ORAL ARGUMENT NOT YET SCHEDULED

Nos. 18-1063, 18-1078

United States Court of Appeals for the District of Columbia Circuit

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC,
Intervenor.

On Petition for Review of an Order of the National Labor Relations Board,
No. NLRB-06CA197492

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

Counsel of Record:
Michael S. Wolly
Zwerdling, Paul, Kahn & Wolly, P.C.
1025 Connecticut Avenue N.W., Suite 712
Washington, D.C. 20036
(202) 857-5000
mwolly@zwerdling.com

Counsel for Amicus Curiae:
Aaron Nisenson
Senior Counsel
Nancy Long
Associate Counsel
American Association of University Professors
1133 19th Street N.W., Suite 200
Washington, D.C. 20036
(202) 737-5900
legal.dept@aaup.org

Counsel for Amicus Curiae:
Risa L. Lieberwitz
General Counsel
American Association of University Professors
Professor of Labor and Employment Law
School of Industrial and Labor Relations
Cornell University
361 Ives Hall
Ithaca, NY 14853
(607) 255-3289

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

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

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

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

/s/ Michael S. Wolly
Michael S. Wolly

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (Continued)

Page

Other Authorities

TABLE OF AUTHORITIES (Continued)

Page

STATEMENT OF INTEREST

The American Association of University Professors ("AAUP"), founded in 1915, is a non-profit organization of over 40,000 faculty, librarians, graduate students, and academic professionals, a significant number of whom are private sector employees. The mission of the AAUP is to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good. As discussed in greater detail below, AAUP has played a primary role in establishing academic freedom as an essential aspect of higher education. AAUP, both independently and in concert with other higher education organizations, issues statements and interpretations that have been recognized by the Supreme Court and are widely respected and followed in American colleges and universities. *See, e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). In cases that implicate AAUP policies, or otherwise raise legal issues important to higher education or faculty members, AAUP frequently submits *amicus* briefs in the Supreme Court, the federal and state appellate courts, and the National Labor Relations Board

(generally "NLRB" or "the Board"). *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000); *McAdams v. Marquette University*, 2018 WI 88, 914 N.W.2d 708 (2018); *Columbia University*, 364 NLRB No. 90 (2016); *Pacific Lutheran University*, 361 NLRB 1404 (2014).[1]

AAUP has worked both independently and in cooperation with organizations representing colleges and universities in the formulation, recognition, and observance of principles and standards indispensable to the sound operation of colleges and universities in all their aspects. These principles and standards, along with interpretations that AAUP issues, serve as models for institutional policy on matters such as academic freedom, due process, research and teaching and have been given significant deference by the courts. *See, e.g., McAdams v. Marquette University*, 2018 WI 88, 914 N.W.2d 708 (2018) (Wisconsin Supreme Court referred to the 1940 *Statement of Principles on Academic Freedom and Tenure*

[1] Pursuant to F.R.A.P. 29(a)(4)(E) and Circuit Rule 29(b), all parties have consented to AAUP's filing of this brief. Further, no party's counsel authored this brief in whole or in part and no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. *Amicus* AAUP may apply for funding from AAUP Foundation, its related 501 (c) (3) entity, to support the brief's preparation and submission. *See* Rule 29(a)(4)(E)(iii).

with 1970 Interpretive Comments,[2] "as necessary to understand the scope of the academic freedom doctrine.") AAUP also conducts investigations into potential violations of these standards, which can result in a higher education institution being placed on AAUP's list of censured administrations.

SUMMARY OF ARGUMENT

Since its founding in 1915, AAUP has played a pivotal role in developing principles and standards of academic freedom, which is "an essential aspect of higher education in the United States." William A. Kaplin & Barbara A. Lee, THE LAW OF HIGHER EDUCATION 704 (5TH ed. 2013). Together with national organizations representing higher education institutions, AAUP co-authored the 1940 *Statement*, which is considered the seminal statement on academic freedom. It has been endorsed by more than 250 higher education institutions and disciplinary societies, including the Association of Theological Schools, the American Academy of Religion, the American Catholic Philosophical Association, and the College Theology Society and adopted by hundreds of American colleges and universities. The 1940 *Statement* has been recognized by the Supreme Court as indicative of an institution's inclusion in the broader higher education community.

