workers in the enterprise's operation and governance. *Loretto*

*Heights College v. NLRB*, 742 F.2d 1245, 1248 (10th Cir. 1984) ("*Loretto Heights College*").

The "business" of an institution of higher learning "is education." *Id*. at 1252. Accordingly, to determine whether college faculty are managerial, the Board must focus its attention on the faculty's role in determining academic affairs beyond their own classrooms, for it is that role that aligns a faculty's interest with that of management. *Kendall School*, 866 F.2d at 160; *Loretto Heights College*, 742 F.2d at 1252; *Livingstone College*, 286 NLRB 1308, 1314 (1987). The Board and the courts thus consider the extent of faculty control over curriculum, the academic calendar and course schedules, matriculation standards and admissions decisions, class size, teaching methods, grading policies, student retention and graduation, teaching loads, tuition, and the location of the school. *Yeshiva*, 444 U.S. at 676-77, 686. Less weight is accorded to the faculty's influence over matters extending beyond strictly academic concerns, such as hiring, tenure, promotions, terminations, and sabbaticals. *Id.* at 677, 686; *Livingstone College*, 286 NLRB at 1314.

For example, the Supreme Court concluded in *Yeshiva* that the faculty were managerial employees because they controlled academic matters by deciding what courses would be offered, when they would be scheduled, and to whom they would be taught, as well as the teaching methods, grading policies and matriculation

standards that would be used. *Yeshiva*, 444 U.S. at 676, 686. Faculty also made the final decisions regarding the admission, expulsion, and graduation of individual students. *Id.* at 677, 686. Faculty decided teaching loads and student absence policies, and on occasion determined the size of the student body, the tuition to be charged, and the location of a school. *Id.* at 677, 686. In short, the Court found that the faculty in essence determined the product to be produced, the terms upon which it would be offered, and the customers who would be served. *Id* at 686. In addition, the faculty played a predominant role in faculty hiring, tenure, sabbaticals, termination, and promotion. *Id.* at 686 n.23.

A faculty's "control" over academic affairs beyond their own classrooms can be proven in different ways. In some cases, the faculty's control over academic affairs is established by direct evidence showing that the institution's administrators actually consider themselves bound by the faculty's views on those matters or by evidence showing that the administrators do not take action in the academic sphere before reaching a consensus with the faculty. Put simply, when the institution's management is bound by the faculty's views on academic matters, the faculty can fairly be said to be aligned with the management of the academic institution; indeed, in such a situation the faculty "*is*" the academic institution. *Yeshiva*, 444 U.S. at 676 n.4 (emphasis added).

Thus, in concluding that the faculty controlled academic affairs, the *Yeshiva* Court emphasized testimony from administrators that they regard faculty actions on academic matters "as binding," that the administrators serve merely "as 'the executive arm of the faculty,'" that the faculty "is" the school, and that decisions regarding academic matters are made by faculty consensus. *See id.* at 676 n.4. The Second Circuit had relied on similar evidence in finding the Yeshiva faculty to be managerial. *See NLRB v. Yeshiva University*, 582 F.2d 686, 691 (1978) (record shows that deans feel compelled to execute faculty decisions even if they disagree with them).

Faculty control over academic affairs beyond their own classrooms can also be established by evidence showing that the faculty can veto or overrule the administration's academic decisions. For example, in finding faculty to be managers, the *Yeshiva* court also emphasized that the faculty had overruled administrators on significant academic matters. *See Yeshiva*, 444 U.S. at 676-77 & nn.4-5 (when faculty disagreed with a dean's decision to delete the education major, the major was reinstated). Similarly, the Second Circuit had relied on the fact that the faculty assembly at Yeshiva college had the right to veto all measures passed by the college senate, which had jurisdiction over admissions policy, scholastic standards, the grading system and other academic policy matters. *See NLRB v. Yeshiva University*, 582 F.2d at 691.

