

00-2193

In The

United States Court of Appeals

for the fourth circuit

COLUMBIA UNION COLLEGE,

Plaintiff-Appellee,

v.

JOHN J. OLIVER, JR., et al.

Defendant-Appellant.

*On Appeal from the United States District Court
For the District of Maryland*

BRIEF FOR AMICUS CURIAE THE AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS

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**BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS
*AMICUS CURIAE***

This brief is filed on behalf of the American Association of University Professors with the consent of both parties.1

ISSUE PRESENTED FOR REVIEW

Whether the district court erred in stating that a higher education institution's mere notice of religious restrictions on academic freedom complies with the academic community's standard of academic freedom as reflected by the policies of the American Association of University Professors.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Association of University Professors ("AAUP") is an organization of approximately 43,000 faculty members and research scholars in all academic disciplines. Founded in 1915, the Association is committed to the defense of academic freedom. The Association's *1915 Declaration of Principles*, which provides for "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action," is the seminal statement on academic freedom in America. AAUP, "General Report of the Committee on Academic Freedom and Academic Tenure (1915)," *reprinted as* Appendix A, 53 *Law & Contemp. Probs.* 393 (1990) ("1915 Declaration"). The *1915 Declaration* distinguishes between institutions of higher learning that are committed to academic freedom and those institutions where free inquiry is subordinated to religious, economic, or other missions. In making this distinction, the *1915 Declaration* notes that the latter institutions:

. . . do not, at least as regards one particular subject, accept the principles of freedom of inquiry, of opinion, and of teaching; and their purpose is not to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators, but rather to subsidize the promotion of opinions held by the persons, usually not of the scholar's calling, who provide the funds for their maintenance.

Id. at 394.

The *1915 Declaration* was succeeded by the *1940 Statement of Principles on Academic Freedom and Tenure*, which was authored jointly by the AAUP and the Association of American Colleges (now the Association of American Colleges and Universities), and has been endorsed by 172 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP

Policy Documents & Reports 3 (1995 ed.) ("1940 Statement"). The *1940 Statement*, with the gloss of meaning that comes from sixty years of interpretation and application by AAUP, has become the standard for practices regulating academic freedom in higher education. See, e.g., Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, in *Freedom and Tenure in the Academy* 3, 4 (William W. Van Alstyne ed., 1993). Consistent with previous decisions of the Supreme Court, see, e.g., *Tilton v. Richardson*, 403 U.S. 672 (1971); *Roemer v. Bd. of Public Works of Maryland*, 426 U.S. 736 (1976), the district court in this case looked to AAUP policy in evaluating the extent of academic freedom provided by Columbia Union College. This Circuit too has recognized that the *1940 Statement* constitutes the common law of the profession. See *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978).

AAUP has no position on when religious institutions of higher education become so pervasively sectarian that they lose eligibility for state funding under prevailing legal analysis, and it does not take one in this case. Rather, AAUP submits this *amicus* brief to correct the district court's misinterpretation of AAUP policy in its analysis of academic freedom at Columbia Union College.

SUMMARY OF ARGUMENT

The central issue in this case is whether Columbia Union College is so pervasively sectarian that it is ineligible for state funding. In addressing this issue, the district court properly looked to the level of academic freedom afforded Columbia Union's faculty. The district court also properly relied on the joint *1940 Statement* as the prevailing standard of academic freedom in the higher education community. In doing so, however, the district court erred in its interpretation of that academic freedom policy. In concluding that the *1940 Statement* "permits limitations on academic freedom so long as they are communicated to faculty members at the time of hiring," the district court mistakenly assumed that simply providing advance notice to faculty members of restrictions placed on their academic freedom brings an institution into compliance with the academic freedom standards set out in the *1940 Statement*. (Joint Appendix ("JA") 2907).

