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Legal Update

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**Annual Legal Update¹
July, 2018**

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I. Introduction 5

II. First Amendment and Speech Rights 6

A. Garcetti / Citizen Speech 6
Lane v. Franks, 134 S. Ct. 2369 (2014) 6

B. Faculty Speech 6
Demers v. Austin, 746 F.3d 402 (9th Cir. 2014) 6
Wetherbe v. Tex. Tech Univ. Sys., 669 F. Appx 297 (5th Cir. 2017); Wetherbe v. Goebel, No. 07-16-00179-CV, 2018 Tex. App. LEXIS 1676 (Mar. 6, 2018) 6
Buchanan v. Alexander, et al., No. 18-30148 (5th Cir. 2018)(appeal pending) 7

C. Union Speech 9
Meade v. Moraine Valley Cmty. College, 770 F.3d 680 (7th Cir. 2014), and No. 13 C 7950 (N.D. Ill. Oct. 17, 2016)..... 9
Meagher v. Andover Sch. Comm., 94 F. Supp. 3d 21 (D. Mass. 2015) and 2016 U.S. Dist. LEXIS 1100 (D. Mass. Jan. 6, 2016) 10

D. Exclusive Representation..... 10
Hill v. SEIU, 850 F.3d 861 (7th Cir. 2017) cert. denied (Nov. 13, 2017); D'Agostino v. Baker, 812 F.3d 240 (1st Cir. 2016) cert. denied (June 13, 2016); Jarvis v. Cuomo, 660 Fed. Appx. 72 (2d Cir. 2016) cert. denied (Feb. 27, 2017)..... 10

E. Agency Fee 11
Janus v. American Federation of State, County, and Municipal Employees, Council 31, No. 16-1466 (2017)..... 11

¹This outline is an illustrative, not exhaustive, list of higher education cases of interest to this audience. It is intended to provide general information, not binding legal guidance. If you have a legal inquiry, you should consult an attorney in your state who can advise you on your specific situation.

Jarvis v. Cuomo, 660 Fed. Appx. 72 (2d Cir. 2016) cert. denied (Feb. 27, 2017)	13
III. Academic Freedom.....	14
Glass v. Paxton (University of Texas at Austin), appeal docketed, No. 17-50641 (5th Cir. July 24, 2017).....	14
McAdams v. Marquette University, Case No. 2017AP1240, 2018 WI 88, 2018 Wisc. LEXIS 312 (July 6, 2018).....	15
City and County of San Francisco v. Donald J. Trump et. al., No. 3:2017cv00485-WHO (N.D. Cal. 2017), County of Santa Clara v. Donald J. Trump, et. al., No. 3:2017cv00574-WHO (N.D. Cal. 2017), appeal docketed, No. 17-17478 (9th Cir. Nov. 20, 2017)	18
IV. Public Records/Subpoenas.....	19
Energy & Environment Legal Institute v. Arizona Board of Regents, Case No. 2CACV-2017-0002 (Ariz. App. Ct., Second App. Div., Sept. 14, 2017) (unpublished).....	19
Service Employees International Union Local 925 (“SEIU 925”) v. University of Washington, Freedom Foundation, No. 76630-9-1 (Wash. Ct. App. June 11, 2018)	19
V. Tenure, Due Process, Breach of Contract, and Pay	20
A. Tenure – Breach of Contract.....	20
Matter of Monaco v. N.Y. Univ., 145 A.D.3d 567, 43 N.Y.S.3d 328 (N.Y. App. Div., 2016)	20
Beckwith v. Pa. State Univ., 672 F. App’x 194 (3d Cir. 2016).....	21
B. Tenure – Constitutionality	21
Vergara v. State of Cal., 246 Cal. App. 4th 619, 209 Cal. Rptr. 3d 532 (Cal. App. 2d Dist., May 3, 2016)	21
C. Due Process.....	22
Wilkerson v. Univ. of N. Tex., 878 F.3d 147 (5th Cir. 2017)	22
McAdams v. Marquette University, Case No. 2017AP1240, 2018 WI 88 (July 6, 2018) 22	
D. Faculty Handbooks	23
Crosby v. University of Kentucky 863 F.3d 545 (6th Cir. 2017)	23
VI. Discrimination and Affirmative Action.....	23
A. Affirmative Action in Admissions.....	23
Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016)	23
B. Sexual Misconduct – Title IX.....	24
Letter from Office of Civil Rights, Department of Education, (Sept. 22, 2017)	24

Article: Aaron Nisenson, Constitutional Due Process and Title IX Investigation and Appeal Procedures at Colleges and Universities, 120 Penn State Law Review 963 (Spring 2016)	24
VII. Immigration	25
A. Executive Order Banning Immigration.....	25
Trump v. Hawaii, 138 S. Ct. 2392 (2018)	25
Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (June 26, 2017)(granting cert and granting stay in part), 138 S. Ct. 353 (Oct. 10, 2017)(vacating judgement as moot) 27	
VIII. Collective Bargaining Cases and Issues – Private Sector	29
A. NLRB Authority	29
1. Religiously Affiliated Institutions.....	29
Pacific Lutheran University, 361 N.L.R.B. 157 (2014).....	29
2. Faculty as Managers.....	30
Pacific Lutheran University, 361 N.L.R.B. 157 (2014).....	30
University of Southern California v. National Labor Relations Board, appeal docketed, No. 17-1149 (D.C. Cir. 2017).....	32
3. Graduate Assistants’ Right to Organize	33
Columbia University, 364 N.L.R.B. 90 (2016).....	33
B. Bargaining Units	34
Yale University, 365 N.L.R.B. 40 (2017); PCC Structurals, Inc., 365 N.L.R.B. 160 (2017); University of Pennsylvania, 04-RC-199609 (NLRB Reg. 4, Dec. 19, 2017)	34
C. NLRB Elections	36
NLRB Election Rules, 29 CFR Parts 101, 102, and 103; Request for Information Regarding Representation Election Regulations, RIN 3142-AA12 (NLRB Dec. 14, 2017)	36

I. Introduction

The election of Donald Trump as President has significantly impacted the legal landscape. There have been substantive changes already reflected in rulings of administrative agencies with the National Labor Relations Board reversing a decision on the standard for determining bargaining units and the Department of Education changing course on Title IX guidance. Finally, the new political and social environment has led to an increase in the harassment and discipline of faculty members, resulting in First Amendment and other legal challenges.

Most importantly, on June 27, 2018, the United States Supreme Court overruled a 41 years of precedent and held that it is unconstitutional to collect fees for representational work from non-union members without their voluntary consent (*Janus*). As the AAUP argued in an amicus brief filed with the National Education Association (NEA), for over four decades the Court had repeatedly found constitutional the agency fee system under which unions could charge an agency fee to public employees represented by those unions but who don't want to be union members. This system was applied in 22 states and across thousands of labor agreements covering millions of employees. The majority's decision (written by Justice Alito) overturned this precedent on the theory that collection of agency fees from non-members "violates the free speech rights of non-members by compelling them to subsidize private speech on matters of substantial public concern." The court did not delay the effective date of its decision and therefore public unions and employers generally cannot collect agency fees from non-members after June 27, 2018. The court did recognize that certain fees could be collected from non-members but only if the non-member "clearly and affirmatively consents before any money is taken from them."

In the private sector, the coming change in the makeup of the Board will likely bring into question the future of the Board's rulings in a number of important cases. With new appointments now filling two of three vacancies on the National Labor Relations Board and the likelihood that the third vacancy will be filled by another conservative nominee, the Board may revisit some of its important rulings regarding faculty, particularly its *Pacific Lutheran University* (2014) decision on the test used to determine whether religiously-affiliated institutions are exempt from NLRB jurisdiction, and its *Columbia University* (2016) decision that graduate student employees (teaching assistants and research assistants) have the right to unionize.

The increase in scrutiny of faculty actions, and the attendant publicity and harassment of faculty, has also created new legal challenges. (*McAdams* and *Buchanan*.) In some instances, faculty have been disciplined for their activities, drawing First Amendment or contract based challenges, and these cases are winding their way through the courts.

II. First Amendment and Speech Rights

A. Garcetti / Citizen Speech

Lane v. Franks, 134 S. Ct. 2369 (2014)

In this Supreme Court case the Court held unanimously that a public employee's speech that may concern their job, but is not ordinarily within the scope of their duties, is subject to First Amendment protection. The Court reversed the Eleventh Circuit's holding that Lane did not speak as a citizen when he was subpoenaed to testify in a criminal case, finding that Eleventh Circuit relied on too broad a reading of *Garcetti*. *Garcetti* does not transform citizen speech into employee speech simply because the speech involves subject matter acquired in the course of employment. The crucial component of *Garcetti* then, is, whether the speech "is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." (See Legal Update, July 2016 for further discussion.)

B. Faculty Speech

Demers v. Austin, 746 F.3d 402 (9th Cir. 2014)

In this important decision, the U.S. Court of Appeals for the Ninth Circuit reinforced the First Amendment protections for academic speech by faculty members. (***Important note, a previous opinion by the Ninth Circuit in this case dated September 4, 2013 and published at 729 F.3d 1011 was withdrawn and substituted with this opinion.***) Adopting an approach advanced in AAUP's *amicus* brief, the court emphasized the seminal importance of academic speech. Accordingly, the court held that *Garcetti* does not apply to "speech related to scholarship or teaching" and reaffirmed that "*Garcetti* does not – indeed, consistent with the First Amendment, cannot – apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor." (See Legal Update, July 2016 for further discussion.)

Wetherbe v. Tex. Tech Univ. Sys., 669 F. Appx 297 (5th Cir. 2017); *Wetherbe v. Goebel*, No. 07-16-00179-CV, 2018 Tex. App. LEXIS 1676 (Mar. 6, 2018)

In this case, the Fifth Circuit held that a professor's public statements opposing tenure were protected by the First Amendment. Professor James Wetherbe sued his employer, Texas Tech University, and the current and former deans of the business school where he taught. Wetherbe claimed that the University and the deans violated the First Amendment by retaliating against him for publicly criticizing tenure in the academy. The district court granted Defendants' motion to dismiss, holding that Wetherbe's speech was not protected by the First Amendment as it did not involve a matter of public concern because "[t]enure is a benefit that owes its existence to, and is generally found only in the context of, government employment."