As this Court has also noted, faculty control over academic matters can also be found to exist even when the faculty lacks "final authority" to change academics *if* the record demonstrates that the faculty's recommendations regarding academic matters are "effective." *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 56-57 (D.C. Cir 2004)("*LeMoyne-Owen*"). However, an administration's mere consultation with faculty does not establish that faculty effectively control academic policy. *Florida Memorial College*, 263 NLRB 1248, 1253 (1982).

Rather, faculty can be found to make effective recommendations regarding academic matters only when the record establishes both that the faculty make academic recommendations on their own *and* that the institution gives deference to, and routinely implements, those faculty recommendations. *See Yeshiva*, 444 U.S. at 676-77 & nn.4-5, 683 n.17 (that administration possesses a rarely exercised veto power does not defeat a finding of managerial status where record shows that the "overwhelming majority" of faculty recommendations were implemented and that administrators felt bound to implement even those faculty recommendations with which they disagreed). *Compare Lewis & Clark College*, 300 NLRB 155, 163 (1990)(Board finds faculty to be managers where nearly all faculty recommendations on academic matters were routinely approved by administrative hierarchy) *with Florida Memorial College*, 263 NLRB at 1254 (Board rejects managerial claim; faculty suggestions "are shown no systematic deference and thus

do not rise to the level of effective recommendations"). *See generally Kendall School*, 866 F.2d at 160 (an administration's systematic deference to faculty wishes is critical in determining managerial status). *Cf. Mid-America Care Foundation v. NLRB*, 148 F.3d 638, 641 (6th Cir. 1998) (effective recommendation exists in the supervisory context when recommendations receive "deference"); *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719, 721 (7th Cir. 2000) (the "weight" accorded to the alleged supervisor's recommendations "is critical").

As the party asserting the applicability of the managerial exclusion, the employer bears the burden of proving that particular workers are managerial. *See NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-12 (2001). The task of defining who qualifies as an employee under the Act has been assigned primarily to the Board. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944). The case for judicial deference to the Board's conclusion is particularly strong, because the issue involves a "definition of status" under the Act and such issues are committed to the Board's special expertise. *Local No. 207, Iron Workers v. Perko*, 373 U.S. 701, 706 (1963). The Board's determination that an employer has failed to show that its workers are managerial is "conclusive" if supported by substantial evidence on the record considered as a whole. *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1551 (D.C. Cir. 1984). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even

though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

As we now show, the Board reasonably found that Carroll failed to show that its faculty are managerial.

### B. Carroll Failed To Show that Its Faculty Are Aligned with Management and Control, or Effectively Control, Academic Affairs Beyond Their Own Classrooms

#### 1. Carroll does not consider itself bound by the faculty's views on academic matters, and Carroll does not have a consensus-based governance system

Substantial evidence supports the Board's finding that Carroll failed to show that its faculty are managerial employees. As an initial matter, unlike *Yeshiva*, there is no evidence that Carroll's administration feels bound by the faculty's views on academic matters or that the faculty can veto or overrule the administration's wishes regarding academic policy. Also unlike *Yeshiva*, there is no evidence that Carroll's administrators feel compelled to refrain from taking action in the academic sphere until they reach a consensus with the faculty. To the contrary, President Falcone has repeatedly made clear that Carroll does *not* have, and does *not* favor, a consensus-based governance system. Thus, when a higher learning commission evaluation team implied that Carroll should adopt a consensus-based governance system, Falcone replied "that a consultative model

was more consistent with our practice and more appropriate for our situation." (A.1871.) Similarly, President Falcone stated in his most recent state of the college report before the hearing that the trustees "favor a consultative model of governance" rather than the consensus model advocated by the faculty. (A.1515.)

### 2. Carroll's faculty do not effectively control academic affairs beyond their own classrooms

#### a. Carroll does not give systematic deference to, or routinely implement, its faculty's recommendations

Carroll also failed to show that its faculty effectively control academic affairs beyond their own classrooms by making effective recommendations on such matters to the administration. Although President Falcone claimed that a consultative model of governance was consistent with Carroll's practice, it is well settled that an administration's "mere consultation" with its faculty does not establish that the faculty effectively control academic affairs, when the administration does not give the faculty's recommendations "systematic deference." *Florida Memorial College*, 263 NLRB at 1253-54.