[2] AAUP, *1940 Statement of Principles of Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS AND REPORTS, 3-19 (11th ed. 2015)(hereinafter the "1940 *Statement*")

See infra pp. 13-14; *Bd. of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971).

Many religiously-affiliated universities[3] have joined the broader higher education community and adopted the principles and standards of academic freedom. The 1940 *Statement* recognizes the special needs and purposes of religiously-affiliated universities by including a "limitations clause" stating, "Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment." 1940 *Statement, supra*, at 14. When an institution clearly states a limitation on academic freedom, AAUP will not take jurisdiction over or investigate alleged violations of academic freedom for actions within the scope of those limitations. The scope of the limitations clause exemption depends on how the institution holds itself out to the faculty member: that is, the limitations clause applies where the religiously-affiliated university has notified the faculty member at the time of appointment of the specific nature of the faculty member's religious functions. Thus, the limitations clause protects the autonomy of religiously-affiliated universities to define faculty job functions that require adherence to religious doctrine or practice.

[3] The term "religiously-affiliated universities" is used in this brief to refer to colleges and universities, and is synonymous with the term "religiously- affiliated institutions."

The NLRB's jurisdictional test in *Pacific Lutheran University* also uses a "holding out" standard for religiously-affiliated universities. *Pacific Lutheran University*, 361 NLRB 1404 (2014) (*"Pacific Lutheran*"). Specifically, the Board will not assert jurisdiction where the university "holds itself out as providing a religious educational environment…and holds out the petitioned-for faculty members as performing a religious function." Indeed, the concept of how a religiously-affiliated university "holds itself" out to the public and its employees has been a touchstone of the analysis in a number of cases involving the exemption of religiously-affiliated universities from statutory coverage: from the determination of whether the ministerial exemption is applicable to certain employees (*Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Employment Opportunity Commission*, 565 U.S. 171,191 (2012)), to the standard used by this Court (*University of Great Falls v. NLRB*, 278 F 3d. 1335 (D.C. Cir.2002) (*"Great Falls"*), to the jurisdictional standard applied by the Board in *Pacific Lutheran*.

AAUP files this *amicus* brief to provide assistance to this Court in evaluating the jurisdictional test in *Pacific Lutheran*. *Amicus* AAUP's pivotal role and experience in developing principles and standards in higher education, including the limitations clause, may prove helpful to this Court in evaluating the Board's standard that relies on the way that religiously-affiliated universities hold

themselves out to faculty, students, and the public. This *amicus* brief explains the history of the 1940 *Statement,* the history and implementation of the 1940 *Statement's* "limitations clause," its adoption by religiously-affiliated institutions, and its relevance to the Board's *Pacific Lutheran* test. As argued more fully below, similar to AAUP's limitations clause, the Board's *Pacific Lutheran* jurisdictional test protects the rights of faculty in institutions of higher education, while also limiting jurisdiction based on religiously-affiliated universities' autonomy to define their religious educational environment and faculty religiously-based job functions.

ARGUMENT

I. Academic Freedom is an Essential Element of Higher Education and the 1940 *Statement* on Academic Freedom and Tenure is Recognized as its Bedrock.

The 1915 formation of AAUP, and its strong commitment to academic freedom from its inception, have been pivotal in the development of academic freedom as one of the foundations of higher education in the United States. *See generally,* Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure,* 53 Law & Contemp. Probs. 3 (1990); Kaplin & Lee, *supra,* at 706-07. The first authoritative statement on academic freedom in America was the 1915 Declaration of Principles, written by a committee of American scholars to mark the founding of the AAUP. *1915 Declaration of Principles on Academic Freedom and*

Academic Tenure, AAUP POLICY DOCUMENTS AND REPORTS 3-12 (11th ed. 2015) (hereinafter the "1915 *Statement*"); Kaplin & Lee, *supra*, at 706-07.

Within a decade, national organizations representing higher education institutions began to recognize the need for national statements affirming academic freedom, particularly the American Association of Colleges [4] ("AAC") (now the Association of Colleges and Universities). Over a period of over 15 years, the AAUP and AAC worked on reports and statements that culminated in their co-authoring the foundational document on academic freedom in higher education: The 1940 *Statement* (*See infra* pp.11-13 for further discussion of development of the 1940 *Statement*.)