The Fifth Circuit reversed the lower court, finding that Wetherbe's statements criticizing tenure were protected. The court explained that "Whether speech addresses a matter of public concern is to be 'determined by the content, form, and context of a given statement.'" As to the content of the speech, the court found that "Because these articles focus on the systemic impact of tenure, not Wetherbe's own job conditions, the content of the speech indicates that the speech involves a matter of public concern." As to the form and context of the speech, the court emphasized the publicity and media coverage surrounding Wetherbe's statements, and that the speech consisted of articles Wetherbe published in various media outlets. The court also rejected arguments by the university that Wetherbe's speech was made in the course of performing his job, as there was no reason to infer that writing articles on tenure or speaking to the press are part of Wetherbe's job duties.

By contrast, in an earlier case, the Fifth Circuit had found that the First Amendment did not protect Wetherbe's decision to reject tenure or his personal views on tenure. *Wetherbe v. Smith*, 593 F. App'x 323, 327-29 (5th Cir. 2014). In that case, the Fifth Circuit found that because Wetherbe's statements had been made solely to university employees during the course of his interview for a position, and had not been made publicly, they were not speech on a matter of public concern and therefore were not protected by the First Amendment. These two cases together demonstrate that it is not just the content of the speech that is important, but the forum and audience at which the speech is directed.

In *Wetherbe v. Goebel*, No. 07-16-00179-CV, 2018 Tex. App. LEXIS 1676 (Mar. 6, 2018), a parallel case before a state appellate court of Texas, the sole issue on appeal was whether Wetherbe's speech was a matter of public concern. The court reversed the dismissal of this state law claim and remanded the case back to the trial court for further proceedings finding that "the continued value of academic tenure was a matter of public concern, conceptually distinct from any speech related to Appellant's prior litigation or disputes with the university."

***Buchanan v. Alexander, et al.*, No. 18-30148 (5th Cir. 2018)(appeal pending)**

The AAUP filed an *amicus* brief, written primarily by Risa Lieberwitz with contributions from Aaron Nisenson and Nancy Long, in the United States Court of Appeals for the Fifth Circuit that argues that the termination of Professor Teresa Buchanan, for making statements in the classroom that the university improperly characterized as sexual harassment, violated her academic freedom. The brief explains that sexual harassment policies, particularly those focused on speech, must be narrowly drawn and sufficiently precise to ensure that their provisions do not infringe on free speech and academic freedom. In public universities, these policies must meet constitutional standards under the First Amendment. AAUP argues that the university's policies, and their application to the facts, failed this test and thus violated Professor Buchanan's academic freedom.

Professor Buchanan was a highly productive scholar and teacher at Louisiana State University ("LSU"), who was on the verge of promotion to full professor when she was summarily

suspended by her dean, pending an investigation of “serious concerns” that had been raised about her “inappropriate statements” to her students. In May 2014, LSU’s Office of Human Resource Management (“OHRM”) found Buchanan guilty of sexual harassment based solely on her occasional use of profanity and sexually explicit language with her students, despite the fact that Buchanan did not use language in a sexual context and instead employed it to further educational objectives. Buchanan’s dean recommended her dismissal, and has stated that he did not condone “any practices where sexual language and profanity are used educating students.”

Subsequently, a faculty hearing committee recommended unanimously against dismissal of Professor Buchanan. While the FHC faulted Professor Buchanan for having violated LSU’s policies on sexual harassment by her occasional use of “profanity, poorly worded jokes, and sometimes sexually explicit ‘jokes’ in her methodologies,” it found no evidence that this behavior was “systematically directed at any particular individual.” Despite this recommendation, the university president recommended Professor Buchanan’s dismissal to LSU’s Board of Supervisors, which terminated her in June of 2015.

Professor Buchanan filed suit in the United States District Court for the Middle District of Louisiana, and argued that LSU’s sexual harassment policy violated her First Amendment rights because it was vague and overbroad both facially and as applied in her case, and that her due process rights were violated. The District Court ruled against Professor Buchanan, finding that that LSU’s sexual harassment policy was constitutional, and that she was afforded procedural and substantive due process. Professor Buchanan appealed the court’s ruling that the sexual harassment policy, both facially and as applied, was constitutional, and the AAUP filed an *amicus* brief in support of her appeal.

The AAUP *amicus* brief emphasizes the importance of faculty being able to use controversial language and ideas to challenge students in the classroom.

The use of provocative ideas and language to engage students, and to enliven the learning process, is well within the scope of academic freedom protected by the First Amendment. Many things a professor says to his or her students may “offend” or even “intimidate” some among them. If every such statement could lead to formal sanctions, and possibly even loss of employment, the pursuit of knowledge and the testing of ideas in the college classroom would be profoundly chilled.

The brief also recognizes the importance of combatting sexual harassment, and explains that these two goals are not in contradiction, but can instead be mutually achieved.

AAUP has long emphasized that there is no necessary contradiction between a university’s obligation to address problems of sexual harassment effectively and its duty to protect academic freedom. To achieve these dual goals, hostile

environment policies, particularly those focused on speech alone, must be narrowly drawn and sufficiently precise to ensure that their provisions do not infringe on First Amendment rights of free speech and academic freedom.

Finally the brief argues that to distinguish unprotected harassing speech from constitutionally protected speech under the First Amendment, policies allowing discipline for sexual harassment based solely on speech must include a showing that the speech was so “severe or pervasive” that it created a hostile environment. Because the policies at LSU did not require such a showing, and because none was made in this case, the policies and Professor Buchanan’s termination violated academic freedom.

C. Union Speech

***Meade v. Moraine Valley Cmty. College*, 770 F.3d 680 (7th Cir. 2014), and No. 13 C 7950 (N.D. Ill. Oct. 17, 2016)**

This case arose from the termination of Robin Meade, an adjunct professor and active union officer at Moraine Valley Community College, who was summarily dismissed after she sent a letter criticizing her college’s treatment of its adjunct faculty. The case resulted in several substantive decisions from the district court and one from the Seventh Circuit Court of Appeals. In the appeals court case, the Seventh Circuit greatly enhanced constitutional protection for outspoken critics of public college and university administrators. It reinforced and enhanced recent decisions in two other federal circuits in cases from Washington (*Demers*) and North Carolina (*Adams*). The court specifically relied on a sympathetic interpretation of the Supreme Court’s judgment in the *Garcetti* case, expressly invoking the justices’ “reservation” of free speech and press protections for academic speakers and writers. The three-judge panel unanimously declared that an Illinois community college could not summarily dismiss an adjunct teacher for writing a letter criticizing the administration, at least as long as the issues she had raised publicly and visibly constituted “matters of public concern.” (See Legal Update, July 2016 for further discussion.)

The federal appeals court also noted that even a contingent or part-time teacher had a reasonable expectation of continuing employment at the institution and therefore a protected property interest. The appellate court ruled that Robin Meade, the outspoken critic and active union officer, was “not alone in expressing concern about the treatment of adjuncts.” The panel added that “colleges and universities across the country are targets of increasing coverage and criticism regarding their use of adjunct faculty.” In this regard, the court broke important new ground not only with regard to academic freedom and professorial free expression, but even more strikingly in its novel embrace of the needs and interests of adjuncts and part-timers. On remand, the district court initially denied motions for summary judgment by both the College and Meade. 168 F. Supp. 3d 1094 (N.D. Ill. March 3, 2016). However, on October 17, 2016 in an

unpublished decision the district court vacated this ruling, granted Plaintiff's motion for summary judgment, and denied Defendant's motion for summary judgment. *Meade v. Moraine Valley Community College*, No. 13 C 7950 (N.D. Ill. Oct. 17, 2016). The court ruled in Meade's favor on both First Amendment and Due Process grounds. After this decision was issued Moraine settled with Professor Meade.

***Meagher v. Andover Sch. Comm.*, 94 F. Supp. 3d 21 (D. Mass. 2015) and 2016 U.S. Dist. LEXIS 1100 (D. Mass. Jan. 6, 2016)**

In this case, a U.S. District in Massachusetts ruled that speech made by a teacher as a union representative was protected under the First Amendment. Jennifer was discharged because she sent an email to approximately sixty other teachers in which she urged them to enter an "abstain" vote on the ballots used in an accreditation process as a means of putting the accreditation process on hold and using it to gain leverage in the collective bargaining negotiations. The Court found that the *Garcetti* test did not apply because speech was not a part of her normal employment duties as clarified in *Lane v. Franks*. The court also found that the value of Meagher's speech outweighed any interest that the defendants had in preventing unnecessary disruptions and inefficiencies in the workplace. Therefore, the court found that Meagher's speech was protected and that her termination violated her rights under the First Amendment. (*See* Legal Update, July 2016 for further discussion.)

D. Exclusive Representation

***Hill v. SEIU*, 850 F.3d 861 (7th Cir. 2017) cert. denied (Nov. 13, 2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016) cert. denied (June 13, 2016); *Jarvis v. Cuomo*, 660 Fed. Appx. 72 (2d Cir. 2016) cert. denied (Feb. 27, 2017)**

These cases involved lawsuits in which anti-union plaintiffs challenged the long established rights of unions to exclusively represent employees in public sector bargaining. In a decision written by former Supreme Court Justice David Souter, the First Circuit firmly rejected the plaintiffs' claims. The court explained, that non-union public employees have no cognizable claim that their First Amendment associational rights were violated by the union acting as an exclusive bargaining agent with the state. In *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), the court explained,

. . . that result is all the clearer under *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984), which ruled against *First Amendment* claims brought by public college faculty members, professional employees of a state education system, who challenged a legislative mandate that a union selected as their exclusive bargaining agent be also the exclusive agent to meet with officials on educational policy beyond the scope of mandatory labor bargaining. The Court held that neither a right to speak nor a right to associate was infringed, *id.* at 289; like the appellants

here, the academic employees in *Knight* could speak out publicly on any subject and were free to associate themselves together outside the union however they might desire. Their academic role was held to give them no variance from the general rules that there is no right to compel state officials to listen to them, *id. at 286*, and no right to eliminate the amplification that an exclusive agent necessarily enjoys in speaking for the unionized majority, *id. at 288*.

The court also rejected the Plaintiff's attempts to use the recent Supreme Court decision in *Harris v. Quinn*, 189 L. Ed. 2d 620 (U.S. 2014) to justify their claims. Plaintiffs sought review by the Supreme Court, which was rejected on June 13, 2016. *D'Agostino v. Baker*, 195 L. Ed. 2d 812 (U.S. June 13, 2016).