Limitations on faculty speech, writing, and research are presumed to be inconsistent with academic freedom. AAUP recognizes that some colleges and universities, such as religious and proprietary institutions, limit freedom in teaching and research because of certain doctrinal beliefs. When such institutions seek to limit academic freedom, the *1940 Statement* requires that any such restrictions be imposed with clarity and advance notice. Nevertheless, the mere provision of notice to faculty members is not sufficient to bring a higher education institution into compliance with the *1940 Statement's* provision on academic freedom. If it were, then notice of any restriction on academic freedom, no matter how sweeping or draconian, could be said to bring an institution into compliance with the *1940 Statement*. An institutional policy that announces *limits* on faculty members' academic freedom cannot, by definition, be consistent with a promise of complete academic freedom. As AAUP's Committee A on Academic Freedom put it a decade ago, "invocation of the [limitations] clause does not relieve an institution of its obligation to afford academic freedom as called for in the *1940 Statement*." AAUP "Report of Committee A, 1988-89," *Academe* 54 (Sept./Oct. 1989).

ARGUMENT

I. MERE NOTICE OF LIMITATIONS ON ACADEMIC FREEDOM DOES NOT ABSOLVE HIGHER EDUCATION INSTITUTIONS OF THEIR OBLIGATION TO AFFORD ACADEMIC FREEDOM.

At issue in this case is whether Columbia Union College, a Seventh-day Adventist institution of

higher education, is so pervasively sectarian as to make it ineligible for state funding. Any analysis of whether an institution is pervasively sectarian requires an analysis of the level of academic freedom afforded its faculty.

As the district court correctly recognized, adherence to the *1940 Statement* is generally recognized as a strong indicator that an institution supports the "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action" that constitute the general standard of academic freedom. 1915 Declaration, *supra*, at 393; (JA 2906). Indeed, the United States Supreme Court has repeatedly referenced "subscription" to the *1940 Statement* in determining an institution's commitment to academic freedom. *See, e.g., Tilton*, 403 U.S. at 681-82; *Roemer*, 426 U.S. at 756.

Although the district court properly looked to the *1940 Statement* in evaluating the extent of academic freedom at Columbia Union College, it erred in assuming that the simple act of communicating limitations on academic freedom to faculty members at the time of initial appointment is sufficient to constitute adherence to the *1940 Statement's* obligation to afford academic freedom. (JA 2907). In so doing, the court misinterpreted the *1940 Statement* and the common usage and understanding of academic freedom in the higher education community. A stated limit on professors' academic freedom cannot, by definition, provide complete academic freedom.

The *1915 Declaration* set the standard for academic freedom in America. It recognized the threat constituted by limitations on that freedom, noting that

. . . [t]o the degree that professional scholars, in the formation and promulgation of their opinions, are, or by the character of their tenure appear to be, subject to any motive other than their own scientific conscience and a desire for the respect of their fellow-experts, to that degree the university teaching profession is corrupted; its proper influence upon public opinion is diminished and vitiated; and society at large fails to get from its scholars . . . the peculiar and necessary service which it is the office of the professional scholar to furnish.

1915 Declaration, *supra*, at 396-397.

The *1915 Declaration* also specifically cited the history of ecclesiastical restrictions when discussing this threat to academic freedom, commenting that "[i]n the early period of university development in America the chief menace to academic freedom was *ecclesiastical* In more recent times the danger zone has been shifted to the political and social sciences—though we still have sporadic examples of the former class of [ecclesiastical] cases in some of our smaller institutions." 1915 Declaration, *supra*, at 399 (emphasis added). As the *1915 Declaration* stated,

. . . proprietary school[s] . . . designed for the propagation of specific doctrines . . . do not, at least as regards one particular subject, accept the principles of freedom of inquiry, of opinion, and of teaching; and their purpose is not to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators, but rather to subsidize the promotion of opinions held by the persons, usually not of the scholar's calling, who provide the funds for their maintenance. . . . [I]t is manifestly important that they should not be permitted to sail under false colors. Genuine boldness and thoroughness of inquiry, and freedom of speech, are scarcely reconcilable with the prescribed inculcation of a particular opinion upon a controverted question.

Id. at 394. Such proprietary schools include not only church-related institutions but also, for example,

institutions established to teach "the advantages of a protective tariff, or . . . for the purpose of propagating the doctrines of socialism." *Id.* Examples today might include schools established to teach only the doctrines of Jungian or Freudian analysis.