And, here, the record shows that Carroll's administration does not give systematic deference to--and regularly overrules--the faculty's recommendations on a wide variety of significant academic matters ranging from the academic calendar and curriculum to the academic organization of Carroll itself. Indeed, as a

former faculty and assembly president testified, President Falcone has *never* deferred to a faculty recommendation with which he disagreed. (A.981,1004-05.)

Thus, as shown, President Falcone freely admitted that he eliminated the 4-1-4 academic calendar despite "a great deal of faculty opposition." (A.32,42;255-58.) President Falcone likewise admitted that his administration eliminated six academic majors despite the faculty's vote to retain those majors. (A.30,40; 296-98,340,661.) Similarly, it is undisputed that the administration reorganized Carroll into two schools, despite the fact that the faculty assembly voted against the plan by a two-to-one margin. (A.37,44; 672,844,854.) And, with minimal faculty input and over the faculty's objections, the administration also substantially changed Carroll's academic structure by, among other things, creating 3 academic divisions and eliminating all 23 departmental chairs. (A.37; 235,860,1516-19,1919.) *See NLRB v. Florida Memorial College*, 820 F.2d 1182, 1185-86 (11th Cir. 1987)(administration's willingness to disregard its faculty's recommendations supports Board's rejection of managerial claim); *NLRB v. Cooper Union for Advancement of Science*, 783 F.2d 29, 31-33 (2d Cir. 1986)("*Cooper Union*")(college's implementation of changes over faculty opposition in administration and in core academic areas such as curriculum supports Board's rejection of managerial claim); *Bradford College*, 261 NLRB 565, 566 (1982)

(faculty not managerial because their recommendations were often ignored or reversed).

In view of the foregoing, it is not surprising that Carroll never even argues to this Court that its faculty are aligned with management. Indeed, President Falcone himself acknowledged (A.258,296,1834-36) that his tenure has been "contentious" as the faculty has fought him each step along the way as he has tried to lead Carroll. *See Cooper Union*, 783 F.2d at 32-33 (faculty are not aligned with management in view of extensive evidence of faculty-administration conflict).

**b. the record as a whole undermines Carroll's claim that the faculty manage the curriculum**

Carroll cites (Br.34) one section (A.1146) from its faculty manual for the proposition that the faculty are entrusted with the "management" of the curriculum. However, contrary to Carroll's claim, the record as a whole demonstrates that the faculty do not, in fact, manage the curriculum. *See VIP Health Services, Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999)(although evidence supports the employer's contention that certain individuals are supervisors, much evidence directly contradicts that claim, and Board's rejection of employer's supervisory claim is entitled to affirmance because it is supported by substantial evidence).

For starters, Carroll's roles-and-responsibilities document explicitly states that the faculty merely "[p]rovide advice and counsel" regarding the curriculum, whereas it is the administration that "[p]rovide[s] leadership" with respect to the

curriculum. (A.1135-36.) The record shows, moreover, that the document accurately reflects the reality at Carroll. Thus, the president invoked that document and reminded the faculty that they are merely "responsible for teaching, and for providing advice on curricular matters" to defend himself against faculty complaints that he had acted improperly by changing things at Carroll. (A.1834-35.)

The president's elimination of majors over the faculty's objections, the administration's rejection of the faculty's recommendation to add a Latin American Studies program, the administration's independent review of faculty curricular proposals to determine whether they are academically sound, the administration's power to prevent faculty curriculum proposals from even going to a faculty vote, and the administration's ability to take a curriculum proposal that has been rejected by an academic steering committee to the faculty assembly for a vote and then to enact the proposal even if the faculty assembly votes against it, all belie Carroll's claim that the faculty "manage" the curriculum. *See* cases at pp.48-49; *Loretto Heights College*, 742 F.2d at 1250-51, 1253-54 (fact that PRRC faculty committee reviews and makes recommendations regarding curriculum proposals does not warrant a finding that faculty are managers, because administration approval is required before faculty committee acts).