The 1940 *Statement* begins,

> The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research.

[4] The AAC was an organization composed of undergraduate institutions and run by their top administrators, and it counted in its membership a substantial number of religious institutions. Metzger, *supra*, at 22-25.

Id. at 14 *(footnote omitted)*. The 1940 *Statement* further articulated and defined the shared concept of academic freedom and prescribed procedural guidelines to protect the exercise of that freedom.

The concept of academic freedom, and the 1940 *Statement* in particular, has been recognized as one of the defining standards of an institution's inclusion in the broader higher education community. Kaplin & Lee, *supra*, at 704 ("Academic Freedom traditionally has been considered to be an essential aspect of higher education in the United States.")[5] The 1940 *Statement* has been adopted by over 250 educational and disciplinary societies and incorporated into hundreds of university and college faculty handbooks.[6] Such incorporation is not hortatory, but

---

[5] *See also*, Jamie Darin Prenkert, *Liberty, Diversity, Academic Freedom, and Survival: Preferential Hiring Among Religiously-Affiliated Institutions Of Higher Education*, 22 Hofstra Lab. & Emp. L.J. 1, 57-58 (2004) ("…the 1940 Statement has been the authoritative document shaping the understanding of, and prescribing the procedures necessary to protect, academic freedom."); Charles J. Russo, *Can Academic Freedom in Faith-Based Colleges and Universities Survive During the Era of Obergefell*, 14 Ave Maria L. Rev. 71, 82-83 (2016) (In describing the 1940 *Statement*, "It almost goes without saying that any examination of academic freedom in American higher education must begin with the bedrock document in this area.")

[6] Julius G. Getman and Jacqueline W. Mintz, *Foreword: Academic Freedom in a Changing Society*, 66 Tex. L. Rev. 1247, 1248 (1988)("The right to academic freedom has also been recognized by the courts, incorporated in faculty handbooks, applied by faculty review boards, and ably protected by Committee A of the American Association of University Professors.")

generally creates a binding obligation on the institution and the faculty. *See McAdams*, at 42-43; Kaplin & Lee, *supra*, at 705.

With the exception of institutions whose purpose is to train the clergy or to explicitly indoctrinate all of its students,[7] religiously-affiliated universities have generally joined this broader higher education community and recognized that academic freedom is one of its guiding principles. Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 Law & Contemp. Probs. 303, 307-09 (1990);[8] Marjorie Reiley Maguire, *Comment: Having One's Cake and Eating It Too: Government Funding and Religious Exemptions For Religiously Affiliated Colleges and Universities*, 1989 Wis. L. Rev. 1061, 1103.

[7] Such institutions are not considered by AAUP to be institutions that are part of the broader higher education community to which the 1940 *Statement* would apply in any respect. These are primarily institutions "dedicated to the propagation of particular beliefs or schools of thought", religious or otherwise, and unaccredited institutions. AAUP, *Academic Freedom at Religiously Affiliated Institutions: The "Limitations" Clause in the 1940 Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS AND REPORTS 64 (11th ed. 2015)(hereinafter the "1999 Report"). These include "various sectarian institutions that have been founded and are supported by sponsoring religious denominations for the training of their laity and clergy in the faith." *Id.* Such institutions generally do not claim to be part of the broader higher education community, nor do they typically recognize academic freedom. Therefore, AAUP principles and standards overall, including the limitations clause, would not apply to these institutions. However, such institutions should not then represent themselves as institutions freely engaged in higher education.

[8] Much of this law review raises issues with a 1988 subcommittee report on the limitations clause that AAUP published for information and commentary. This subcommittee report was not ultimately adopted by AAUP. *See infra* pp.14-15.

Thus, the 1940 *Statement* has been adopted by many religiously-affiliated universities. McConnell, *supra*, at 309; Prenkert, *supra*, at 60-61.

Indeed, the Supreme Court has relied upon the adoption of the 1940 *Statement* by certain religiously-affiliated universities to support the conclusion that "the schools were characterized by an atmosphere of academic freedom." *Tilton*, 403 U.S. at 681-682; *see also Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 756 (1976) ("Nontheology courses are taught in an 'atmosphere of intellectual freedom' and without 'religious pressures.' Each college subscribes to, and abides by, the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors.")