Similarly, in *Hill v. SEIU*, 850 F.3d 861 (7th Cir. Ill. Mar. 9, 2017) the National Right to Work Legal Defense Foundation asserted that the state and public sector unions violated plaintiffs First Amendment rights in enacting and enforcing legislation allowing home child-care providers within a state-designated bargaining unit to elect an exclusive representative to bargain collectively with the state. On March 9, 2017, the Seventh Second Circuit soundly rejected this argument, explaining, "under *Knight*, the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm." On November 13, 2017, the Supreme Court denied Plaintiff's writ of certiorari. *Hill v. SEIU*, 850 F.3d 861 (7th Cir. 2017).

E. Agency Fee

Janus v. American Federation of State, County, and Municipal Employees, Council 31, No. 16-1466 (2017)

On June 27, 2018, the United States Supreme Court overruled a 41 year precedent, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and held that it is unconstitutional to collect fees for representational work from non-union members without their voluntary consent. As the AAUP argued in an amicus brief filed with the National Education Association (NEA), for over four decades the Court had repeatedly found constitutional the agency fee system under which unions could charge an agency fee to public employees represented by those unions but who don't want to be union members. This system was applied in 22 states and across thousands of labor agreements covering millions of employees. The majority's decision (written by Justice Alito) overturned this precedent on the theory that collection of agency fees from non-members "violates the free speech rights of non-members by compelling them to subsidize private speech on matters of substantial public concern." The court did not delay the effective date of its decision and therefore public unions and employers generally cannot collect agency fees from non-members after June 27, 2018. The court did recognize that certain fees could be collected from non-members but only if the non-member "clearly and affirmatively consents before any money is taken from them."

The *Janus* decision arose as a result of a long term campaign by anti-union groups to get rid of agency fees and discourage union membership as part of their avowed goal to “deal a mortal blow” to unions. Under *Abood* public sector unions could charge agency fees to non-union members for the cost of the union negotiating and enforcing a collective bargaining agreement covering those individuals. Over the last forty years, the courts have repeatedly found that the agency fee system adequately balances the interests of the employees and the state in an efficient labor relations system and the First Amendment interests of union members and nonmembers. However, in a 2014 decision, *Harris v. Quinn*, Justice Samuel Alito questioned whether *Abood* was good law and virtually invited challenges to the constitutionality of fair share fees.

Janus was one such challenge. It started with a lawsuit filed in Illinois and funded by the National Right to Work Committee. The lower courts summarily ruled against the plaintiffs relying on the forty year precedent of *Abood*. The plaintiffs filed an appeal with the Supreme Court, which accepted the case in September 2017. The AAUP joined with the National Education Association in an *amicus* brief filed with the Supreme Court in January 2018. The *amicus* brief argued that *Abood* should be upheld because the court’s historical interpretation of the First Amendment gives the government, in its role as employer, significant authority to manage the public sector workplace. Where state laws provide for public sector unionization, public employers have strong interests in ensuring robust and effective collective bargaining, including agency fees as a fair and equitable way to distribute the costs of collective bargaining among all the employees who benefit.

However, the conservative majority in *Janus* rejected the argument that *Abood* should be upheld. In previous rulings, Justice Alito made no secret of his contempt for *Abood*. He devotes most of *Janus* to attacking what has been foundational First Amendment precedent for 41 years. He quotes himself as having termed *Abood* “something of an anomaly” in 2012 and “questionable on several grounds” in 2014, and says in *Janus* that “*Abood* went wrong at the start.” As Justice Elena Kagan ably demonstrates in her dissenting opinion, the decision to overrule *Abood* cannot be defended in terms of First Amendment analysis. Rather, it is nothing more than a political decision that “prevents the American people, acting through their state and local officials, from making important choices about workplace governance.” “The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.”

Nonetheless, Alito found that the imposition of agency fees “violates the free speech rights of non-members by compelling them to subsidize private speech on matters of substantial public concern.” Alito concluded that agency fees violate the First Amendment because they require non-members to subsidize union speech, even if they disagree with the message. The Court also ruled that avoiding the risk of “free riders” is not a compelling state interest and free rider arguments “are generally insufficient to overcome First Amendment objections.”

However, the *Janus* decision was limited to the issue of whether non-members could be compelled to pay agency fees. The majority stated “we are not in any way questioning the foundations of modern labor law.” Thus, *Janus* did not hold that the First Amendment is violated

by collective bargaining through an exclusive employee representative. While the majority decision raised issues with the concept of exclusive recognition, it explicitly stated that “It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees.” Further, the *Janus* ruling clearly does not extend to unions in the private sector. For example, the *Janus* opinion severely criticizes *Abood*’s “fail[ure] to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees” than arises from “Congress’s ‘bare authorization’ of *private-sector* union shops under the Railway Labor Act.” In this regard, *Janus* says it is “questionable” whether “any First Amendment issue could have properly arisen” from “Congress’s enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements.”

Even the conservative majority recognized that its ruling would generally not invalidate other provisions in collective bargaining agreements or state law. The court explicitly stated that “States can keep their labor-relations systems exactly as they are—only they cannot force non-members to subsidize public-sector unions.” And that generally if an agency provision “of a collective-bargaining agreement is found to be unlawful, the remaining provisions are likely to remain in effect.” In addition, the majority did allow that some monies or fees could be collected from non-members in limited circumstances, for example it posited that “individual non-members could be required to pay for [union representation in the non-members personal grievance] or could be denied union representation altogether [in a personal grievance]” and that non-members could voluntarily and affirmatively agree to pay a fee to the union. However, there are high standards for collecting fees under these options, which most current agency fee systems likely would not meet.

Jarvis v. Cuomo, 660 Fed. Appx. 72 (2d Cir. 2016) cert. denied (Feb. 27, 2017)

This case addressed an issue that has heightened importance given the Supreme Court’s ruling in *Janus*, namely whether unions are required to refund of agency fees collected from non-union members who were partial public employees under the Supreme Court’s decision in *Harris v. Quinn*, 189 L. Ed. 2d 620 (U.S. 2014). The plaintiffs were individuals operating home child care businesses. They are covered by the Supreme Court’s decision in *Harris* which ruled that collection of agency fees from these individuals violated to the First Amendment.

After the *Harris* decision was issued, the Union and the employer negotiated a new collective bargaining agreement that did not require the deduction of agency fees. The union also rebated to the plaintiff’s agency fees that were collected after the Supreme Court issued its decision in *Harris*. The plaintiffs continued to prosecute their suit arguing that the Union was obligated to rebate them for agency fees paid prior to the Court’s decision in *Harris*.

The federal Second Circuit Court of Appeals found that the Union was not obligated to make such a reimbursement as the union relied in good faith on the law at the time when it collected the agency fees prior to *Harris*. The Court explained, “In obtaining the challenged fair share fees from plaintiffs, CSEA relied on a validly enacted state law and the controlling weight of Supreme

Court precedent. Because it was objectively reasonable for CSEA "to act on the basis of a statute not yet held invalid," defendants are not liable for damages stemming from the pre-Harris collection of fair share fees." *Jarvis v. Cuomo*, 660 Fed. Appx. 72 *76, (2d Cir. N.Y. 2016). Similarly, the district court in Illinois rejected a claim for payment of agency fees collected for services performed before the *Harris* decision was issued on June 30, 2014. *Winner v. Rauner*, 2016 U.S. Dist. LEXIS 175925 (N.D. Ill. Dec. 20, 2016).

III. Academic Freedom

Glass v. Paxton (University of Texas at Austin), appeal docketed, No. 17-50641 (5th Cir. July 24, 2017)

This case involves an appeal of a lawsuit filed by several faculty at the University of Texas contesting a policy that had been promulgated as a result of a Texas campus carry law. Texas passed a "campus carry law" that expressly permits concealed handguns on university campuses, and in 2016 the University of Texas at Austin issued a Campus Carry Policy mandating that faculty permit concealed handguns in their classrooms. Several faculty filed suit in the United States District Court for the Western District of Texas alleging that enforcement of the Campus Carry Policy profoundly changes the educational environment in which Plaintiffs teach in violation of the First Amendment. The District Court dismissed the case, holding that the faculty did not have standing to sue because they had not proven that they had been harmed by the law or university policy. The faculty appealed and the AAUP joined with the Giffords Law Center to Prevent Gun Violence and the Brady Center to Prevent Gun Violence in an *amicus* brief filed in the Fifth Circuit in support of the faculty members' appeal.

The brief explains that college campuses are marketplaces of ideas, and that the presence of weapons has a chilling effect on rigorous academic exchange of ideas. The brief argues that the policy (and the law pursuant to which the policy was created) requiring that handguns be permitted in classrooms harms faculty as it deprives them of a core academic decision and chills their First Amendment right to academic freedom.

The brief further explains that the deleterious impact of guns on education is widely recognized by university administrators and faculty, whose conclusions are confirmed by a significant body of social science research. The brief argues that the "decision whether to permit or exclude handguns in a given classroom is, at bottom, a decision about educational policy and pedagogical strategy. It predictably affects not only the choice of course materials, but how a particular professor can and should interact with her students—how far she should press a student or a class to wrestle with unsettling ideas, how trenchantly and forthrightly she can evaluate student work. Permitting handguns in the classroom also affects the extent to which faculty can or should prompt students to challenge each other. The law and policy thus implicate concerns at the very core of academic freedom: They compel faculty to alter their pedagogical choices, deprive them of the decision to exclude guns from their classrooms, and censor their protected speech."

***McAdams v. Marquette University*, Case No. 2017AP1240, 2018 WI 88, 2018 Wisc. LEXIS 312 (July 6, 2018)**

In one of the best decisions on academic freedom in decades, the Wisconsin Supreme Court, citing AAUP policies and an amicus brief filed by the AAUP, ruled that Marquette University wrongly disciplined Dr. John McAdams for comments he made on his personal blog in 2014. Dr. McAdams criticized a graduate teaching instructor by name for her refusal to allow a student to debate gay rights because "everybody agrees on this." The blog was publicized in the national press, and the instructor received numerous harassing communications from third parties. Marquette suspended Dr. McAdams, and demanded an apology as a condition of reinstatement. Relying heavily on AAUP's standards and principles on academic freedom, as detailed in AAUP's amicus brief, the court held that "the University breached its contract with Dr. McAdams when it suspended him for engaging in activity protected by the contract's guarantee of academic freedom." Therefore, the court reversed and remanded this case with instructions that the lower court enter judgment in favor of Dr. McAdams and determine damages, and it ordered Marquette to immediately reinstate Dr. McAdams with unimpaired rank, tenure, compensation, and benefits.