The *1940 Statement* codified the *1915 Declaration* regarding both the tenets of academic freedom and the dangers of its restriction. The *1940 Statement* promotes both "public understanding and support of academic freedom and tenure" and "agreement upon procedures" to ensure them within colleges and universities. *1940 Statement, supra*, at 3. It states that "[i]nstitutions of higher education are conducted for the common good . . . [which] depends upon the free search for truth and its free exposition." *Id.*

Recognizing that some religious institutions continue to limit the academic freedom of their faculty, the *1940 Statement* also requires (in what is known as its "limitations clause") that such "[l]imitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment." *Id.* This language neither endorses such restrictions nor provides that advance notice is a guarantor of academic freedom. As the Association clarified in its 1970 interpretive comments on the *1940 Statement*, AAUP does not endorse such a departure from the principles of academic freedom. AAUP, 1970 Interpretive Comments, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP Policy Documents and Reports 5, 6 (1995 ed.). Simply put, "invocation of the [limitations] clause does not relieve an institution of its obligation to afford academic freedom as called for in the *1940 Statement*." AAUP "Report of Committee A, 1988-89," *Academe* 54 (Sept./Oct. 1989).

To assume, as does the district court, that clearly stated limits on academic freedom are sufficient to bring an institution into compliance with the academic freedom required by the *1940 Statement* is illogical. Such reasoning would mean that an institution could explicitly announce that it would not allow, for example, any discussion of the existence of alternative religions in the world or of reputable scientific or social-science theories that conflict with a teaching of the sponsoring denomination, and that so long as it was clear what was prohibited, the institution would be affording its faculty academic freedom. Announcing restrictions openly and explicitly serves only to comply with the adequacy of notice that the limitations clause and basic fairness require. But the simple fact of notice alone cannot, and does not, provide any assurances about the existence of academic freedom. The district court misinterpreted AAUP policy on academic freedom.

II. COLUMBIA UNION'S POLICIES RAISE SERIOUS CONCERNS ABOUT THE EXTENT OF ACADEMIC FREEDOM AFFORDED ITS FACULTY.

Columbia Union's policies, as set forth in the district court's opinion and the record below, impose distressingly broad restrictions on the academic freedom of its faculty. Indeed, Columbia Union's very "academic freedom policy" itself substantially limits academic freedom. That policy provides that "faculty members 'have complete freedom *so long as* their speech and actions are in harmony with the philosophies and principles of the college—a Seventh-day Adventist institution of higher educ[a]tion.'" (JA 2907) (citing Commission's S.J. Exh. N at 2) (emphasis added). The district court notes that Columbia Union's academic freedom policy provides that its faculty members "have complete freedom," yet ignores the qualification that seemingly eviscerates that freedom: "*so long as* their speech and actions are in harmony with the philosophies and principles of the college—a Seventh-day Adventist institution of higher educ[a]tion." *Id.* (emphasis added). According to this policy, Columbia Union's faculty have academic freedom *only* to the extent that that freedom does not conflict with Seventh-day Adventist teachings. Such a restriction cannot, by definition, be called a complete guarantee of academic freedom. Faculty members cannot have "complete freedom" if they forfeit it whenever their speech or actions are not "in harmony with the philosophies and principles of the college." The provision substantially restricts the statement of freedom it follows. Nor can the provision

be said to comply with the *1940 Statement* simply because the provision openly states such a limit.

Moreover, this policy is not Columbia Union's only restriction on the academic freedom of its faculty. The college also requires, for example, that its faculty exercise "responsibility in the expression of ideas . . . [that] touch on issues of controversy and sensitivity that may affect the Seventh-day Adventist Church." (JA 488). Its faculty handbook provides that "[r]epudiation, defiance, or violation of the purposes, standards and beliefs of the church is reason for separation from College employment." (JA 411). Furthermore, the college expresses its mission as one with a "Christocentric Vision." (JA 2905). Faculty are required to "promote[] a Christian lifestyle" in their classroom presentations, (JA 555-56), and "uphold" the college's sexual standards "in their teaching." (JA 257).