II. The Limitations Clause of the 1940 *Statement* Accommodates the Needs of Religiously-Affiliated Universities.

While religiously-affiliated universities are generally integrated into the higher education community, the 1940 *Statement* recognizes that some religiously-affiliated institutions may need to restrict the scope of academic freedom to accommodate their particular needs: "Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment." 1940 *Statement*, *supra*, at 14.

The recognition of the need to accommodate the autonomy of religiously-affiliated institutions took form in the precursors to the 1940 *Statement.* The

limitations clause language itself arose from a 1923 AAC committee report, which "held that religious colleges could require faculty members to adhere to creeds . . . but insist[ed] that such requirement be made known to candidates for positions before they sign on." Metzger, *supra,* at 24. That report served as the basis for similar language in the 1925 Conference Statement on Academic Freedom and Tenure, AAUP, *Conference on Academic Freedom and Tenure*: *Bull. of the Am. Ass'n of Univ. Professors* 11, 99-102 (February 1925) ("hereinafter the 1925 *Statement*), which was a joint statement of a large group of higher education associations, including AAUP, AAC, and major associations representing higher education institutions.[9] *See* Metzger, *supra,* at 33. That report in turn was used as the basis for the limitations clause language in the 1940 *Statement.* Thus, when presenting a draft of the 1940 *Statement* to the AAC for its approval, AAC academic freedom committee chair and Brown University President, Henry Wriston, observed of the limitations clause:

> The substance of this declaration appeared in the 1925 *Statement.* It is important because there are institutions in the United States which have definite aims that do limit the freedom of the individual teacher. This demands that those limitations be absolutely explicitly and fully understood

[9] The full group is: The American Association of University Women, the American Association of University Professors, the Association of American Colleges, the Association of American Universities, the Association of Governing Boards, the Association of Land-Grant Colleges, the Association of Urban Universities, the National Association of State Universities, and the American Council on Education.

at the time of appointment.

Educational Discussion, Bull. of the Am. Ass'n of Univ. Professors, 25, 333 (June 1939). Finally, the substantive position of the AAC was reflected in the final language in the 1940 *Statement*: "Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment." 1940 *Statement, supra*, at 14.

The application of the limitations clause has been subject to subsequent interpretation by AAUP.[10] Reflecting the long established integration of religiously-affiliated universities into the broader higher education community, in 1970 AAUP adopted as policy an interpretive comment that "Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 "Statement*,"* and we do not now endorse such a departure." 1940 *Statement*, *supra*, at 14 n.5; *see also* Prenkert, *supra*, at 61 ("…the AAUP was correct when it asserted that many religious and church-related schools no longer need or desire to invoke the limitations clause.")

[10] AAUP issues interpretations, reports and policies which "articulate national academic norms that evidence national custom and usage on academic freedom." Kaplin & Lee, *supra*, at 708. "The major policies, standards and reports are collected in *AAUP Policy Documents and Reports*." *Id.* at 1871. AAUP also publishes in its magazine *Academe* certain subcommittee reports and draft policies, generally for response and commentary from the academic community. *Id.*

In 1988 and 1996 AAUP subcommittees issued reports on the limitations clause "not as policy but for publication with an invitation for readers reactions" and comments. *Academe,* September-October 1988, 52-59; *Academe,* January-February 1997, 49-52. The invitation for reaction was accepted, and significant debate and criticism ensued. *See* McConnell, *supra;* Prenkert, *supra*, at 58. These subcommittee reports, and the reactions to them, yielded the 1999 Report, *Academic Freedom at Religiously Affiliated Institutions,* which was approved by Committee A and published in *AAUP Policy Documents and Reports*. *Supra*. at 64. The 1999 Report represents the guiding principles for interpretation and application of the limitations clause. It affirms the validity of the limitations clause and provides guidelines for the handling of faculty academic freedom complaints that implicate the limitations clause.

Under these guidelines, an institution seeking to invoke the limitations clause must clearly convey to the faculty member the limits on academic freedom that it is imposing on the faculty.[11] Since an exact limitation is a practical impossibility, the limitation must be "adequately explicit." 1999 Report, *supra*, at 66. The limitation need not explicitly invoke the protection of the limitations

[11] When a complaint that may implicate the limitations clause arises, the AAUP first determines whether the institution is an "institution freely engaged in higher education" subject to the academic freedom provisions of the 1940 *Statement. See supra* n. 7. This determination is not applicable here as Duquesne and other like religious institutions are clearly freely engaged in higher education.

clause, and limitations are often set forth in documents such as faculty handbooks and policies or employment letters. *Id.* The AAUP does expect, however, that the university will abide by other requirements of the 1940 *Statement*, such as the requirement that the university afford procedural due process to faculty members. *Id.* at 66.