In late 2014, Dr. McAdams, a tenured professor at Marquette University, published a blog post on his personal blog, which criticized Cheryl Abbate, a graduate student and philosophy instructor, on the way she handled a student's question on a potential controversial topic during one of her philosophy classes. The blog post was picked up by the national media, and Ms. Abbate received numerous harassing and offensive emails and other communications. In December 16, 2014, Dr. McAdams was suspended with pay and banned from campus. On January 26, 2015, the AAUP Department of Academic Freedom, Tenure, and Governance sent a letter to the University President informing him that the suspension appeared to violate AAUP policies.

On January 30, 2015, Marquette formally notified Dr. McAdams that it was commencing the process to revoke his tenure and terminate his employment. Per Marquette's Faculty Statutes the matter was referred to a Faculty Hearing Committee ("FHC"). The FHC concluded "that the suspension of Dr. McAdams pending the outcome of this proceeding, imposed by the University with no faculty review and in the absence of any viable threat posed by the continuation of his job duties, was an abuse of the University's discretion granted under the Faculty Statutes." The FHC further concluded there was not sufficient cause for Marquette to terminate Dr. McAdams, but that he could be suspended for up to two semesters without pay.

On March 24, 2016, President Lovell advised Dr. McAdams that he was to be suspended without pay for two semesters, as the FHC had recommended. The President went beyond the FHC recommendation, and demanded that as a condition of his reinstatement to the faculty, Dr. McAdams provide him (and Ms. Abbate) with a written statement expressing "deep regret" and admitting that his blog post was "reckless and incompatible with the mission and values of Marquette University." By letter dated April 4, 2016, McAdams advised President Lovell that he would not say what he did not believe to be true, and that Lovell was exceeding his authority under the Faculty Statutes by demanding that he do so. As a result, McAdams

was not reinstated to the faculty at the end of his two semester suspension and was effectively fired.

Dr. McAdams brought suit and claimed, *inter alia*, that Marquette violated his due process rights under the contract and his right to academic freedom. The court granted Marquette's motion for summary judgment and found that Dr. McAdams "expressly agreed as a condition of his employment to abide by the disciplinary procedure set forth in the Faculty Statutes, incorporated by reference into his contract" and that Marquette substantially complied with these procedures. On the academic freedom claim, the court opined, "In short, academic freedom gives a professor, such a Dr. McAdams, the right to express his view in speeches, writing and on the internet, so long as he does not infringe on the rights of others." Dr. McAdams appealed the trial court's decision. On January 22, 2018, the Wisconsin Supreme Court agreed to bypass the Court of Appeals, and to hear the case immediately.

AAUP submitted an *amicus* brief to the Wisconsin Supreme Court, which explained that "Such a formulation of limiting academic freedom to 'views' that do 'not infringe on the rights of others' vastly undermines academic freedom. The nature of offering opinions, particularly controversial ones, is that they may prompt vigorous responses, including assertions that the right of others have been infringed. Views and opinions should be subject to debate, not to limitations based on claims that the expression of views infringes upon the rights of others. Adding such a component will only serve to limit the openness and breadth of the views expressed in academia, compromising essential rights of academic freedom." The *amicus* brief urged the court to adopt AAUP standards to interpret academic freedom policies, including those at Marquette, as protecting faculty from discipline for extramural speech unless the university administration proves that such speech clearly demonstrates the faculty member's unfitness to serve, taking into account his entire record as a teacher and scholar. As AAUP standards explain, "Extramural utterances rarely bear upon the faculty member's fitness for continuing service." The *amicus* brief also argued that Marquette violated Dr. McAdams's due process rights by unilaterally imposing a new penalty that required Dr. McAdams to write a statement of apology/admission as a condition of reinstatement. This severe sanction would compel Dr. McAdams to renounce his opinions, a fundamental violation of his academic freedom. It also amounted to a *de facto* termination that was imposed in contravention of the Faculty Hearing Committee's recommended lesser penalty.

The Wisconsin Supreme Court determined that it would decide this case on the merits. As an initial matter, the court declined to defer to the university's decision. One important reason was that the faculty hearing committee's decision was only advisory and not binding on the administration. The court stated, "The Discipline Procedure produced advice [from the FMC], not a decision. We do not defer to advice." In addition, the court noted there were no rules for the President on appeal, stating "The Discipline Procedure is silent with respect to how the president must proceed after receiving the report." And "once it reached the actual decision-maker (President Lovell), there were no procedures to govern the decision-making process." The lack of procedures

governing appeals to the President was one area in which the Marquette's grievance procedure did not track AAUP's Recommended Institutional Regulations.

In its analysis of the merits of Dr. McAdams's academic freedom argument, the court specifically cited to the AAUP's standards and principles as outlined in our *amicus* brief. The court stated: "The University acknowledges this definition (of academic freedom) came from the American Association of University Professors' *1940 Statement of Principles on Academic Freedom and Tenure*. During their arguments, both the University and Dr. McAdams had recourse to that document, as well as to subsequent AAUP-authored, explanatory documents such as the 1970 Interpretive Comments. Consequently, we will refer to those sources as necessary to understand the scope of the academic freedom doctrine." (Emphasis added.)

Relying on AAUP's standards and principles, the court determined that Dr. McAdam's blog post was an "extramural comment," a type of expression made in Dr. McAdams' personal not professional, capacity. In the next step of its analysis, the court adopted the AAUP's "analytical structure" to analyze the impact of the blog post—the controlling principle, the court noted, is that a "faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. If the comment meets this standard, the second part of this analysis considers the broader context of the faculty member's complete record before deciding whether the extramural comment is protected by the doctrine of academic freedom: '[A] final decision should take into account the faculty member's entire record as a teacher and scholar.'" *quoting from AAUP's 1940 Statement of Principles of Academic Freedom and Tenure with 1970 Interpretive Comments and Committee A Statement of Extramural Utterances*. Marquette failed to follow these long standing AAUP standards and principles.

The court further touted AAUP's standards and principles---"The AAUP properly limits the analysis to whether the actual extramural comment, on its face, clearly demonstrates that the professor is unfit to serve. This very narrow inquiry explains why the AAUP can confidently state that '[e]xtramural utterances rarely bear upon the faculty member's fitness for a particular position.' If we adopted the alternative structure now favored by the University, academic freedom would be nothing but a subjective, post-hoc analysis of what the institution might find unacceptable after watching how events unfolded. And this would likely chill extramural comments to the point of extinction. It would be a fearless professor indeed who would risk such a comment, knowing that it licenses the University to scrutinize his entire career and assay it against the care of 'all aspects of the lives of the members of the institution.'" Ultimately, Justice Daniel Kelly concluded "McAdams's blog post qualifies as an extramural comment protected by the doctrine of academic freedom." "The post is incapable of clearly demonstrating McAdams is unfit to serve as a professor because, although the university identified many aspects of the blog post about which it was concerned, it did not identify any particular way in which the blog post violated McAdams' responsibilities to the institution's students."

***City and County of San Francisco v. Donald J. Trump et. al.*, No. 3:2017cv00485-WHO (N.D. Cal. 2017), *County of Santa Clara v. Donald J. Trump, et. al.*, No. 3:2017cv00574-WHO (N.D. Cal. 2017), *appeal docketed*, No. 17-17478 (9th Cir. Nov. 20, 2017)**

This pending appeal involves a challenge to a January 25, 2017 Trump administration Executive Order 13768 “Enhancing Public Safety in the Interior of the United States,” which declared that “(i)t is the policy of the executive branch to . . . (e)nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law.” Section 9 implements that policy by commanding executive branch officials to strip state and local governments deemed to be “sanctuary jurisdictions” of their eligibility “to receive grants.” The City and County of San Francisco filed suit in the US District Court for the Northern District of California against President Trump and other federal officials, alleging that the Executive Order violated the separation of powers doctrine, the Tenth Amendment, and due process guarantees. On April 25, 2017, the District Court entered a nationwide preliminary injunction against the Executive Order determining that the City and County of San Francisco and County of Santa Clara had pre-enforcement standing to protect hundreds of millions of dollars of federal grants from the unconstitutionally broad sweep of the Executive Order. The AAUP joined an *amicus* brief submitted to the Ninth Circuit in support of the permanent injunction that enjoins the US government from enforcing Section 9 (a) of Executive Order 13768. The *amicus* brief argued that upholding the Executive Order would create a precedent that would enable the Trump administration to extend the Executive Order to apply to colleges and universities, and addresses the harms that would flow from overturning the permanent injunction.

The *amicus* brief further argued that such an extension would negatively impact colleges’ and universities’ ability to carry out their public mission (“This public mission extends to private and nonprofit colleges and universities as well. In the United States, colleges and universities explicitly see themselves as “conducted for the common good.” AM. ASSOC. OF UNIV. PROFESSORS, 1940 *Statement of Principles on Academic Freedom and Tenure*), and their interests in developing a diverse student body, “. . . A diverse student body breaks down stereotypes, “promotes learning outcomes,” and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” *Grutter*, 539 U.S. at 330. (quoting from *amicus* brief). Diversity contributes to a robust exchange of ideas, exposure to different cultures and the acquisition of competencies necessary in our increasingly diverse society and closely connected world. *Id.* at 2211.” The brief also emphasized the harms caused by the Executive Order—undermining the critical interest that our society has in the education of all its residents regardless of immigration status; threatening higher education’s constitutional interest in educational independence to create the sort of diverse student body that is critical to the intellectual and academic life of the community; devastating university research opportunities by withdrawing federal funding for failure to participate in federal immigration enforcement; and penalizing students’ opportunities for higher education by withdrawing federal student scholarship funding.

IV. Public Records/Subpoenas

Energy & Environment Legal Institute v. Arizona Board of Regents, Case No. 2CACV-2017-0002 (Ariz. App. Ct., Second App. Div., Sept. 14, 2017) (unpublished)

In this decision the Arizona Court of Appeals rejected attempts by a “free market” legal foundation to use public records requests to compel faculty members to release emails related to their climate research. In an *amicus* brief in support of the scientists, the AAUP had argued that Arizona statute creates an exemption to public release of records for academic research records, and that a general statutory exemption protecting records when in the best interests of the state, in particular the state’s interest in academic freedom, should have been considered. The appeals court agreed and reversed the decision of the trial court that required release of the records and returned the case to the trial court so that it could address these issues. (*See* Legal Update, July 2016 for further discussion.)

