AAUP Annual Legal Update

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I. Introduction

This 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.

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 the 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 US 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note, a previous opinion by the Ninth Circuit in this case dated September 4, 2013 and published at 729 F.3d 1011 was withdrawn and substituted with this opinion.)*** Adopting an approach advanced in AAUP's *amicus* brief, the court emphasized the seminal importance of academic speech.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.*, 699 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*, 919 F.3d 847 (5th Cir. March 22, 2019)**

On March 22, 2019, the Fifth Circuit issued a decision finding that Professor Teresa Buchanan's termination for her classroom use of profanity and discussion of sex did not violate her First Amendment right to freedom of speech. While the court acknowledged that certain classroom speech was protected by the First Amendment, the court held that Buchanan's speech was not protected as it did not serve an academic purpose.

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. Buchanan's dean recommended her dismissal and 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, and instead recommended that she be censured. 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 the termination violated her First Amendment right to free speech, 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.

In its ruling the Court of Appeals explained the overall standard applied to speech in college classrooms.

> The Supreme Court has established that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." Accordingly, "classroom discussion is protected activity." However, even this protection has limits: Students, teachers, and professors are not permitted to say anything and everything simply because the words are uttered in the classroom context.

In order to receive First Amendment protection, classroom speech must involve a "matter of public concern." "This court has held that, in the college classroom context, speech that does not serve an academic purpose is not of public concern." In ruling that Buchanan's speech was not protected, the court found "that Dr. Buchanan's use of profanity and discussion of her sex life and the sex lives of her students was not related to the subject matter or purpose of training Pre-K–Third grade teachers." Since the court found that Buchanan's speech was not protected, it held that her termination did not violate the First Amendment. The court also dismissed Buchanan's claims that

the harassment policy was unconstitutional as it found that Buchanan had not sued to proper party for this claim. Therefore, the court did not address the substantive arguments regarding the constitutionality of the policy.

The AAUP filed an *amicus* brief, written primarily by Risa Lieberwitz with contributions from Aaron Nisenson and Nancy Long, which 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.

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. "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.

***EXECUTIVE ORDER, Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities* (D. Trump March 21, 2019)**

On March 21, 2019, President Trump issued an Executive Order entitled "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities." While the President had

made statements regarding higher education that were highly charged, the Executive Order itself was extremely thin. In its purpose section the Order states:

> [My] Administration seeks to promote free and open debate on college and university campuses. Free inquiry is an essential feature of our Nation's democracy, and it promotes learning, scientific discovery, and economic prosperity. We must encourage institutions to appropriately account for this bedrock principle in their administration of student life and to avoid creating environments that stifle competing perspectives, thereby potentially impeding beneficial research and undermining learning.

The Executive Order's provisions addressing free speech and "free inquiry" were very brief and unspecific.

> Sec. 2. Policy. It is the policy of the Federal Government to: (a) encourage institutions to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions; . . .
>
> Sec. 3. Improving Free Inquiry on Campus. (a) To advance the policy described in subsection 2(a) of this Order, the heads of covered agencies shall, in coordination with the Director of the Office of Management and Budget, take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies.

As the AAUP has noted, "the executive order itself is a solution in search of a problem--as the order notes, colleges and universities already have policies protecting free expression on campus, and, in the case of public institutions, are bound by the First Amendment. Given the vague nature of the order, much depends on implementation. It remains to be seen if the executive order, in allowing cabinet agencies to draw up their own guidelines that could outline what the administration considers noncompliance, will have an impact on federal research and education grants."

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

***Uradnik v. Inter Faculty Organization,* 2018 U.S. Dist. LEXIS 165951 (Sept. 27, 2018) *cert denied, 18-3086* (U.S. April 29, 2019) and *Bierman, et. al., v. Tim Walz, Governor of Minnesota,* et. al, 900 F. 3d 570 (8th Cir. 2018) *cert denied, 18-766* (U.S. May 13, 2019)**

A number of anti-union organizations are advancing cases that assert that "exclusive representation" by public sector unions is unconstitutional. The Supreme Court has clearly held that exclusive representation is constitutional in a case involving college faculty members. *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984). However, plaintiffs have argued that the Court's recent decision in *Janus* overruled, or at least brought into question, its holding in *Knight*. The lower courts have uniformly ruled against the challenges to exclusive representation, finding that *Knight* remained binding precedent, and that exclusive representation is constitutional. *See Mentele v. Inslee*, 916 F.3d 783, 789 (9th Cir. 2019) ("[W]e apply *Knight*'s more directly applicable precedent, rather than relying on the passage [plaintiff] cites from *Janus*, and hold that Washington [State]'s authorization of an exclusive bargaining representative does not infringe [plaintiff's] First Amendment rights. . . Even if we assume that *Knight* no longer governs the question presented by [plaintiff's] appeal, we would reach the same result."); *See also Branch v. Commonwealth Emp't Relations Bd.*, 481 Mass. 810 (April 9, 2019)(citing recent cases).