Carroll ignores the testimony of its own provost when it mistakenly claims (Br.36,38) that its administration does not review faculty curricular proposals to ensure that they are academically sound, but rather only reviews them to ensure that they are financially viable. Thus, the provost testified that she does indeed consider whether faculty curricular proposals are "academically sound" and whether they represent a direction Carroll wishes to follow. (A.364,413-14,518-19,552.)

Similarly, Carroll's claim (Br.38)--that there is "no evidence" that the administration rejected the faculty's Latin American Studies proposal--ignores that Carroll *admitted* that the faculty's proposed Latin American Studies program "was rejected by Provost Bernier" on page 10 of its brief in support of exceptions to the ARD's denial of its election objections.[7] (Addendum p.11.)

Carroll does not advance its case by claiming (Br.11,35) that most, if not all, of the courses listed in the course catalog were developed by faculty. Carroll makes no effort to show that most, if not all, of the courses in that catalog were developed by the faculty *after* President Falcone assumed office and the trustees issued the roles-and-responsibilities document indicating that faculty merely provide advice and counsel regarding curriculum. To the contrary, the record

[7] Relevant excerpts from Carroll's brief in support of exceptions are included in the attached addendum for the convenience of the Court.

shows, for example, that many of the English courses in the catalog date to the 1960's. (A.830-31.)

Thus, the question before the Court is not whether the faculty controlled curriculum and were managers before President Falcone arrived and the trustees issued its statements on roles and responsibilities. Rather, the question before the Court is whether Carroll carried its burden of showing that the faculty were managers at the time of the hearing--after President Falcone had been in office for a decade and the trustees had issued their roles-and-responsibilities document.

This Carroll did not do. To the contrary, a former faculty and assembly president testified that the faculty's ability to promulgate and institute curricular change has been "severely restricted" since the 1996 institution of the roles-and-responsibilities statement. (A.567,605.) Similarly, a 2003 faculty ad hoc committee report indicates that, although the faculty once was responsible for the curriculum, the faculty no longer had that authority at the time of the hearing because President Falcone's administration had "usurp[ed] authority over the College's curriculum" and had "claimed authority that [wa]s . . . historically vested in the Faculty[.]" (A.1878.) *See Passaic Daily News v. NLRB*, 736 F.2d 1543,

1550 (D.C. Cir. 1984) ("Past supervisory status is not determinative. Instead, great weight is given to the individual's current status").[8]

Similarly, Carroll's assertion (Br.10,35)--that an ad-hoc faculty committee formulated the core curriculum in 1994-1995--hardly establishes that the faculty controlled the core curriculum at the time of the hearing. After all, that faculty action took place 10 years before the hearing and before the trustees issued its statement to the effect that the faculty merely "provide advice and counsel" on curriculum. There is no evidence that the core curriculum has been changed since then, and the president candidly admitted that the faculty cannot change it on their own. (A.31-32; 303,336-37,426.)

Carroll disingenuously suggests (Br.39) that it closed the social work department only because its faculty approved doing so, and that this demonstrates the faculty's authority. To be sure, the faculty did vote in favor of the *administration's* proposal to eliminate that department after the *administratio*n decided on its own not to seek reaccredidation of that program. But, it strains credulity to believe that the administration would have reversed itself and

[8] That Carroll has instituted eight majors approved by the faculty during President Falcone's tenure hardly shows (Br.37) that the faculty effectively controls curriculum, because, as shown, during that same period, Carroll eliminated six majors over the faculty's objections and rejected the faculty's proposal to add a Latin American Studies program. In other words, even crediting Carroll's figures, Carroll has acted in accordance with the faculty wishes barely 50 percent of the time.

maintained the department if the faculty had requested it. This is so because Carroll would not be able to attract students to an unaccredited social work department; the administration had already decided on its own not to seek reaccredidation; and President Falcone has been adamant about not offering programs that will not attract students. (A.30-31; 417,517-18,552-53,925-29,963,1935.) Moreover, as shown, Carroll went ahead with its plans to eliminate six majors and to create two schools and three academic divisions despite the faculty's opposition. In these circumstances, Carroll is simply wrong in contending (Br.39) that the ARD should have attached significance to the faculty's vote to approve the elimination of that department.