Service Employees International Union Local 925 (“SEIU 925”) v. University of Washington, Freedom Foundation, No. 76630-9-1 (Wash. Ct. App. June 11, 2018)

In this case, the Court of Appeals in Washington State found that emails to and from a faculty member at his University of Washington email address relating to faculty organizing and addressing faculty concerns were not “public records” under state law as they were “not within the scope of employment, [and] do not relate to the UW’s conduct of government or the performance of government function.”

This case arose from a public records request by the Freedom Foundation (“Foundation”) to the University of Washington (“UW”) under the State of Washington Public Records Act (the “PRA”). The request sought documents from UW Professor Robert Wood (the President of the UW AAUP Chapter² and a member of SEIU 925), particularly emails sent to and from Professor Woods university email address, aaup@u.washington.edu, including records involving faculty union organizing; the UW AAUP Chapter; and other personal and private matters (the “Records”).

On April 25, 2016, SEIU 925 filed a Complaint seeking a temporary restraining order to temporarily enjoin release of the Records. The trial court granted a TRO enjoining UW from releasing the Records but required that the “public records” portion of the Records be released by July 6, 2016. SEIU argued that documents in the following categories were not “public records”

² The Court of Appeals specifically noted that the “UW chapter of the national nonprofit organization, the American Association of University Professors, uses the UW e-mail account, aaup@u.washington.edu. That account operates as an email ‘listserver’ and distributes messages to an e-mail subscriber list.”

and therefore disclosure was not required or permitted: (1) emails and documents about faculty organizing including emails containing opinions and strategy in regard to faculty organizing and direct communication with SEIU 925; (2) postings to AAUP UW Chapter listserv; (3) personal emails and/or documents unrelated to any UW business; and (4) personal emails sent or received by Professor Wood in his capacity as AAUP UW chapter president and unrelated to UW business (the “Non-Public Records”). SEIU argued that the Non-Public Records were personal and private and thus not “public records” under the PRA because they do not relate to the conduct of government or a governmental or proprietary function. Following this reasoning, the trial court (in March 2017) entered a permanent injunction enjoining release of those because they are not “public records” under the PRA. The Foundation filed a Notice of Appeal with the Court of Appeals of the State of Washington, Division I (the “Court of Appeals”).

The Court of Appeals upheld the permanent injunction issued by the trial court and determined that (1) SEIU had standing to seek injunctive relief “as a party to whom public records held by a public agency may pertain and under chapter 7.40 RCW as a party whose rights may be affected by the release to the public of non-public records.”; and (2) the emails at issue did not qualify as public records under the PRA (and therefore do not have to be disclosed) because “documents relating to faculty organizing and addressing faculty concerns are not within the scope of employment, do not relate to the UW’s conduct of government or the performance of government function.” This finding is a great victory--disclosure of the Non-Public Records will have a chilling effect on the ability of faculty to freely associate and exchange ideas. This chilling effect would come from faculty fearing surveillance of whether they are members of UW AAUP or SEIU 925 and of faculty participation in internal SEIU 925 or UW AAUP discussions and debates.

V. Tenure, Due Process, Breach of Contract, and Pay

A. Tenure – Breach of Contract

Matter of Monaco v. N.Y. Univ., 145 A.D.3d 567, 43 N.Y.S.3d 328 (N.Y. App. Div., 2016)

Professors Marie Monaco and Herbert Samuels, New York University Medical School, had their salaries significantly slashed after NYU arbitrarily imposed a salary reduction policy. (See Legal Update, July 2017 for further discussion.) The Professors believed that this policy violated their contracts of employment, as well as NYU’s handbook which, in its definition of tenure, “guarantees both freedom of research and economic security and thus prohibits a diminution in salary.” NYU argued that it was not even bound by the Faculty Handbook. On December 15, 2016, the Supreme Court of the State of New York, Appellate Division, First Department found that Professors Monaco and Samuels sufficiently alleged that the policies

contained in NYU's handbook, which "form part of the essential employment understandings between a member of the Faculty and the University have the force of contract."

***Beckwith v. Pa. State Univ.*, 672 F. App'x 194 (3d Cir. 2016)**

Plaintiff, a tenure track faculty, brought suit against the university and alleged that the university breached her employment agreement when the university terminated her before the end of her employment agreement. Plaintiff's offer letter described her position as "tenure-eligible" with tenure being a six-year process although consideration for earlier tenure was possible based on performance, yet was also subject to the universities' policies regarding faculty appointments. The United States Court of Appeals for the Third Circuit held that Plaintiff failed to overcome Pennsylvania's presumption of at-will employment because she failed to show that there was "an express contract between the parties for a definite duration or an explicit statement that an employee can only be terminated "for cause." The court emphasized that because Plaintiff's employment agreement (nor any other document that was incorporated by reference) failed to establish a term of years, Plaintiff did not meet her burden on the breach of contract claim.

B. Tenure – Constitutionality

***Vergara v. State of Cal.*, 246 Cal. App. 4th 619, 209 Cal. Rptr. 3d 532 (Cal. App. 2d Dist., May 3, 2016)**

In this case, the Court of Appeal of California issued a decision overturning a ruling by a California state court judge that found that California statutes providing tenure protections to K–12 teachers violated the equal protection provisions of the California constitution. (*See* Legal Update, July 2017 for further discussion.) The case arose from a challenge, funded by anti-union organizations, to five California statutes that provide primary and secondary school teachers a two-year probationary period, stipulate procedural protections for non-probationary teachers facing termination, and emphasize teacher seniority in reductions of force. The AAUP submitted an *amicus* brief which argued that the challenged statutes help protect teachers from retaliation, help keep good teachers in the classroom by promoting teacher longevity and discouraging teacher turnover, and allow teachers to act in students' interests in presenting curricular material and advocating for students within the school system. The Court of Appeal reversed the trial court's decision, holding that the statutes themselves did not create equal protection violations, so they are not unconstitutional. (*See* Legal Update, July 2017 for further discussion.)

C. Due Process

***Wilkerson v. Univ. of N. Tex.*, 878 F.3d 147 (5th Cir. 2017)**

Plaintiff, a non-tenured professor, had a one-year appointment per a contract that included a five-year commitment to renew at the option of the university. Plaintiff was informed by a university representative that the renewal provision was only included for the university's convenience and would only be invoked if there was a reduction in workforce that necessitated non-renewals. Plaintiff was terminated and alleged that he had a property interest in his continued employment. The question before the court was not whether the university was within its right to terminate Plaintiff but rather was Plaintiff reasonable in expecting, based on rules and expectations, the university to employ him for the fourth year of a five-year contract? The United States District Court for the Eastern District of Texas followed the reasoning in *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), and held that Plaintiff had a reasonable expectation of his continued employment based on the university's assurances and the context of his contract that it would exercise its option to renew each year, absent serious violations or a reduction in force.

The U.S. Court of Appeals for the Fifth Circuit reversed the district court's decision and found that the *Sindermann* case was not dispositive here, as ". . . Sindermann noted that Texas law could still bar a teacher's due process claim." "Far from inviting Wilkerson 'to feel that he has permanent tenure'", [citation omitted], his contract provided a one-year appointment, and the bylaws and caselaw warned not to expect further ones. . ." The court further noted that the district court had overlooked the contract's integration clause and had put "informal understandings and customs" above the university's officially promulgated position.

***McAdams v. Marquette University*, Case No. 2017AP1240, 2018 WI 88 (July 6, 2018)**

This case is discussed in detail above. As explained above, the Wisconsin Supreme Court declined to defer to the university's decision on the discipline of Dr. McAdams. One important reason was that the faculty hearing committee's decision was only advisory and not binding on the administration. The court stated, "The Discipline Procedure produced advice [from the FMC], not a decision. We do not defer to advice." In addition, the court noted there were no rules for the President on appeal, stating "The Discipline Procedure is silent with respect to how the president must proceed after receiving the report." And "once it reached the actual decision-maker (President Lovell), there were no procedures to govern the decision-making process." The lack of a procedures governing appeals to the President were one area in which the Marquette's grievance procedure did not track AAUP's Recommended Institutional Regulations.

D. Faculty Handbooks

***Crosby v. University of Kentucky* 863 F.3d 545 (6th Cir. 2017)**

In this case, the Sixth Circuit affirmed the dismissal of Plaintiff-Appellant's claims. Plaintiff-Appellant, Richard Crosby, is a tenured Professor and former Department Chair at the University of Kentucky's College of Public Health. He filed suit against the University and several University officials under Section 1983 and state law, claiming that his removal as Department Chair amounted to a violation of his right to due process. Prior to his removal, the University had investigated Plaintiff-Appellant for reports that he was "[v]olatile," "explosive," "disrespectful," "condescending," "out of control," "prone to angry outbursts," made an offensive remark about women, and that the Department's performance was suffering because of Plaintiff-Appellant's temper and hostility toward other departments. After being stripped of his Department Chair position, Plaintiff-Appellant appealed and demanded that the University handle his appeal under a proposed governing regulation not yet adopted by the University. The University declined, and Plaintiff-Appellant filed suit. In affirming the district court's dismissal, the Sixth Circuit found that Plaintiff-Appellant identified "no statute, formal contract, or contract implied from the circumstances that supports his claim to a protected property interest in his position as Chair," and that the individual Defendants were entitled to qualified immunity.

VI. Discrimination and Affirmative Action

A. Affirmative Action in Admissions

***Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016)**

The US Supreme Court upheld the constitutionality of University of Texas at Austin's affirmative action program. In its second consideration of *Fisher's* challenge to UT's program, the Court confirmed that universities must prove that race is considered only as necessary to meet the permissible goals of affirmative action. In particular, the university must prove that "race-neutral alternatives" will not suffice to meet these goals. (*See* Legal Update, July 2017 for further discussion.)

The Court confirmed that universities must prove that race is considered only as necessary to meet the permissible goals of affirmative action. In particular, the university must prove that "race-neutral alternatives" will not suffice to meet these goals. This was the most controversial aspect of the *Fisher I* decision. In *Fisher II*, though, the Court takes a reasonable approach, finding that UT had sufficient evidence that its "Top Ten" admissions policy based on class rank was not adequate, by itself, to meet diversity goals. By adding a "holistic" evaluation of applicants who were not admitted in the "Top Ten" program, UT was able to consider race as one factor in a broader assessment of qualifications.

The Court noted that the “prospective guidance” of its decision is limited to some extent by the particularities of the UT case. Despite this, the Court’s decision does provide important guidance to universities concerning the criteria that will be applied in evaluating affirmative action programs. The Court also emphasizes that universities have “a continuing obligation” to “engage [] in periodic reassessment of the constitutionality, and efficacy, of [their] admissions program[s].” While this requires ongoing study and evaluation by universities, the Court’s decision creates a significant and positive basis for universities to adopt affirmative action programs that meet constitutional requirements.

