CASE NO. 10-2305

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LYNN BRANHAM,
Plaintiff – Appellant,

-v.-

THOMAS M. COOLEY LAW SCHOOL
and DONALD LeDUC,
Defendants – Appellees.

On Appeal from the United States District Court
For the Western District of Michigan
Case No. 1:07-CV-630 (Robert J. Jonker, J.S.D.J.)

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

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DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Rule 26.1 of the Sixth Circuit Rules, *Amicus* American Association of University Professors makes the following disclosure:

1. Is said party a subsidiary or affiliate of any publicly-owned corporation not named in this appeal?

   Answer: No.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   Answer: No.

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Interest of Amicus

The American Association of University Professors (AAUP) was founded in 1915 to advance the "standards, ideals and welfare" of teachers and research scholars in accredited colleges, universities and professional schools. Since its inception the AAUP has formulated *Statements*, often in concert with other organizations, intended to establish standards of institutional practice. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure*, drafted jointly with the Association of American Colleges and currently endorsed by over 200 educational organizations and disciplinary societies. The Association of American Law Schools endorsed the 1940 *Statement* in 1946. The 1940 *Statement* has become the norm in American higher education and is widely relied upon by institutions and the courts. *E.g., Otero-Burgos* v. *Inter American University*, 558 F.3d 1, 10 (1st Cir. 2009), *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003). The AAUP has played an active *amicus curiae* role before the courts. The AAUP submits that it is uniquely situated to assist the court by illuminating why this case should be reconsidered.

Statement under Fed.R.App.P. 29(a)(5)

No party or party's counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting the brief, and no

person other then amicus curiae, its members, and counsel contributed money intended to fund preparing or submitting this brief.

Summary of Argument

Does the tenure policy at the Thomas M. Cooley Law School, as implemented in its contracts with its faculty, accord tenure as it is generally recognized in American higher education, or, despite asserting that tenure is accorded, does it provide only for annual appointment? The panel took the latter view. In so doing, the panel neglected the established body of law to the contrary, failed to appreciate the role of annual statements of continuing terms within the context of the tenure system, and failed to perceive the serious consequences of its reading to the vitality of academic freedom. The decision should be reconsidered.

Argument

The Panel Decision, By Failing to Attend to the Contract Law of Academic Tenure, Erodes the Protection of Academic Freedom

Thomas M. Cooley School of Law's Policy 201 was held, quite rightly, to supply the terms of Professor Branham's contract. It provides in pertinent part:

> (12) No tenured faculty member shall be dismissed, nor a nontenured faculty member dismissed, prior to the expiration of the term of his appointment, except for good cause shown in accordance with the following procedure.

Policy 201 would *seem* to provide for tenure as it is generally understood in American higher education. Not so according to the instant panel decision. The panel opinion elided the second clause (slip opinion, p. 5) and, by that elision, read "term of appointment" to qualify both tenured and nontenured faculty. Accordingly, the panel held that, though Professor Branham was accorded academic "tenure," the tenure she held was, in reality, only eligibility for a series of annual academic term appointments. The panel buttressed this conclusion by reference to two other non-grammatical considerations. First, that Professor Branham was tendered annual contracts; and, second, the strong disfavor of permanent employment contracts in Michigan law, noting that, in Michigan, "contracts for permanent employment are for an indefinite period" and are presumptively at-will. *Rowe* v. *Montgomery Ward & Co.*, 473 N.W. 2d 268, 271 (Mich. 1991). Though Cooley's policies also referenced and incorporated American Bar Association standards encouraging the provision of academic tenure as it is generally understood, that reference was held to be merely precatory and so of no legal effect.

The decision has drawn considerable attention in the academic community, understandably for reasons to be explored below. Whence *amicus* AAUP's concern.

Let us start first with the panel's reliance on the judicial disfavor of contracts of "permanent" employment. *Amicus* does not dispute the fact that Michigan law might well be chary of contracts of permanent employment, for such individual contracts have been and are rare in American industry and are not lightly to be implied. *Cf. Littell* v. *Evening Star Newspaper Co.*, 120 F.2d 36, 37 (D.C. Cir. 1941) (requiring a very clear expression of intent). But the court is presented here with a contract expressly of professorial "tenure," an important institution in American higher education that has its own well-accepted meaning. *See generally,* Matthew Finkin, THE CASE FOR TENURE Ch. 1 (1996); Clark Byse & Louis Joughin, TENURE IN AMERICAN HIGHER EDUCATION (1959). This fact alone should have drawn attention to three contractual precepts. First, that

> Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. *The readings of the market place are not invariably apt in this non-commercial context.*

Greene v. *Howard University*, 412 F.2d 1128, 1135 (D.C. Cir. 1969) (emphasis added).