Because Columbia Union does not explicitly subscribe to the *1940 Statement* in general, and the *Statement's* academic freedom principles in particular, the college differs from those religious institutions whose "religious affiliations" the Supreme Court has found not to "interfere[] with . . . their secular educational functions." *Tilton*, 403 U.S. at 676. In *Tilton* and *Roemer* the Court looked to academic freedom as an indicator of whether an institution was pervasively sectarian. In doing so, it considered "subscription" to the *1940 Statement* to be an important indicator of academic freedom. *Tilton*, 403 U.S. at 681-82; *Roemer*, 426 U.S. at 756. In *Tilton*, the Court noted that the higher education institutions under consideration were "characterized by an atmosphere of academic freedom rather than religious indoctrination," and that "[a]ll four institutions, for example, subscribe to the 1940 Statement of Principles on Academic Freedom and Tenure . . ." and "subscribe to a well-established set of principles of academic freedom." *Tilton*, 403 U.S. at 681-82, 687. Similarly, in *Roemer*, the Court found the institutions to have an "atmosphere of intellectual freedom . . . without religious pressures," and noted that "each college subscribes to, and abides by, the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors." *Roemer*, 426 U.S. at 756.

Unlike the institutions considered by the Court in *Roemer* and *Tilton*, Columbia Union does not expressly subscribe to the *1940 Statement* and its principles of academic freedom. Indeed, with its requirement of broad compliance with the wide-ranging "philosophies and principles" of the Seventh-day Adventist religion, Columbia Union imposes broad restrictions that raise serious concerns about its compliance with the *1940 Statement* and "well-established . . . principles of academic freedom." See *Tilton*, 403 U.S. at 687.

Since the issuance of the *1940 Statement*, AAUP has had over sixty years of experience investigating the compliance of institutions with the *1940 Statement's* academic freedom provisions. AAUP has not conducted its own independent investigation of conditions at Columbia Union College, and so disclaims such first-hand knowledge. However, worrisome similarities emerge when Columbia Union's policies are compared to those at institutions investigated and administrations censured² by AAUP³. These policies, viewed against that AAUP experience and judicial precedent, raise serious concerns as to the extent of academic freedom provided to Columbia Union faculty.

AAUP has not taken a position on the pervasive sectarianism of institutions, nor does it do so here. Yet the Supreme Court has identified academic freedom as an important element in the determination of pervasive sectarianism. The apparent breadth of the combination of Columbia Union's policies limiting academic freedom certainly raises serious concerns about the extent of the academic freedom afforded the college's faculty.

Whether or not this Court decides that Columbia Union is pervasively sectarian, it should correct the district court's misinterpretation of the *1940 Statement*. Mere notice of limitations on academic freedom does not, by definition, guarantee complete academic freedom.

CONCLUSION

AAUP urges this Court to correct the district court's misinterpretation of AAUP policy. In doing so, it should recognize that notice of a restriction on academic freedom is just that . . . notice of a *restriction* on academic freedom. Columbia Union's policies give notice of a troublingly broad restriction on academic freedom. It is not this notice, but the extent of that restriction, that determines whether it "effectively empt[ies] academic freedom of its substantive content," Nyack Report, *supra*, at 78. Notice of limitations alone cannot be a guarantor of compliance with AAUP policy on academic freedom.

Respectfully submitted,

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Footnotes:

1. Letters of consent to filing of this brief have been lodged with the Clerk of the Court.
2. Censure is AAUP's strongest condemnation of the administration of an institution. It is imposed when AAUP has found, after an extensive review including investigation by an *ad hoc* committee of uninvolved faculty members from other institutions, that the institution has not observed generally recognized principles of academic freedom and academic due process. *See, e.g., Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1105, 1109-1112 (1968).
3. For example, AAUP imposed censure for lack of academic freedom at Brigham Young University, whose *Statement on Academic Freedom* provided that limitations on academic freedom "invoked against individual faculty conduct or expression" are "reasonable when the faculty behavior or expression seriously and adversely affects the University Mission or the Church," and forbade "expression . . . in public that . . . contradicts or opposes, rather than analyzes or discusses, fundamental Church doctrine or policy." AAUP, "Academic Freedom and Tenure: Brigham Young University," *ACADEME* 52, 64-65 (Sept./Oct. 1997). Similarly, AAUP imposed censure at Nyack College, where faculty were assured academic freedom "as long as they 'remain within the accepted confessional basis of the institution and the Christian and Missionary Alliance.'" AAUP, "Academic Freedom and Tenure: Nyack College," *ACADEME* 73, 77 (Sept.-Oct. 1994)(emphasis added). At both institutions, AAUP found that these policies, as they had been interpreted and applied to faculty, did not guarantee sufficient academic

freedom to comply with the *1940 Statement*.