Nonetheless, some of these cases are being appealed to the US Supreme Court in hopes that the Court will overturn its prior precedent. Last term, the US Supreme Court denied petitions for a writ of certiorari in both cases, *Uradnik v. Inter Faculty Organization,* 2018 U.S. Dist. LEXIS 165951 (Sept. 27, 2018) *cert denied,* 18-3086 (U.S. April 29, 2019) and *Bierman, et. al., v. Tim Walz, Governor of Minnesota, et. al,* 900 F. 3d 570 (8th Cir. 2018) *cert denied,* 18-766 (U.S. May 13, 2019).

However, a petition for review is pending in at least one case, *Reisman v. Associated Faculties of Univ. of Maine,* 939 F.3d 409 (1st Cir. 2019) *cert petition filed,* 19-847 (U.S. Jan. 2, 2020), and there are a number of other similar challenges that are winding their way through the lower courts. The legal department is monitoring these cases, and if the Court grants certiorari, AAUP would submit an amicus brief in favor of maintaining exclusive representation.

E. Agency Fee

***Janus v. American Federation of State, County, and Municipal Employees, Council 31,* 138 S. Ct. 2448 (2018)**

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."

***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 childcare 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 (the "good faith defense") 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, several district courts rejected claims 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); *Hoffman v. Inslee*, No. 14-CV-200 (MJP), 2016 WL 6126016, at *5 (W.D. Wash. Oct. 20, 2016).

Litigation Seeking Pre-Janus Refunds

On June 27, 2018, the Supreme Court in *Janus* overruled more than forty years of precedent and held that it was unconstitutional for unions to collect agency fees from non-union members in the public sector. Unions promptly stopped collecting agency fees, and refunded any fees collected after the *Janus* ruling. However, the *Janus* ruling promoted another sort of class-action lawsuit, which demands the refund of agency fees paid by public employees who were not union members prior to the date *Janus* was issued. Numerous lawsuits have been filed and are seeking an estimated $150 million in refunds. The legal theory underpinning these suits is that even though the agency fees (or "fair-share fees" or "representation fees") were legal when they were collected, Supreme Court decisions that overrule precedents in civil cases are retroactive because these decisions do not change the law but announce the "true law." Therefore, public employee who paid agency fees would be eligible for a refund. The only limit on these retroactive claims is state statutes of limitations, which are generally two or three years. Unions are thus being sued for damages under 42 U.S.C. §1983 which prohibits the violation of constitutional rights under the authority of state law ("§1983 claim"). Some Plaintiffs also seek redress under the civil retroactivity doctrine and state common-law tort claims. We have previously reported that these lawsuits have not gained traction in the federal district courts and have been uniformly dismissed. As a general rule, the federal courts have found that the unions properly stopped collecting agency fees, refunded fees collected after *Janus*, and have not sought to collect fees going forward. Courts have found that Plaintiffs' request for injunctive relief prohibiting the collection of agency fees is moot because, given the *Janus* ruling, the Union permanent shift in policy and the challenged conduct cannot be reasonably expected to recur, and declaratory relief is moot because there is no immediate legal controversy. Further, on indistinguishable facts, the federal courts have uniformly ruled that Unions that collected agency fees prior to *Janus* have a good-faith defense. As the federal courts have stressed, the collection of agency fees was authorized by state statutes and pursuant to Supreme Court precedent, and as a result, the Unions were acting in good faith.

For state common-law tort claims, Plaintiffs argue that the federal courts must first look to the most analogous common-law tort, which is generally conversion. Conversion is the strict liability tort that is unconcerned whether the Unions acted in good faith. This argument (and

arguments made for other state common-law torts, *i.e*., unjust enrichment, trespass to chattels, and replevin) has failed in every federal court.