*LeMoyne-Owen College*, 345 NLRB 1123 (2005) is not to the contrary. (Br.39.) Put simply, the very different record there provided the Board with a reasonable basis for finding it significant that LeMoyne-Owen's decision to discontinue a program did not become operative until its faculty approved it. After all, the record there showed that LeMoyne-Owen's administration, unlike Carroll's, *had* given systematic deference to its faculty's wishes, by, among other things, abandoning its provost's idea to reduce the number of academic divisions after the faculty objected and by *always* adhering to faculty curricular recommendations. *Id.* at 1125, 1129 & n.18, 1131.

### c. Carroll's arguments regarding admissions, calendars, class size, individual classroom matters, and teaching loads are contrary to the facts or the law

Carroll claims (Br.41) that the ARD had no basis for concluding that Carroll's administration has the authority to adjust the admissions formula, and therefore had no basis for finding that the administration's ability to do so tempers the faculty's role in admissions. The short answer is that Carroll admitted on page 12 of its brief in support of exceptions that the admissions formula "can be adjusted by the Administration." (Addendum p.12.) Carroll also ignores that the faculty's "authority" over admissions is tempered in other ways as well. Thus, the administration determines enrollment levels; has directly admitted students who do not meet the admissions formula and who were not reviewed by the admissions committee; and can override committee rejection of candidates. (A.28n.7,32,43; 476,533,586, 834-35.) And, as the roles-and-responsibilities document indicates, it is the administration that is charged with the responsibility for providing leadership in admissions. (A.1135.)

Carroll concedes (Br. 43) that the faculty do not determine or effectively control the academic calendar. Although it attempts to minimize the significance of the President's changing the 4-1-4 calendar over the faculty's objections, the change has impacted the curriculum by limiting the courses and faculty-organized

study-abroad trips that Carroll had offered under the old calendar. (A.256,258, 606.)

Carroll also misleadingly suggests (Br.43) that the faculty currently "regulate[s]" the size of their individual classes. But, as Carroll essentially concedes (Br.43), class size is largely "a function of classroom size," and it is the administration (i.e., the provost and registrar) that assigns classrooms to particular courses. Although the administration also takes into account faculty educational concerns--as well as financial considerations--in determining class size, the president testified that the administration ultimately determines class size, and the faculty had no role in the administration's decision to raise the class size in the history department's survey courses from 30 to 35. (A.32,42; 252-53,316,835.)[9]

As for teaching methods and grading policies, there is no evidence that Carroll has college-wide policies regarding those matters. Rather, Carroll merely contends (Br.11-12,42) that faculty determine the content of their own classes, the teaching methods to be used in their own classes, and their own students' grades. However, as the Supreme Court has explained: "It is plain **…** that professors may not be excluded [as managers] merely because they determine the content of their

[9] The Court is precluded from considering Carroll's claim (Br.44) that the ARD improperly ignored evidence describing the faculty's role in the review and approval of candidates for graduation, the discipline of students, and the conferral of special academic honors because Carroll never raised this argument to the Board in the representation proceeding. *See* cases cited above at p. 35.

own courses, evaluate their own students, and supervise their own research." *Yeshiva*, 444 U.S. at 690-691 n.31.

Moreover, Carroll overstates the faculty's authority even here. For example, the faculty manual indicates that the VPAA can change a student's grade after a student's appeal. (A.1263-64.) In addition, Carroll simply ignores that the administration, not the faculty, determines when classes are offered and the times faculty teach. (A.32,42; 401,846,850-52,972-73,1261-62.)

Finally, Carroll's reliance (Br.42-43) on the administration's adoption of the faculty's teaching load recommendation, before Falcone assumed Carroll's presidency in 1993, hardly shows that the faculty effectively controlled teaching loads at the time of the hearing in 2004.