B. Sexual Misconduct – Title IX

Letter from Office of Civil Rights, Department of Education, (Sept. 22, 2017)

In a Dear Colleague Letter issued on September 22, 2017 the Department of Education announced its withdrawal of the 2011 Dear Colleague Letter and the related 2014 "Q&A" guidance. The Department also issued a Q&A on Campus Sexual Misconduct and announced it intends to conduct a notice and comment rulemaking process. The 2017 letter and Q&A’s largely revert to the guidance that predated the 2011 Dear Colleague Letter, though they offer certain specific advice that extends beyond the earlier guidance.

Article: Aaron Nisenson, Constitutional Due Process and Title IX Investigation and Appeal Procedures at Colleges and Universities, 120 Penn State Law Review 963 (Spring 2016)

Over the last several years, the federal government has been pressing universities and colleges to strengthen the processes used for the investigation, discipline, and appeal of sexual harassment and assault cases arising under Title IX of the Education Act Amendments. Public sector universities and colleges are also obligated to provide to employees and students disciplined for sexual harassment or assault procedural protections under the Due Process Clause of the U.S. Constitution. These disparate legal obligations have led to lawsuits alleging that universities have failed to comply with the Due Process Clause when discipline has been instituted as a result of Title IX investigations or when instituting discipline. This article provides an overview of Constitutional Due Process rights and their application to public sector universities and colleges and will review recent judicial decisions addressing these rights in cases arising from investigations, discipline and appeals under Title IX. It also includes recommendations for balancing the need to address sexual misconduct on campus with the due process rights of students and employees.

VII. Immigration

A. Executive Order Banning Immigration

Trump v. Hawaii, 138 S. Ct. 2392 (2018)

On June 26, 2018 the Supreme Court of the United States by a 5-4 vote rejected a challenge to President Trump's September 2017 *Presidential Proclamation 9645 (Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public-Safety Threats)*—referred to as the “travel ban”—restricting immigration to the United States by citizens of 8 countries, most of which are predominately Muslim. In an opinion by Chief Justice Roberts, the majority relied on the national security justifications for the ruling, and held that the travel ban is fully consistent with Congress's Immigration and Nationality Act as well as the Establishment Clause of the U.S. Constitution. Justice Sonia Sotomayor, in dissent, lamented that the court had “blindly” endorsed “a discriminatory policy motivated by animosity toward Muslims.”

The case arose when, on September 24, 2017, the Trump administration issued a new (third) travel ban. The third travel ban places entry restrictions on individuals traveling to the United States from eight countries. (The two earlier bans, which had also been challenged, both expired by their own terms and the Supreme Court dismissed those challenges as moot. *See Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353, 199 L. Ed. 2d 203, (Oct. 10, 2017)(Vacating judgement as moot); *Trump v. Hawaii*, 2017 U.S. LEXIS 6367, 199 L. Ed. 2d 275, (Oct. 24 2017)(Vacating judgement as moot).) The state of Hawaii and others challenged the third travel ban, arguing that it violated both federal law and the US Constitution. On October 18 and 20, 2017, two federal district court judges, in Hawaii and Maryland, issued nationwide preliminary injunctions against enforcement of the third travel ban. The Court of Appeals upheld the Hawaii injunction. *Hawaii v. Trump*, 878 F.3d 662, (9th Cir. Haw., Dec. 22, 2017). The Trump administration appealed to the Supreme Court which granted certiorari.

In March 2018, the AAUP joined with the American Council on Education and other higher education groups in submitting an *amicus* brief to the Supreme Court opposing this third travel ban. (The AAUP and other higher education groups also filed an *amicus* brief opposing the earlier bans in *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (June 26, 2017) (No. 16-1436)(granting cert and granting stay in part), 138 S. Ct. 353, 199 L. Ed. 2d 203, (Oct. 10, 2017)(Vacating judgement as moot).) The brief explained that “*amici* share a strong interest in ensuring that people from around the world, including the eight countries identified in the challenged Presidential Proclamation, are not barred or deterred from entering the United States and contributing to American colleges and universities.” The *amicus* brief argued that “foreign students, faculty and researchers come to this country because our institutions are rightly perceived as the destinations of choice compared to all others around the globe.” The most recent travel ban, together with the first two travel ban executive orders, “altered those positive

perceptions with the stroke of a pen.” Its “clarion message of exclusion” says that “America’s doors are no longer open to foreign students, scholars, lecturers, and researchers.” The brief concluded “American colleges and universities ‘have a mission of “global engagement” and rely on . . . visiting students, scholars, and faculty to advance their educational goals.’ *Washington v. Trump*, 847 F.3d 1151, 1160 (9th Cir. 2017). That vital mission cannot be achieved if American immigration policy no longer sends a welcoming message to the members of the international community who wish to enter our campus gates. . . the Proclamation jeopardizes the many contributions that foreign students, scholars, and researchers make to American colleges and universities, as well as our nation’s economic and general well-being.”

However, the majority of the court rejected the challenges to the travel ban. In his opinion for the majority, Roberts first rejected the argument that the travel ban exceeds the president’s authority under federal immigration law. Section 1182 (f) of the Immigration and Nationality Act, Roberts explained, “exudes deference” to the president, giving him “broad discretion to suspend” the entry of noncitizens into the United States. Under this provision, Roberts reasoned, the president can block noncitizens from coming into the United States if he determines that allowing them to enter “would be detrimental to the interests of the United States.” And the president has done exactly that here, Roberts emphasized, because the travel ban was a result of a “worldwide, multi-agency review” that concluded that the entry restrictions in the travel ban were necessary, for example, to prevent foreign nationals from coming to the United States from countries that did not share enough information about their citizens to allow U.S. immigration officials to vet them properly. In his decision Roberts declined to address the significant policy grounds against the ban, such as those advanced in the ACE/AAUP amicus brief, explaining that the “inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.” In short, Roberts concluded, “the language of Section 1182(f) is clear, and the Proclamation (travel ban) does not exceed any textual limit on the president’s authority.”

The court also ruled that the travel ban is permitted by the Establishment Clause of the First Amendment to the U.S. Constitution. Under the court’s cases, Roberts suggested, the justices would normally only look at whether the travel ban is neutral on its face---that is, whether it applies to all religions equally. But even if they look beyond the text of the travel ban as other evidence of the president’s intent, Roberts continued, the travel ban still survives because it is based on a legitimate purpose:” preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.” Roberts dismissed the state’s contention that the travel ban applies too broadly and “does little to serve national security interests,” responding that courts should not substitute their own judgment for that of the executive branch on national-security matters, which he characterized as “delicate,” “complex,” and involving “large elements of prophecy.”

While the majority did not directly address the issues raised in the ACE/AAUP amicus brief, the brief was directly cited in dissents authored by Justices Breyer and Sotomayor. In

response to the government’s argument that regarding waivers granted by the state department, the dissent by Justice Breyer (joined by Justice Kagan) explained, “*Amici* have suggested that there are numerous applicants who could meet the waiver criteria. For instance, the Proclamation anticipates waivers for those with ‘significant business or professional obligations’ in the United States, §3(c)(iv)(C), **and amici identify many scholars who would seem to qualify. Brief for Colleges and Universities as Amici Curiae 25–27**; Brief for American Council on Education et al. as *Amici Curiae* 20 (identifying more than 2,100 scholars from covered countries); see also Brief for Massachusetts Technology Leadership Council, Inc., as *Amicus Curiae* 14–15 (identifying technology and business leaders from covered countries).” (Emphasis added.)

Similarly the dissent by Justice Sotomayor (joined by Justice Ginsburg) began by observing that ours is “a Nation built upon the promise of religious liberty,” with “the principle of religious neutrality” embedded in the First Amendment.” Justice Sotomayor lamented that the majority’s decision “fails to safeguard that fundamental principle” by “leav[ing] undisturbed” a discriminatory policy that “now masquerades behind a façade of national-security concerns.” Near the end of her lengthy dissent ACE/AAUP’s amicus brief was cited in support of the conclusion that “plaintiffs and their *amici* have convincingly established that ‘an injunction is in the public interest.’ *Winter*, 555 U. S., at 20. **As explained by the scores of amici who have filed briefs in support of plaintiffs, the Proclamation has deleterious effects on our higher education system;**⁸ national security;⁹ healthcare;¹⁰ artistic culture;¹¹ and the Nation’s technology industry and overall economy.¹² Accordingly, the Court of Appeals correctly affirmed, in part, the District Court’s preliminary injunction.¹³ [**See Brief for American Council on Education et al. as Amici Curiae**; Brief for Colleges and Universities as *Amici Curiae*; Brief for New York University as *Amicus Curiae*.]” (Emphasis added, footnotes omitted.)

***Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (June 26, 2017)(granting cert and granting stay in part), 138 S. Ct. 353 (Oct. 10, 2017)(vacating judgement as moot)**

The Supreme Court case arose out of appeals from two lower court decisions addressing the travel ban, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. June 12, 2017) and *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. May 25, 2017). In *Hawaii v. Trump*, plaintiffs brought suit challenging the legality of the travel ban. The federal district court preliminarily enjoined the federal government from enforcing certain sections of the travel ban. The government appealed, and the Court of the Appeals for the Ninth Circuit largely upheld the district court’s ruling. The Ninth Circuit found that the President exceeded his authority in issuing an order excluding nationals of specified countries from entry into the United States since there were no adequate findings that entry of excluded nationals would be detrimental to the interests of the United States, that present vetting standards were inadequate, or that absent improved vetting procedures there likely would be harm to the national interests. It also held that the travel ban improperly suspended entry of the nationals on the basis of their country of origin, since the travel

ban in substance operated as a prohibited discriminatory ban on visa issuance on the basis of nationality. Finally, it ruled that restricting entry of refugees and decreasing the annual number of refugees who could be admitted was improper since there was no showing that the entry of refugees was harmful and procedures for setting the annual admission of refugees were disregarded.