Since our last Legal Update other relevant cases were decided:

Wenzig v. SEIU Local 668, 1:19-cv-01367 MEM, __ F. Supp. 3d __, 2019 WL 6715741 (M.D. Pa. Dec.10, 2019), Plaintiffs brought a putative class action suit seeking a declaratory judgment that the Defendant Union violated their First Amendment rights to free speech and association and 42 U.S.C. § 1983, by requiring the payment of fair-share fees as a condition of employment and by collecting such fees. Additionally, Plaintiffs sought repayment of all fair-share fees paid prior to the *Janus* ruling. The district dismissed Plaintiffs claims and held that, "[n]ineteen district courts, including this Court, and the Seventh Circuit have already rejected the same §1983 claim that Plaintiffs bring here based on the good faith defense. Despite Plaintiffs arguments that the good faith defense should not bar their suit for damages under §1983, the court finds the many cases to which SEIU cites persuasive and concurs with their conclusion that the good faith defense shields the union from liability with the respect to plaintiffs' post-*Janus* claims for damages under §1983." *See also Oliver v. SEIU Local 668*, 2:19-cv-00891 GAM, __ F. Supp. 3d __, 2019 WL 5964778 (E.D. Pa. 2019). In another Pennsylvania case, the district court dismissed Plaintiffs' §1983 claim because of the Defendant Union's good-faith belief that it was complying with statutory and constitutional law prior to *Janus*.

Smith v. N.J. Educ. Ass'n, 1:18-cv-10381 RMB KMW, __ F. Supp. 3d __, 2019 WL 6337991 (D.N.J. Nov. 27, 2019), Plaintiffs filed a putative class action complaint against the Defendant Unions seeking monetary and injunctive relief under 42 U.S.C. § 1983 for alleged First Amendment violations. The district court declined to order retrospective monetary relief because the Defendant Unions' "deduction of representation fees from non-member employees was conducted in good-faith reliance on the Supreme Court decision overruled by *Janus*, *Abood" (citations omitted).*

Some of the cases we previously reported were appealed. These appeals also failed:

*Mooney v. Ill. Educ. Ass'n, 942 F. 3d 368 (*7th Cir. 2019), Plaintiff filed a putative class action suit seeking restitution pursuant to 42 U.S.C. §1983 for the fees that had been deducted from her pay prior to *Janus*. The district court dismissed Plaintiff's claims with prejudice. In so doing, it joined a consensus across the country concluding that Unions that collected fair-share fees prior to *Janus* are entitled to assert a good faith defense to § 1983 liability. The Seventh Circuit affirmed the district court's decision and held, ". . . we agree with the district court's analysis, which finds ample support in the law."

Danielson v. Am. Fed'n of State, Cty., & Mun. Emps., Council 28, AFL-CIO, __ F.3d__, 2019 WL 7182203, No. 18-36087 (9th Cir. December 26, 2019), Plaintiff argued that other recent Supreme Court decisions had demonstrated that collection of agency fees violated the First Amendment rights of public sector employees and should be returned to workers who paid them. The federal district court in Washington dismissed the lawsuit and held that the Unions collected

the fees in good-faith and in accordance with state and federal laws. Further, the court noted that the Washington state government stopped deducting fair-share fees after the Supreme Court handed down its decision in *Janus*. The Ninth Circuit affirmed the district court decision by confirming the applicability of the good faith defense to public sector unions and dismissing Plaintiff's claims for retroactive agency fees paid prior to the Supreme Court's decision in *Janus.*

Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, AFL-CIO, 942 F. 3d 352 (7th Cir. 2019), Plaintiffs sought repayment of agency fees paid prior to the *Janus* ruling. A federal court in Illinois found that the Unions' actions were in accord with a constitutionally valid state statute and nothing presented by Plaintiffs prevented application of the good-faith defense. "Defendant AFSCME followed the law and could not reasonably anticipate that the law would change. Consequently, the Court concludes that the good-faith defense applies, and Plaintiffs are not entitled to damages." *Citations omitted.* The Seventh Circuit affirmed the district court decision by confirming the applicability of the good faith defense to public sector unions and dismissing Plaintiff's claims for retroactive agency fees paid prior to the Supreme Court's decision in *Janus.*

Wholean v. CSEA SEIU Local 2001, et al., 955 F. 3d 332 (2nd Cir. 2020)**,** in which the Second Circuit Court of Appeals affirmed the dismissal of claims against a union representing Connecticut state workers in which the plaintiffs sought to claw back fair-share fees the union had lawfully charged them before *Janus.* Joining the unanimous judicial consensus on the issue, the court recognized that the union defendant's good-faith reliance on state law barred the plaintiffs' attempts to extract refunds of fair-share fees that they had paid under then-valid state law and binding Supreme Court precedent.