### C. The Degree of Faculty Involvement in Financial and Personnel Matters Does Not Compel a Finding of Managerial Status

Carroll does not claim that its faculty determine, or effectively control, Carroll's tuition, budget, location, or faculty sabbaticals. Carroll nevertheless claims (Br.44-46) that the case for managerial status is "decidedly" strengthened because its faculty exercise effective control over promotions, hiring, and tenure. However, as Carroll concedes (Br.31), faculty authority in these nonacademic areas is entitled to less weight. Moreover, Carroll does not even claim to this Court, as it did before the Board, that the faculty possess sufficient authority over these areas to be deemed supervisors; the administration decides on its own

whether a new hire will hold a tenure track position; and Carroll actually asserted to the Board that the faculty's recommendation of nontenure promotions "is not evidence of 'managerial' status." (Request p.6n.8.) (Addendum p.5 n.8.)

Carroll unconvincingly claims (Br.17, 44-45) that its faculty make effective recommendations regarding tenure because it does not second-guess the faculty committee's judgment concerning the academic qualifications of tenure candidates and because it has adhered to 80 percent of the faculty's tenure recommendations. However, the record as whole shows that Carroll does not give systematic deference to, or routinely implement, the faculty's tenure recommendations. Thus, Carroll conveniently omits that the provost admitted that she makes her own independent judgment of the candidate's academic qualifications before passing along her recommendation to the president, because, as she put it, she is "just as capable" of judging an candidate's academic qualifications as the committee members are. (A.465,548-49. See A.231.) Moreover, Carroll implicitly concedes (Br.17,45) that it has overruled the faculty committee's positive recommendations and denied tenure to some candidates based on its own assessment of candidates' academic credentials. In addition, President Falcone admitted that the College granted tenure to an additional candidate, notwithstanding the faculty's negative recommendation, based in part on the provost's recommendation concerning "his

qualifications." (A.263,273-74,1523.) In fact, Carroll has not followed five of the last seven faculty tenure recommendations. (A.262-63,1523.)

Carroll also ignores evidence that shows that the faculty tenure and promotions committee cannot fairly be said to be aligned with management. Thus, the record shows that the committee was not properly constituted in 2004 because faculty were skeptical of the process in light of the tenure denials and did not wish to serve "in a system that has become so thoroughly distrusted." (A.484-85,1923.)

**D. Carroll's Reliance on *LeMoyne-Owen* and *Point Park* Is Unavailing**

Carroll also briefly argues (Br.47-49) that the Court must deny enforcement of the Board's order because the ARD failed to explain which *Yeshiva* factors are significant, and which less so, and why as this Court required in *LeMoyne-Owen*, 357 F.3d at 61 and *Point Park University v. NLRB*, 457 F.3d 42, 50 (2006)("*Point Park*"). Once again, however, the Court is precluded from considering Carroll's argument, because it failed to preserve it for appellate review.

Thus, Carroll never argued in its request for review to the Board that the ARD erred by failing to explain which *Yeshiva* factors are significant, which less so, and why, even though this Court had decided *LeMoyne-Owen* nearly a year

before the ARD issued his decision here.[10] Nor did Carroll even cite *LeMoyne-Owen* in its request for review.

In short, Carroll's failure to raise in the representation proceeding its argument that the ARD failed to explain which *Yeshiva* factors are significant, which less so, and why, precludes this Court from considering it now, even though Carroll belatedly raised its argument in the unfair labor practice proceeding in response to the motion for summary judgment. As Carroll concedes (Br.4), the Board invoked (A.201) its rule against relitigating matters that were, or could have been, raised in the prior representation proceeding, when it granted the General Counsel's motion for summary judgment and "rejected the College's argument that it reconsider the issue of the faculty's managerial status in light of **…**this Court's decision in *Point Park* **….**" *See* cases cited at p.35; *Pace University v. NLRB*, 514 F.3d 19, 23-24 (D.C. Cir. 2008) ("'a party must raise all of his available arguments in the representation proceeding rather than reserve them for an enforcement proceeding"')(citation omitted).[11]

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[10] Instead, the College chiefly argued in its request for review (pp.7-8 & n.9) that the ARD had improperly relied on the fact that faculty recommendations were subject to formal review by the administration.