The limitations clause thus acknowledges that faculty members at religiously-affiliated universities may be subject to certain limitations on academic freedom based on the university's religious affiliation and mission. At the same time, the limitations clause ensures that any such limitations are carefully articulated so that both the religiously-affiliated university and the faculty member are given express notice of, and have an opportunity to comprehend, any such restrictions at the time appointments are made.

An example of a religiously-affiliated university's use of the limitations clause arose in AAUP's 1997 decision to remove Marquette University in Wisconsin from its list of censured administrations. *Academe*, Sept-Oct 1997, at 77. [12] AAUP had previously censured Marquette University in 1976 after an

[12] In instances of particularly egregious violations of the principles and standards of academic freedom or governance an institution may be placed on AAUP's list of censured administrations. Kaplin & Lee, *supra*, at 1872-73. Placement on this list generally requires an investigation and report by an AAUP investigating committee, a recommendation from AAUP's Committee A, and a vote of the membership at the AAUP Annual Meeting. *See* Jordan E. Kurland, *Implementing AAUP Standards, Academe: Bull. of the Am. Ass'n of Univ. Professors* 414, 416

investigation found that a tenured Jesuit faculty member was terminated, without a showing of cause and without due process, because he had resigned from membership in the Marquette Jesuits Associates, the university's sponsoring religious order. *Id.* The university had argued that under an agreement between the university and the religious order, the faculty member had removed himself from his faculty position by deciding to leave the religious order. *Id.* However, because the agreement did not clearly proscribe the professor's continuance as a faculty member upon his resignation from the religious order, AAUP found violations of the 1940 *Statement* and accordingly placed Marquette University on its list of censured administrations. *Id.*

In 1997, AAUP revisited the censure. AAUP found that the university and the religious order had revised their agreement to specifically state that when a faculty member leaves the religious order he thereby severs his relationship with the university. *Id.* The AAUP report explained how the university had utilized the limitations clause:

> In a letter to the Association dated February 17, 1997, the president of the university, following discussions with officers of the local AAUP chapter and of Marquette Jesuit Associates, offered precise assurances that 1) the conditions of the agreement between the order and the university will be repeated in every annual contract signed by a Jesuit faculty member; and 2) a Jesuit faculty member subject to separation from the University for having left the order will have the opportunity for a hearing before a faculty

(Dec. 1980). The AAUP Annual Meeting also votes on removal of censure, generally after receiving a report and recommendation from Committee A.

> committee if he contends he is not aware of the consequences of his leaving the order for his university appointment. Committee A believes that these assurances while leaving undisturbed the condition of tenure provided in the agreement between the order and the university, serve to mitigate the kinds of concerns in any future case that characterized the case that occurred more than two decades ago.

Id. Accordingly, removal of Marquette University from the AAUP's list of censured administrations was recommended by Committee A and approved by the AAUP at its Annual Meeting. *Id.* Marquette University continues to be governed by the language of the 1940 *Statement*. *McAdams v. Marquette University*, 2018 WI 88, 914 N.W.2d 708, 730 (2018).

Similarly, in an earlier case involving Gonzaga University, an AAUP investigating committee criticized the lack of specific guidance afforded by a rule whereby the university conditioned the termination of faculty appointments upon the commission of a "grave offense against Catholic doctrine or morality." *See*, AAUP, *The "Limitations" Clause in the 1940 Statement of Principles, Academe: Bul. of the Am. Ass'n of Univ. Professors* 52, 53 (Sept./Oct. 1988). When the institution revised its faculty handbook to "exercise its right under the 1940 *Statement"* to specify a limitation more exactingly, the investigating committee declined any further critical comment upon it. *Id.*

These examples demonstrate how a religiously-affiliated university can articulate the limitations that faculty members will face, recognizing and respecting

principles of academic freedom and due process while also protecting the fundamental faith tenets of religiously-affiliated universities.