While unions have consistently prevailed in the post-*Janus* cases thus far, litigation of these issues is far from over. There are additional appeals pending in the other circuit courts, with potentially more to come. We will continue to monitor these cases.

III. Academic Freedom

Glass v. Paxton, 900 F. 3d 233 (5th Cir. 2018)

The Court of Appeals for the Fifth Circuit upheld a Texas law permitting the concealed carry of handguns on campus (the "campus carry law") and a corresponding University of Texas at Austin (UT) policy prohibiting professors from banning such weapons in their classrooms. Faculty from UT filed suit and argued that the law and policy violated the First Amendment, Second Amendment, and Equal Protection Clause of the Fourteenth Amendment. The lower court dismissed the faculty's claims and the faculty appealed. In its amicus brief, the AAUP argued that the law and policy 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 appeals court rejected the faculty's claims finding that they lacked standing under the First

Amendment as it deemed that the harm was not certainly impending. The court also affirmed the dismissal of the Second Amendment and Equal Protection claims.

***McAdams v. Marquette University,* 383 Wisc. 2d 358, 914 N.W.2d 708 (2018)**

In one of the best decisions on academic freedom in decades, the Wisconsin Supreme Court, citing AAUP polices 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.

***City & Cty.of San Francisco v. Trump,* 897 F. 3d 1225 (9th Cir. 2018)**

The Circuit Court of Appeals for the Ninth Circuit declared unconstitutional the Trump administration's executive order withholding federal funds from sanctuary cities and counties. The AAUP joined an amicus brief opposing the executive order and supporting a permanent injunction preventing its enforcement. The appeals court held that under the principle of Separation of Powers and in consideration of the Spending Clause, which vests exclusive power to Congress to impose conditions on federal grants, the executive branch may not refuse to disperse the federal grants in question without congressional authorization. Because Congress has not acted, the panel affirmed the district court's decision finding that the Executive Order was unconstitutional. The appeals court upheld the permanent injunction preventing enforcement of the order against the city and county of San Francisco and in California, but lifted the nationwide injunction and sent the case back to the lower court for a more searching inquiry into the need for such relief.

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.) In November 2017, the trial court ordered the University to release the requested records, based on the trial court's finding that the subject matter of the documents had become available to the general public. On August 29, 2018, the Arizona Supreme Court denied motions by the Arizona Board of Regents for stays of the release of the records.

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 Chapter[1] 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" 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 the AAUP UW Chapter listserve; (3)

[1] 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@washington.edu. That account operates as an email 'listserver' and distributes messages to an e-mail subscriber list."

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

***Sumner v. Simpson University*, 27 Cal. App. 5th 577 (Sept. 25, 2018)**

After her employment was terminated Professor Sumner, the dean of a theological seminary (that was part of a university) sued the university for breach of contract and other causes of action. The trial court granted the university's motion for summary judgment deciding that even though Sumner was not a minister when employed as the dean of Tozer Seminary, the ministerial exception nevertheless applied to Sumner, and that all of her causes of action were barred by the ministerial exception doctrine based on the First Amendment. The trial court reasoned that Sumner's claims "are intertwined with the employment decision of retaining or terminating Sumner, and all of the grounds for terminating her relate to ecclesiastical governance."

The Court of Appeal reversed the summary adjudication of the breach of contract claim relying on *Kirby v. Lexington Theological Seminary* 426 S.W.3d 597, a case from the Supreme Court of Kentucky which held that breach of contract actions are not foreclosed by the ministerial exception (Id. at p. 601.) The Plaintiff, Kirby, was a tenured professor at Lexington Theological

Seminary and was terminated for financial reasons, after which he filed an action alleging, inter alia, breach of contract. The Kentucky Supreme Court held that because the enforcement of the contract did not arouse concerns of government interference in the selection of the school's ministers and the contract did not involve matters of ecclesiastical concern. This court further stated that as to whether applying the state's contract law would involve excessive government entanglement, Kirby's breach of contract claims did not require an inspection or evaluation of church doctrine, but merely an application of neutral principles of law. (*Kirby, supra*, 426 S.W.3d at p. 619.)