[11] There is no reason to depart from the general principle that a court will not consider a point on appeal that was not raised below merely because an amicus briefs the point on appeal. *See State of R.I. v. Narragansett Indian Tribe*, 19 F.3d

In any event, the ARD did explain (A.38,40,42), consistent with *Yeshiva*, that faculty control over academic affairs beyond their own classrooms (such as control over the curriculum generally) is more significant than faculty control over academic matters inside their own classrooms (such as determining the content of their own classes and evaluating their own students) because, as *Yeshiva* itself pointed out, the latter merely establishes that faculty are professionals, rather than managers. The ARD further explained (A.38,43) that faculty authority in the academic policy sphere is more significant than faculty authority in nonacademic areas, such as hiring and promotions.

Carroll cites nothing in this Court's decisions in *LeMoyne-Owen* and *Point Park* that requires the Board to assign precise weights to each *Yeshiva* factor, which is not surprising. After all, nothing in the Act itself--or the Supreme Court's decision in *Yeshiva*--requires the Board to assign a precise weight to each factor. Moreover, the courts have long upheld multi-factor tests applied by the Board, even though the Board has not assigned precise weights to each of the factors. *See, for example, Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835-836 (D.C. Cir. 1998) (discussing multi-factor test for determining whether interrogation is unlawful under all the circumstances). Requiring the Board to assign a precise weight to

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685, 705 n.22 (1st Cir. 1994) (amicus cannot raise issue not properly preserved for appeal).

each of the factors would transform the broad flexible tool for determining managerial status into a rigid hurdle divorced from its purpose of ensuring that only those faculty members truly aligned with management are excluded from the Act's protections.

Finally, contrary to Carroll's claim (Br.32,34-35), the Board's decision here is not inconsistent with the Board's decision on remand in *Lemoyne-Owen College*, 345 NLRB 1123 (2005). To be sure, the Board found on remand that LeMoyne-Owen's faculty were managers, even though, as here, their recommendations were reviewed by administrators. But, Carroll is simply wrong in suggesting (Br.32) that *LeMoyne-Owen* stands for the proposition that the "extent" of administrative review of faculty recommendations is irrelevant in determining whether faculty recommendations are effective.

Thus, as shown (pp.44-45), well-settled law establishes that the amount of deference shown to the putative supervisor or manager's recommendations is critical to determining the effectiveness of those recommendations and his supervisory or managerial status. It is thus not surprising that the *LeMoyne-Owen* Board took pains to distinguish (1) cases where uncontroverted evidence established that faculty recommendations were afforded deference and always, or virtually always, implemented from (2) those other cases where the record

indicated that faculty recommendations were not afforded deference and routinely implemented. *See id*. at 1129, 1131 & n.27, 1132.

Moreover, as the Board noted (A.200), the facts of *Lemoyne-Owen* are clearly distinguishable. Put simply, *LeMoyne-Owen*'s administration, unlike Carroll's, accorded deference to its faculty's recommendations and routinely adopted them. For example, the Board noted in *LeMoyne-Owen* that even though the provost had proposed collapsing the number of academic divisions from five to three, Lemoyne-Owen abandoned that proposal after the faculty objected. *Id.* at 1125, 1129. Here, by contrast, Carroll's administration reorganized the college into two schools, created three academic divisions, and imposed a new administrative structure despite overwhelming faculty opposition.

In *LeMoyne-Owen*, the record showed that the president and trustees had "never failed to approve" faculty curriculum recommendations and that "all" of the faculty's tenure recommendations were implemented. *Id*. at 1125, 1127, 1129-32. Here, by contrast, Carroll eliminated majors over strong faculty objection, declined to adopt faculty curricular proposals, and overruled several faculty tenure recommendations. Moreover, unlike there, the record here contains direct admissions that Carroll's administration independently evaluates whether faculty curricular proposals are academically sound, can prevent faculty curricular

proposals from even going to a faculty vote, and independently evaluates the academic credentials of tenure candidates.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment denying the Company's petition for review and enforcing the Board's order in full.

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| Intervenor | ) | |

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,781 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 22nd day of April 2008

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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