In *Int'l Refugee Assistance Project v. Trump*, after the district court concluded that Plaintiffs had standing to sue, it found that Plaintiffs were likely to succeed on the merits of their Establishment Clause claim and issued a preliminary injunction against enforcement of the travel ban. The Court of Appeals for the Fourth Circuit affirmed in part, holding that the political branches' plenary power over immigration is subject to constitutional limitations and that, "Where plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith," courts are required to look beyond that stated, facially legitimate rationale for evidence the rationale is not genuine. In this case, the court examined the travel ban in the context of statements made by the president during the 2016 campaign season and found that it "drip[ped] with religious intolerance, animus, and discrimination." The court held that the preliminary injunction was proper because it could likely be shown that the Muslim travel ban violated the Establishment Clause because its primary purpose was religious, based on evidence that it was motivated by the President's desire to exclude Muslims from the United States. The court also rejected the government's reliance on allegations of harm to national security interests finding they did not outweigh the competing harm of the likely constitutional violation and because it was plausibly alleged that the stated national security purpose was provided in bad faith.

The Supreme Court of the United States consolidated these cases and on June 26, 2017, the Supreme Court granted the government's *petition for writ of certiorari* and issued a brief opinion allowing the government to enforce the Muslim travel ban, with an exception for travelers and refugees who have a "credible claim" of a genuine relationship with an individual or institution in the United States. When that relationship is with an institution, the relationship must be a genuine one, rather than one created just to get around the Muslim travel ban.

On September 18, 2017, the AAUP joined with the American Council on Education and other higher education associations, in an *amicus* brief filed in the Supreme Court that opposes the travel ban. The brief specifically noted the harm to faculty: "From the moment [travel ban] was signed, . . . [f]aculty recruits were . . . deterred from accepting teaching and research positions. And scholars based abroad pulled out of academic conferences in the United States, either because they were directly affected by the [travel ban] or because they are concerned about the [travel ban's] harmful impact on academic discourse and research worldwide." It is difficult to overstate the importance of conferences, colloquia, and symposia to scholarly communication. They enable intellectual give-and take and real-time digestion and discussion of research. Conferences also allow for in-person encounters and discussions that give rise to important future collaborations."

The brief concluded "American colleges and universities 'have a mission of 'global engagement' and rely on . . . visiting students, scholars, and faculty to advance their educational goals.' *Washington v. Trump*, 847 F.3d 1151, 1160 (9th Cir. 2017). That vital mission cannot be

achieved if American immigration policy no longer sends a welcoming message to the members of the international community who wish to enter our campus gates. As explained above, the [travel ban] jeopardizes the many contributions that foreign students, scholars, and researchers make to American colleges and universities, as well as our nation’s economy and general well-being.”

The travel ban expired by its own terms in late 2017. Therefore, on October 10, 2017, the Court vacated the judgment of the Fourth Circuit and remanded the case with instructions to dismiss the case as moot due to the September 24, 2017 expiration of certain parts of the travel ban. *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (Oct. 10, 2017)(vacating judgement as moot). On October 24, 2017, vacated the judgement of the Ninth Circuit and remanded the case with instructions to dismiss the case as moot due to the October 24, 2017 expiration of another provision of the travel ban. *Trump v. Hawaii*, 2017 U.S. LEXIS 6367, 199 L. Ed. 2d 275, (Oct. 24 2017)(vacating judgement as moot.)

VIII. Collective Bargaining Cases and Issues – Private Sector

A. NLRB Authority

1. Religiously Affiliated Institutions

***Pacific Lutheran University*, 361 N.L.R.B. 157 (2014)**

In this case the National Labor Relations Board published a significant decision expanding the organizing rights of private-sector faculty members. The Board modified the standards used to determine two important issues affecting the ability of faculty members at private-sector higher education institutions to unionize under the National Labor Relations Act: first, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities; and second, whether certain faculty members are managers, who are excluded from protection of the Act. (*see infra*) However, both holdings may be overturned by a newly constituted Board.

In its decision the NLRB ruled that it had jurisdiction over the petitioned for faculty members, even though they were employed at a religious institution. The question of whether faculty members in religious institutions are subject to jurisdiction and coverage of the Act has long been a significant issue, with the Supreme Court’s 1979 decision in *Catholic Bishop* serving as the foundation for any analysis. In *Pacific Lutheran University (PLU)*, the Board established a two-part test for determining jurisdiction. First, whether “as a threshold matter, [the university] holds itself out as providing a religious educational environment”; and if so, then, second, whether “it holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school’s religious educational environment.”

The employer and its supporters argued that only the threshold question of whether the university was a bona fide religious institution was relevant, in which case the Act would not apply to any faculty members. The Board responded that this argument “overreaches because it focuses solely on the nature of the institution, without considering whether the petitioned-for faculty members act in support of the school’s religious mission.” Therefore, the Board established a standard that examines whether faculty members play a role in supporting the school’s religious environment.

In so doing, the Board recognized concerns that inquiry into faculty members’ individual duties in religious institutions may involve examining the institution’s religious beliefs, which could intrude on the institution’s First Amendment rights. To avoid this issue the new standard focuses on what the institution “holds out” with respect to faculty members. The Board explained, “We shall decline jurisdiction if the university ‘holds out’ its faculty members, in communications to current or potential students and faculty members, and the community at large, as performing a specific role in creating or maintaining the university’s religious purpose or mission.”

The Board also found that that faculty must be “held out as performing a *specific religious function*,” such as integrating the institution’s religious teachings into coursework or engaging in religious indoctrination (emphasis in original). This would not be satisfied by general statements that faculty are to support religious goals, or that they must adhere to an institution’s commitment to diversity or academic freedom. Applying this standard, the Board found that while Pacific Lutheran University held itself out as providing a religious educational environment, the petitioned-for faculty members were not performing a specific religious function. Therefore, the Board asserted jurisdiction and turned to the question of whether certain of the faculty members were managerial employees.

However, this holding is very susceptible to reversal by a newly constituted Board, and the holding drew dissents from both Republican members of the Board. The NLRB would not be able to modify *PLU* until one or more cases with these issues come to the Board on appeal. In recent unfair labor practice cases, the Board rejected attempts by several religiously affiliated universities to overturn earlier election decisions where the Board asserted jurisdiction. *See Xavier University*, Case 3–CA–204564 (NLRB March 9, 2018). However, these were generally procedural rulings that do not portend the Board affirming the *Pacific Lutheran* standard substantively in later cases. One of these cases involving Duquesne University was recently appealed to the United States Court of Appeals for the District of Columbia Circuit, and the Court may address the standard there. *Duquesne v. NLRB*, appeal docketed, No.18-1063 (D.C. Cir. March 1, 2018).

2. Faculty as Managers

***Pacific Lutheran University*, 361 N.L.R.B. 157 (2014)**

In this case the National Labor Relations Board published a significant decision expanding the organizing rights of private-sector faculty members. The Board modified the standards used to determine two important issues affecting the ability of faculty members at private-sector higher

education institutions to unionize under the National Labor Relations Act: first, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities (*see supra*); and second, whether certain faculty members are managers, who are excluded from protection of the Act. In addressing this second issue, the Board specifically highlighted, as AAUP had in its *amicus* brief submitted in the case, the increasing corporatization of the university. However, this holding is susceptible to reversal under a newly constituted Board.

This case started when faculty members at Pacific Lutheran University petitioned for an election to be represented by a union. The university challenged the decision to hold the election, claiming that some or all of the faculty members were managers and therefore ineligible for union representation. The NLRB Regional Director ruled in favor of the union and found that the faculty in question do not have enough managerial authority to be precluded from unionizing. Pacific Lutheran asked the NLRB to overturn this ruling. The NLRB invited briefs from interested parties on the questions regarding whether university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded as managers and whether the NLRB has jurisdiction over faculty members at religious educational institutions.

In March 2014, the AAUP submitted an *amicus* brief urging the NLRB to consider the full context when determining whether faculty at private colleges are managerial. The brief described the significant changes in university hierarchical and decision-making models since the US Supreme Court ruled in 1980 that faculty at Yeshiva University were managerial employees and thus ineligible to unionize. The AAUP brief urged the NLRB to consider, when determining the managerial status of faculty, factors such as the extent of university administration hierarchy, the extent to which the administration makes academic decisions based on market-based considerations, the degree of consultation by the administration with faculty governance bodies, whether the administration treats faculty recommendations as advisory rather than as effective recommendations, whether the administration routinely approves nearly all faculty recommendations without independent administrative review, and whether conflict between the administration and the faculty reflects a lack of alignment of administration and faculty interests.

In its decision the NLRB ruled that it had jurisdiction over the petitioned for faculty members, even though they were employed at a religious institution, and that the faculty members were not managers. This second question arises from the Supreme Court's decision in *Yeshiva*, where the Court found that in certain circumstances faculty may be considered "managers" who are excluded from the protections of the Act. The Board noted that the application of *Yeshiva* previously involved an open-ended and uncertain set of criteria for making decisions regarding whether faculty were managers. This led to significant complications in determining whether the test was met and created uncertainty for all of the parties.

Further, in explaining the need for the new standard, the Board specifically highlighted, as AAUP had in its *amicus* brief, the increasing corporatization of the university. The Board stated, "Indeed our experience applying *Yeshiva* has generally shown that colleges and universities are increasingly run by administrators, which has the effect of concentrating and centering authority

away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself. Such considerations are relevant to our assessment of whether the faculty constitute managerial employees.”

In *Pacific Lutheran*, the Board sought to create a simpler framework for determining whether faculty members served as managers. The Board explained that under the new standard, “where a party asserts that university faculty are managerial employees, we will examine the faculty’s participation in the following areas of decision making: academic programs, enrollment management, finances, academic policy, and personnel policies and decisions.” The Board will give greater weight to the first three areas, as these are “areas of policy making that affect the university as whole.” The Board “will then determine, in the context of the university’s decision making structure and the nature of the faculty’s employment relationship with the university, whether the faculty actually control or make effective recommendation over those areas. If they do, we will find that they are managerial employees and, therefore, excluded from the Act’s protections.”

The Board emphasized that to be found managers, faculty must in fact have actual control or make effective recommendations over policy areas. This requires that “the party asserting managerial status must prove actual—rather than mere paper—authority. . . . A faculty handbook may state that the faculty has authority over or responsibility for a particular decision-making area, but it must be demonstrated that the faculty exercises such authority *in fact*.” Proof requires “specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision making area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed.” Further, the Board used strong language in defining “effective” as meaning that “recommendations must almost always be followed by the administration” or “routinely become operative without independent review by the administration.”

University of Southern California v. National Labor Relations Board, appeal docketed, No. 17-1149 (D.C. Cir. 2017)

This case arose when SEIU filed a petition to represent non-tenure-track full-time and part-time faculty in two colleges within USC. USC objected to the petition arguing that the faculty were managers under *Yeshiva*. The Board applied the test established in *Pacific Lutheran University*, 361 NLRB 1404 (2014) (in which AAUP had also filed an *amicus* brief) and found that the faculty in the units were not managerial and therefore were eligible to unionize. After the union won the election in the Roski School of Art and Design, USC refused to bargain citing its objection, and the Board ordered USC to bargain. USC appealed to the US Court of Appeals for the DC Circuit arguing that the faculty had no right to unionize as they were managerial employees.