The Court of Appeal found that Dean Sumner was a ministerial employee, even if many of her duties were administrative in nature because her job requirements included a doctorate in ministry, teaching courses in religion, promoting the seminary, including preaching and she was a visionary leader. Following the reasoning of Kirby, the Court of Appeal held that Professor Sumner's breach of contract claim was not barred by the ministerial exception because "it would not require the court to wade into doctrinal waters." The Court of Appeal concluded that since Defendants has never claimed to have terminated Sumner for religious reasons, only for insubordination, they "voluntarily circumscribed their own conduct by entering into the contract with Sumner and the contract can be enforceable without breaching the institution's religious autonomy," citation omitted.

Fagal v. Marywood Univ., 786 Fed. Appx. 353, (3rd Cir. October 8, 2019)

Plaintiff, Dr. Frederick Fagal, was a tenured faculty member at Defendant, Marywood University. Dr. Fagal was suspended and ultimately terminated by Marywood following his development and distribution of two parodies which depicted members of the Marywood administration as Nazis. Following his termination, Dr. Fagal filed a complaint alleging a breach of contract in that Defendant failed to provide him with the proper process before his suspension and ultimate termination. At trial, the court granted Defendant's motion for Judgment on Partial Findings finding that "no Marywood action resulted in a breach of contract with Dr. Fagal." The Third Circuit applied a clear error standard of review for contractual language that is not unambiguous and affirmed the district court ruling.

In analyzing Pennsylvania contract law, the court found that Dr. Fagal failed to meet Pennsylvania's breach of contract rules. In Pennsylvania, "[T]he standard of review for an action for breach of a tenure contract is the same as that applicable to a contract between private parties." citations omitted. The Pennsylvania Supreme Court expressly declined to apply a deferential standard of review in contractual disputes between a private university and its professors, citation omitted. However, the Pennsylvania Supreme Court has also distinguished claims for breach of contract contesting the merits of a private university's decision to terminate a tenured professor, which are generally unreviewable if the contract exclusively reserves such decisions to the university, from claims that allege a university failed to adhere to the procedural protections

afforded to tenured professors per the terms of their employment contract, which ARE subject to judicial scrutiny," citations omitted. The court here found that Dr. Fagal failed to show that Marywood acted (or failed to act) in a manner that supported his breach of contract claim.

The Third Circuit affirmed the decision because the relevant policy language was not unambiguous, and the district court interpretation was not clearly erroneous.

***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."

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

Carlock v. Wayne State Univ., 2020 U.S. Dist. LEXIS 112660 (E.D. Mich. June 25, 2020)

The district court held that tenured professors employed at public universities have a due process right to receive adequate notice of termination and be given an opportunity to respond to allegations to a decisionmaker with the authority to enact or prevent termination. Adequate notice includes the purported reasons for termination and notice that the employer is considering or pursuing termination.

This case arises from Defendant Wayne State University's, termination of Plaintiff Leon Carlock, a tenured professor at Wayne State's medical school. Wayne State's President terminated Plaintiff after sexual harassment allegations were alleged. An investigation was held; Carlock received the complaint detailing the allegations and was interviewed by the investigator, who, after the investigation concluded, recommended the matter be referred for further proceedings and action. Plaintiff attempted to appeal but was terminated before receiving notice his appeal was rejected. Plaintiff filed suit against Wayne State and its President for denial of due process in his individual and official capacities.

The court ruled against Defendant's motion for judgment on the pleadings was denied. The court rejected Defendant's arguments that: 1) Plaintiff received due process; 2) Plaintiff was not entitled to due process before termination; and 3) Defendant had qualified immunity. Further, Plaintiff failed to receive adequate notice that his investigation could lead to a potential termination.

The court also ruled that Plaintiff was entitled to adequate due process prior to termination because post-termination processes are not always adequate remedies for pre-termination processes that violate due process rights. Notably, the University failed to follow its own termination procedures. The court also rejected Defendant's Eleventh Amendment immunity argument because it does not apply to state officials when the requested remedy is injunctive relief preventing constitutional violations. Finally, the court rejected Defendant's qualified immunity argument because the right to notice and opportunity to be heard has been clearly established in case law.

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*, 383 Wisc. 2d 358, 914 N.W.2d 708 (2018)**

(This case is also discussed in the Academic Freedom section 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 FHC], 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

***Munker v. Bd. of Supervisors of La. State Univ. Sys.*, 255 So. 3d 718 (La. App. September 19, 2018)**

Plaintiff, Dr. Reinhold Munker, a tenured professor at Louisiana State University Medical Center, filed this lawsuit against Defendant, Board of Supervisors of Louisiana State University System, alleging that he had been terminated "without prior notice and without cause" and in violation of the university's faculty handbook. He also alleged that, as a tenured professor, he "has a property interest in employment protected by the procedural due process provisions of the Fourteenth Amendment to the United States Constitution and Article 2 of the Louisiana Constitution. Defendants argued that Plaintiff submitted his resignation and voluntarily ended his

employment. The district court granted summary judgment in favor of Defendants. Plaintiff appealed to the Court of Appeal and the Court of Appeal reversed.