Second, and consequent upon this principle, in the event of any doubt in the matter the norms and usage of the academic profession are to be looked to for guidance on what institutional tenure policies mean. *Id; see also, McConnell* v.

Howard University, 818 F.2d 58, 64 (D.C. Cir. 1987); *Krotkoff* v. *Goucher College,* 585 F.2d 675, 678-80 (4th Cir. 1978); *Browzin v. Catholic Univ.,* 527 F.2d 843, 845-46 (D.C. Cir. 1975); *Collins* v. *Parsons College*, 203 N.W.2d 594, 597 (Iowa 1973) ("The word tenure has come to have quite a definite meaning, especially in contracts of teachers in institutions of higher learning…"); *Drans* v. *Providence College*, 383 A.2d 1033 (R.I. 1978), *after remand* 410 A.2d 942 (R.I. 1980); *Keiser* v. *State Board of Regents*, 630 P.2d 194, 199 (Mont. 1981) (of contractual tenure). The panel decision fails to weigh this well-developed body of law in which the courts have uniformly emphasized that tenure accords a continuing appointment until dismissal for cause.

Third, the courts have stressed that in construing the content of academic tenure, which, historically, was modeled on the tenure of office of federal judges, attention has to be paid to the relationship of tenure to the protection of academic freedom. *See, e.g., Browzin* v. *Catholic Univ., supra; AAUP* v. *Bloomfield College,* 322 A.2d 846, 853-54 (N.J. Super 1974), *enf'd as mod.* 346 A.2d 615 (N.J. App. 1976); *Cf. Saxe* v. *Board of Trustees of Metro St. College*, 29 IER Cases 1496 (Colo. Dist. Ct. 2009), *on remand from* 179 P.3d 67 (Colo. App. 2007). Of this, the panel opined that, "while Branham may have had 'tenure' in the sense that she had academic freedom …," all she had under Cooley's tenure policy, was, because of the tender of an annual contract, only a one-year appointment. This

blinks at the fact that it is permanence of appointment that protects academic freedom in a way that a sequence of annual contracts simply cannot. That is why *tenure* means what it does. Richard Hofstadter & Walter Metzger, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955); Ralph Brown & Jordan Kurland, *Academic Tenure and Academic Freedom* in FREEDOM AND TENURE IN THE ACADEMY 325 (William Van Alstyne ed. 1993); Matthew Finkin, THE CASE FOR TENURE Ch. 1 (1996). Recall that academic tenure was modeled on the tenure of office of federal judges. Would freedom of judicial judgment be equally safeguarded – or safeguarded at all – by submitting the commissions of federal judges to annual Senatorial consent?

Policy 201(12), read all of a piece, certainly *seems* to state that the tenure accorded at the Cooley Law School is in all key respects consistent with the academic profession's understanding of what tenure means and does. Whence the reference to the ABA policy encouraging just that understanding. But, by eliding the text – and so connecting "tenure" to "term" – the panel read the tenure obligation to consist only of consideration for the award of annual contracts. This reading places more weight on a grammatical construct than it can possibly bear. It also creates a trap for the unwary. It is as if the institution were to have said to its faculty: "By action of the Governing Board eligible faculty will be granted tenure—but, (*sotto voce*), if you are careful enough to note the placement of a

comma after the second clause of Policy 201(12), you will see that what you will actually be awarded is not 'tenure' at all, as it is generally understood in accredited legal education, but rather only eligibility for a series of annual appointments." Of course, the Cooley Law School said no such thing, nor does *amicus* suggest that any such sharp practice was at work by the school's failure to inform the faculty of the provision's *real* purport. *Cf. Collins* v. *Parsons College*, *supra* at 595, (where college's bylaws provided for "permanent tenure," but the plaintiff was given a contract of "tenure," the Iowa Supreme Court observed, "we do not believe ... [the Vice President for Academic Affairs] was trying to trick Collins [the faculty member] by using" different words). The policy without such a disclaiming explanation was not deceptive for the simple reason that it *did* accord tenure and *not* something else.