III. AAUP Standards of Academic Freedom, Including the "Limitations Clause," are Relevant to this Court's Review of the NLRB's *Pacific Lutheran* Test to Determine Jurisdiction Over Religiously-Affiliated Universities.

Amicus AAUP submits that the limitations clause is relevant to this Court's consideration of the Board's jurisdictional test in *Pacific Lutheran*. The 1940 *Statement*'s limitations clause is analogous to the Board's *Pacific Lutheran* standard for determining whether to assert jurisdiction over religiously-affiliated universities. Both use an objective "holding out" standard that defers to the university's definition of faculty religious-based functions. The 1940 *Statement's* limitations clause applies when the institution notifies the faculty member at the time of appointment of specific religious-based functions required for the faculty position. In such a case, the AAUP will not take jurisdiction over or investigate alleged violations of academic freedom for actions within the scope of those limitations. Under the *Pacific Lutheran* test, the Board will not assert jurisdiction where the university "holds itself out as providing a religious educational environment…and holds out the petitioned-for faculty members as performing a religious function." 361 NLRB at 1404.

The relevance of the 1940 *Statement's* limitations clause to the issues before this Court goes beyond simply a description of its similarity to the Board's *Pacific Lutheran* test. As discussed above, the 1940 *Statement* – with its limitations clause – has been adopted by hundreds of colleges and universities, including many religiously-affiliated universities. In adopting the 1940 *Statement*, religiously-affiliated universities have recognized the central importance of adhering to the norms of faculty academic freedom that are shared by the community of institutions of higher education. At the same time, religiously-affiliated universities recognize that the 1940 *Statement*'s limitations clause protects their institutional autonomy to define faculty positions that entail specifically articulated religiously-based job functions.

The Board's jurisdictional test in *Pacific Lutheran* follows similar logic in determining whether to assert jurisdiction over religiously-affiliated universities. The *Pacific Lutheran* standard recognizes the need to protect the rights of university faculty under the NLRA, while also limiting the scope of NLRB jurisdiction in deference to the autonomy of a religiously-affiliated university to define its religious educational environment and faculty religious functions. The Board's test protects the autonomy of religiously-affiliated universities to define faculty positions that require the performance of religious functions. Where the university holds out the petitioned-for faculty as performing religious functions, as

the Department of Theology at Duquesne University did in the instant case, the Board will refuse to assert jurisdiction over that faculty. Consistent with the principles of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and *Great Falls*, the Board's *Pacific Lutheran* test avoids First Amendment concerns of governmental entanglement with religion, as "the 'holding out' requirement eliminates the need for a university to explain its beliefs, avoids asking how effective the university is at inculcating its beliefs, and does not 'coerce[] an educational institution into altering its religious mission to meet regulatory demands.'" *Pacific Lutheran*, 361 NLRB at 1411, *citing Great Falls*, 278 F.3d at 1344-45.

In evaluating the Board's test in *Pacific Lutheran*, *Amicus* AAUP urges this Court to consider the distinctions between higher education and primary or secondary education. AAUP was founded in 1915 in recognition of the distinctive public mission of higher education in the U.S. and the need for college and university faculty to exercise independence and broad academic freedom in their teaching, research, and public speech. As discussed above, many religiously-affiliated universities have joined the broader community of secular higher education institutions in adopting broad academic freedom standards for faculty, with the specific exceptions covered by the 1940 *Statement*'s limitations clause. This institutional history of religiously-affiliated universities is different from

primary or secondary parochial schools, given "the unique role that teachers in elementary and secondary schools play as servants of the Church in fulfilling the religious mission of the school." *Universidad Central de Bayamon v. NLRB*, 793 F. 2d 383, 404 (1st Cir.1986).[13]

These differences between the role of faculty in parochial schools and religiously-affiliated universities support the validity of the Board's "holding out" test for university faculty. Further, the *Pacific Lutheran* test is fundamentally different from the Board's earlier tests rejected by this Court. By relying on the way the university holds itself out to faculty, students, and the public, the *Pacific Lutheran* test avoids the risk of entanglement that could result from deciding whether an educational institution is "pervasively sectarian" or "has a substantial religious character."