The AAUP submitted an *amicus* brief December 28, 2017 to the US Court of Appeals for the DC Circuit urging the Court to uphold the NLRB’s determination that non-tenure-track faculty at USC are not managerial employees. The brief supported the legal framework established by the NLRB in *Pacific Lutheran University* and describes in detail the significant changes in university hierarchical and decision-making models since the US Supreme Court ruled in 1980 that faculty at Yeshiva University were managerial employees and thus ineligible to unionize under the National Labor Relations Act. Specifically, the Board concluded that USC had not proven that non-tenure-track faculty actually exercise control or make effective recommendations about policies that affect the university as a whole. The brief focused on the fundamental structural and operational changes in universities during the more than three decades since *NLRB v. Yeshiva University*. Universities have adopted a corporate model of decision-making and employment relations that has reduced faculty authority in university policy-making and has created conflicts of interests between faculty and university administrations. Rather than relying on faculty expertise and recommendations, the growing ranks of university administrators have engaged increasingly in unilateral top-down decision-making, often influenced by considerations of external market forces and revenue generation. At the same time, universities have cut back on tenure-track/tenured positions and greatly expanded non-tenure-track faculty positions. Under these conditions, universities’ assertions that faculty are managerial are often based only on “paper authority” rather than actual authority or effective recommendations by faculty in university policy-making.

3. Graduate Assistants’ Right to Organize

***Columbia University*, 364 N.L.R.B. 90 (2016)**

Echoing arguments made by the AAUP in an *amicus* brief, the National Labor Relations Board held that student assistants working at private colleges and universities are statutory employees covered by the National Labor Relations Act. The 3–1 decision overrules a 2004 decision in *Brown University*, which had found that graduate assistants were not employees and therefore did not have statutory rights to unionize. However, this decision is susceptible to reversal under a newly constituted Board.

The AAUP filed an *amicus* brief with the Board arguing that extending collective bargaining rights to student employees promotes academic freedom and does not harm faculty-student mentoring relationships, and instead would reflect the reality that the student employees were performing the work of the university when fulfilling their duties. In reversing *Brown*, the majority said that the earlier decision “deprived an entire category of workers of the protections of the Act without a convincing justification.” The Board found that granting collective bargaining

rights to student employees would not infringe on First Amendment academic freedom and, citing the AAUP *amicus* brief, would not seriously harm the ability of universities to function. The Board also relied on the AAUP *amicus* brief when it found that the duties of graduate assistant constituted work for the university and were not primarily educational.

Despite the instability that this would add to the NLRB's precedents, the newly constituted NLRB could overrule *Columbia University* and return to the *Brown University* holding that graduate assistants are not employees under the NLRA. In *Columbia*, Republican-appointed member Miscimarra filed a vigorous dissent arguing that the Board's earlier decision and reasoning in *Brown* were correct. *Id.* at 24-25. The position in this dissent would likely represent the position of the majority of the new Republican-dominated Board.

Unions representing graduate student employees have withdrawn pending NLRB petitions and charges, and are not filing new petitions or charges, which would result in the NLRB not having the opportunity to review and reverse or modify the *Columbia University* decision. Therefore, it appears that there are not currently any pending cases before the NLRB that would allow the NLRB to overrule *Columbia University*. However, it is possible that such a case could reach the NLRB.

B. Bargaining Units

***Yale University*, 365 N.L.R.B. 40 (2017); *PCC Structurals, Inc.*, 365 N.L.R.B. 160 (2017); *University of Pennsylvania*, 04-RC-199609 (NLRB Reg. 4, Dec. 19, 2017)**

Another area in which there has recently been significant change is in the standard for determining the appropriate bargaining unit for collective bargaining. In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), the Board modified its standards for making unit determinations when a representation petition is filed and clarified that a unit proposed by the union, even a small one, would be appropriate when a petitioned-for unit consists of employees who are readily identifiable as a group, and the employees in the group share a community of interest, unless the party seeking a larger unit demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit. However, in *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017) the new Board overruled *Specialty Health Care*, throwing into question recent decisions of the Board on bargaining units at colleges and universities.

In *Yale University*, 365 NLRB No. 40 (Feb. 22, 2017), the NLRB applied the *Specialty Healthcare* standard and approved an election for graduate students in nine separate units. Yale contended that the graduate students were not employees, asserting that the Board's earlier *Columbia University* decision was wrongly decided, and alternatively even under that standard the graduate students were not employees.

On December 15, 2017, one day before Chairman Philip A. Miscimarra's term on the Board expired, the Board issued *PCC Structural, Inc.*, 365 NLRB No. 160 (N.L.R.B. December 15, 2017), which overruled *Specialty Healthcare* and reinstated the prior community-of-interest standard for determining an appropriate bargaining unit in union representation cases. Newly appointed members Marvin E. Kaplan (R) and William J. Emanuel (R) joined Miscimarra in the 3-2 decision. This important decision was issued without the normal request for *amicus* briefs, and it was followed by a NLRB General Counsel Memorandum, OM 18-05, that specifies that employers will be allowed to raise issues with previously determined or agreed to bargaining units.

On December 19, 2017, Regional Director Dennis Walsh applied the Board's new standard to an election petition involving graduate students at the University of Pennsylvania. *University of Pennsylvania*, 04-RC-199609 (NLRB Reg. 4, Dec. 19, 2017). The Regional Director outlined the legal standard under *PCC Structural*.

The Act requires only that a petitioner seek representation of employees in an appropriate unit, not in the most appropriate unit possible. *Overnite Transportation Co.*, 322 NLRB 723 (1996). Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. When the Board determines that the employees in the unit sought by a petitioner share a community of interest, the Board must next evaluate whether the interests of that group are "sufficiently distinct from those of other [excluded] employees to warrant establishment of a separate unit." *PCC Structural*, 365 NLRB No. 160, slip op. at 7 (Dec. 15, 2017) quoting *Wheeling Island Gaming*, 355 NLRB 637, 642 fn. 2 (2010). Specifically, the inquiry is whether "excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *PCC Structural*, *supra*, slip op. at 11, quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016). In making this assessment, *PCC Structural* instructs the decision-maker to assess [w]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *Id.*, slip op. at 5 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). Particularly important in considering whether the unit sought is appropriate are the organization of the facility and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, 1069 fn. 5

(1981). However, all relevant factors must be weighed in determining community of interest.

Id. at 21.

Applying these standards, Walsh directed that students from the business and engineering schools — who were previously excluded — must also be included in the bargaining unit:

[B]ased on the record and relevant Board cases, including the Board’s recently minted decision in *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017) overturning *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. 727 F.3d 552 (6th Cir. 2013), I find, in agreement with the Employer, that a unit limited to graduate student employees in the seven petitioned-for schools is not appropriate, and that to constitute an appropriate unit it must also include graduate students in both the Wharton School and the School of Engineering and Applied Science because the interests of the former group are not sufficiently distinct from those of the latter group to warrant a separate unit.

Id. at 2.

In February 2018 the union in the University of Pennsylvania case withdrew its election petition and therefore the Board will not address the bargaining unit standard in this case.

C. NLRB Elections

NLRB Election Rules, 29 CFR Parts 101, 102, and 103; Request for Information Regarding Representation Election Regulations, RIN 3142-AA12 (NLRB Dec. 14, 2017)

In December 2014 the NLRB issued revisions to union election rules that vastly simplified and expedited the election process. However, this election rule may be retracted or changed by the new Board based on a recent Request for Information.

On December 15, 2014, the Board published the Election Rule, which amended the Board’s prior Election Regulations. 79 Fed. Reg. 74308 (2014). The final rule became effective on April 14, 2015, and has been applicable to all representation cases filed on or after that date. Lawsuits challenging the facial validity of the Election Rule were rejected, with the Courts finding that the changes were not arbitrary or capricious and did not violate federal statutes or the Constitution. *See Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 218 (5th Cir. 2016) (The “rule, on its face, does not violate the National Labor Relations Act or the Administrative Procedure Act[.]”); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 220 (D.D.C. 2015).

The 2014 Election Rule includes the following: Provides for electronic filing and transmission of election petitions and other documents; Ensures that employees, employers and

unions receive timely information they need to understand and participate in the representation case process; Eliminates or reduces unnecessary litigation, duplication and delay; Adopts best practices and uniform procedures across regions; Requires that additional contact information (personal telephone numbers and email addresses) be included in voter lists, to the extent that information is available to the employer, in order to enhance information sharing by permitting other parties to the election to communicate with voters about the election; and Allows parties to consolidate all election-related appeals to the Board into a single appeals process. Cumulatively, these changes will likely reduce the time from the filing of a representation petition to the holding of an election to between 10 and 20 days.

Some of the new provisions are particularly important for faculty members. For example, the new election rules require that employers provide the union with personal email addresses and phone numbers for employees. This is particularly important for reaching out to contingent faculty, who often perform most of their work off campus. Also, parties must be aware that the NLRB representation hearing and election process is extremely fast paced and the NLRB will rarely grant requests for extensions of time. Therefore, parties should be fully aware of the revised rules and prepared for the hearing and election process prior to filing any election petition with the NLRB.

However, a recent Request for Information issued by the Board indicates the Board may modify or rescind the 2014 election rule. On December 14, 2017, the National Labor Relations Board published a Request for Information in the Federal Register, asking for public input regarding the Board's 2014 Election Rule, which modified the Board's representation-election procedures located at 29 CFR parts 101 and 102. The Board sought information from interested parties regarding three questions:

1. Should the 2014 Election Rule be retained without change?
2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be changed?

Responses to this request were originally due on April 18, 2018.

The Request for Information was approved by former Board Chairman Philip A. Miscimarra and Board Members Marvin E. Kaplan (now Chairman) and William J. Emanuel. Board Members Mark Gaston Pearce and Lauren McFerran dissented. The majority noted that the request "does not suggest even a single specific change in current representation election procedures." *Id.* at 3. However, member McFerren in a dissent argued that "the nature and timing of this [request], along with its faulty justifications, suggests that the majority's interest lies . . . in

manufacturing a rationale for a subsequent rollback of the Rule in light of the change in the composition of the Board.” *Id.* at 11.