But, perhaps, because of the grammar of section 12 the tenure policy is really not so clear; that due to dubious punctuation alternative readings are actually presented – permanence *or* annual appointment. In that case, that is, in the presence of an ambiguity, attention should have turned to the normative understanding of tenure in American higher education to resolve it, just as in the many cases referenced above[1]. In fact, the Law School's own reference to ABA

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1 Appellee's brief before the panel cited five cases for the proposition that

policy should have alerted the contract-reader to just such a source to resolve doubt, should any arise, about contractual intent.

And so attention turns to what the panel took to color Cooley's policy: the fact that Professor Branham (and, presumably, all other tenured faculty) were tendered annual "contracts." But, these do not evidence that anything other than tenure was intended. Tenure, to reiterate, is a right to continue in office until discharge for cause and then only after a hearing to decide whether cause to dismiss has been proven. The *terms* of continuing service – salary, class assignment, leaves, office space, committee assignments, and a good deal more – are not determined by tenure. The customary practice in higher education is for these terms to be decided upon, and confirmed, in annual notices, not uncommonly captioned as "contracts," to effect the necessary annual adjustments going forward. This speaks not at all to the continuing vitality of the underlying tenure

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academic norms do not add terms not provided for in an integrated contract. Brief of Appellee at 38, *citing Linn* v. *Andover-Newton Theological Seminary*, 638 F.Supp.1114, 1116 n.3 (D.Mass. 1986); Brief of Appellee at 45-46, *citing Kirschenbaum* v. *Northwestern University*, 728 N.E.2d 752 (Ill. App. 2000), *Jacobs* v. *Mundelein College, Inc.*, 628 N.E.2d 201 (Ill. App. 1993), *Saha* v. *George Washington University*, 577 F.Supp.2d 439, 444 (D.D.C. 2008), and *Fox* v. *Parker*, 98 S.W.3d 713 (Tex. App. 2003). Without debating here what these cases actually mean, it should be enough to observe that reference to the generally understood content of tenure is for the purpose of explaining the meaning of a contract term, not to add a term not agreed to.

commitment. *Drans* v. *Providence College, supra,* 383 A.2d at 1038; *Keiser* v. *State Board of Regents, supra,* (annual contract does not bear on continuing tenure); *Rose* v. *Elmhurst College*, 379 N.E.2d 791, n.2 at 794 (Ill. App. 1978); *Collins* v. *Parsons College, supra,* at 598 ('[The faculty member] did not waive his right to tenure by executing written contracts … in individual years."). As the Trustees of Boston University argued *amicus curiae* before the Supreme Court of Rhode Island in *Drans* v. *Providence College*, *supra*: "The annual reappointment form is a skeleton document; it focuses attention primarily on such matters as academic rank and salary; it is regarded by neither party as an integrated expression of the contract." (*quoted in* Matthew Finkin, *Regulation By Agreement: The Case of Private Higher Education*, 65 Iowa L. Rev. 1119, at 1142 n.109 (1980)). Thus, the panel mistook a matter of routine housekeeping to substitute periodicity for permanence, with dire consequences to the tenure system.

Conclusion

The panel, faced with a grammatical ambiguity in a single sentence of a policy otherwise committing an institution of higher learning to observe academic tenure, neglected the rich gloss of legal texture governing how such an ambiguity is best resolved. By negating the security of academic tenure the decision weakens academic freedom, not only at Cooley, nor only in schools of law, but in every institution of higher education in this Circuit insofar as tenured faculty are given

annual notice of the terms of their continuing appointments. For these reasons, *amicus* AAUP submits that the panel's decision merits reconsideration.

Respectfully submitted,

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Date: September 6, 2012

CERTIFICATE OF COMPLIANCE

I certify, in accordance with the word-counting function of the word-processor system used to create this brief (Microsoft Word, set to include footnotes) that the body of this amicus brief contains no more than 1922 words.

s/Paul H. Tobias

CERTIFICATE OF SERVICE

On September 6, 2012, I served a copy of the foregoing brief on the attorneys for the Appellant and the Appellees through this Court's ECF system, addressed as follows:

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