The *Pacific Lutheran* test is a feasible and workable standard for determining jurisdiction over faculty in religiously-affiliated universities. The Board examines "job descriptions, employment contracts, faculty handbooks, statements to accrediting bodies, and statements to prospective and current faculty

[13] In *Bayamon*, three judges on an equally divided *en banc* court "view[ed] as critical the gap that separates the role of such teachers from the role of professors in a school such as Bayamon," which was a "religiously controlled university with a predominant mission of secular education." However, by virtue of the evenly-divided appellate court, the Board's order requiring the University to bargain with the faculty union was not enforced. 793 F. 2d at 399.

and students" to determine the way the college or university holds itself out to the public. *Pacific Lutheran*, 361 NLRB at 1412. Such documents and statements will provide an objective basis for determining whether to assert jurisdiction and the Board will not put itself in a position of "questioning the institution's good faith or otherwise second-guessing those statements." *Id.*

In considering whether the university holds out faculty as performing a religious function, the Board's inquiry recognizes "that a relevant inquiry will be the extent to which the college or university holds itself out as respecting or promoting faculty independence and academic freedom, versus focusing on religious identification and sectarian influence." *Pacific Lutheran*, 361 NLRB at 1412, n. 15. Similar to the 1940 *Statement's* limitations clause, a university's specification of a faculty member's religious functions distinguishes his or her position from faculty who exercise full academic freedom in the same institution or, more generally, in universities that are not religiously affiliated. As the Board explains, a religiously-affiliated university that holds itself out as being committed to academic freedom states a shared commitment with norms of higher education that are almost universally accepted. "Although we are not examining an institution's beliefs or practices, or questioning a university's religious identity, our examination of a university's public representations must show that it holds its

faculty out as performing a specifically religious role, not a role that they would be expected to fill at virtually all universities." *Id.* at 1412.

The concept of a "market check" that this Court described in *Great Falls* is particularly apt in the context of higher education. As the Board observed in *Pacific Lutheran*, "Our 'holding out faculty members' requirement serves as a similar market check, as representations that faculty members perform a religious function will come at a cost to the university. Analogous to students' decision making process, the representation that faculty members must carry out a religious function might attract some potential applicants for faculty positions but dissuade others from even applying." 361 NLRB at 1412, citing *Great Falls,* 278 F.2d at 1344.

The AAUP's 103-year history demonstrates that the protection of academic freedom is central to the professional identity and functions of higher education faculty. To recruit excellent faculty in the competitive national or international labor market, religiously-affiliated universities have an incentive to specify clearly when a faculty position provides full academic freedom, similar to the broader higher education community. The university also has an incentive to clearly specify – that is, to hold out – whether a faculty position requires religious-based functions, as this will reduce the number of candidates who will choose to apply for the position. Thus, in the context of higher education, labor market forces

influence universities, including religiously-affiliated universities, to be clear when they hold out faculty positions as requiring religious functions. When they do, the Board will refuse to assert jurisdiction based on the objective evidence of the university's own documents and statements describing the religious functions of the faculty position.

CONCLUSION

For the foregoing reasons, and those in the brief of the Respondent NLRB, Duquesne University's petition for review should be denied, and the Board's Order should be enforced in full.

September 24, 2018

Respectfully submitted,

/s/ Michael S. Wolly
Michael S. Wolly

Counsel of Record:
Michael S. Wolly
Zwerdling, Paul, Kahn & Wolly, P.C.
1025 Connecticut Avenue N.W., Suite 712
Washington, D.C. 20036
(202) 857-5000
mwolly@zwerdling.com

Counsel for Amicus Curiae:
Aaron Nisenson
Senior Counsel
Nancy Long
Associate Counsel

Counsel for Amicus Curiae:
Risa L. Lieberwitz
General Counsel
American Association of
University Professors
Professor of Labor and
Employment Law
School of Industrial and
Labor Relations
Cornell University
361 Ives Hall
Ithaca, NY 14853
(607) 255-3289

American Association of University Professors
1133 19th Street N.W., Suite 200
Washington, D.C. 20036
(202) 737-5900
legal.dept@aaup.org

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P.32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,218 words.

2. This document complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

/s/ Michael S. Wolly
Michael S. Wolly

CERTIFICATE OF SERVICE

I certify that on September 24, 2018, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Michael S. Wolly
Michael S. Wolly