The Court of Appeal acknowledged that a contract existed between the parties even though Louisiana does not recognize policies in a faculty handbook as the basis of a breach of contract claim. Since the parties conceded that Plaintiff was a tenured professor, he was no longer an at-will employee and the university was bound by the terms of the faculty handbook. The court opined, "the historical purpose of tenure, which originated in higher education, was the protection of academic freedom by preventing arbitrary or repressive dismissal," citations omitted.

***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.

***Barry v. Trs. of Emmanuel Coll.,* 2019 U.S. Dist. LEXIS 20511 (D. Mass. Feb. 8, 2019)**

Plaintiff Jacqueline Barry brought a lawsuit against Defendant, Trustees of Emmanuel College alleging that they breached the terms of the contract that Defendant had with its faculty during its review of Plaintiff's application for promotion and tenure. Professor Barry claims that Defendant breached its contract with her by failing to follow the tenure process delineated in the handbook when reviewing her application.

The district court found that Plaintiff presented genuine issues of material fact regarding her breach of contract claim. Under Massachusetts law, a breach of contract claim requires a plaintiff to prove that "she had a binding contract, that the plaintiff was willing and able to perform under that contract, that defendant's breach prevented the plaintiff from performing, and that the plaintiff suffered damages," citation omitted. Massachusetts state courts have found that a college's

faculty handbook may constitute a binding contract between that college and its faculty, citations omitted. In this case, Defendant does not dispute that its handbook was a binding contract. In interpreting Defendant's handbook as a contract, the court emphasized that, as a general matter, unless there is "arbitrary and capricious conduct" by the university, courts are not to intrude into university decision-making. In this case, however, the court determined that when Defendant unilaterally modified the terms of its handbook, a genuine issue of fact arose and must be further adjudicated.

E. Ministerial Exception

***Our Lady of Guadalupe School v. Morrissey-Berru,* 140 S. Ct. 2049 (2020)**

The U.S. Supreme Court clarified the scope and applicability of the "Ministerial Exception" previously recognized by the Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). The Court determined that the four factors examined in *Hosanna-Tabor* were not a rigid test and that there was sufficient evidence in the record to conclude that the plaintiffs both performed vital religious duties that triggered *Hosanna-Tabor's* limitation on judicial interference on employment decisions of a religious nature. The 7-2 majority ruled, "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."

In the two underlying cases that were consolidated before the Supreme Court, the two plaintiffs were educators in Catholic elementary schools. As part of their employment, both teachers signed employment agreements that expressly stated that their role was to promote the religious mission of the school and received employee handbooks that stated the same. The teachers' employment agreements were not renewed, and they each filed Charges of Discrimination with the U.S. Equal Employment Opportunity Commission (EEOC)—one under the Age Discrimination in Employment Act (ADEA) and the other under the Americans with Disabilities Act (ADA). The District Court granted summary judgment to the schools applying the Ministerial Exception. The Ninth Circuit Court of Appeals reversed, holding the Ministerial Exception did not apply because the schools did not satisfy the four factors identified in *Hosanna-Tabor*.

The Supreme Court noted that the underpinning for the Ministerial Exception rests on "the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government." *OLG*, At 12. In *Hosanna-Tabor*, the Court declined "to adopt a rigid formula for deciding when an employee qualifies as a minister" but identified four relevant circumstances. The Court in *Hosanna-Tabor* was silent as to the way the four factors should be analyzed or given any weight.

The four factors identified were: 1) whether the individual was given the title of "minister, with a role distinct from that of most of its members"; 2) whether the individual's position "reflected a significant degree of religious training followed by a formal process of commissioning"; 3) whether the individual held herself out as a minister of the Church by accepting the formal call to religious services and by claiming certain tax benefits; and 4) whether the individual's "job duties reflected a role in conveying the Church's message and carrying out its mission."

In *OLG*, the Court boiled down the four factors to a critical underlying question: *what is the role of the individual in conveying the Church's message and carrying out its mission?* The Court further elucidated that the other factors simply help "shed light on that connection." The inquiry must focus on what the employee in question does and whether the functions are in furtherance of conveying the Church's message and carrying out its mission.

It is premature to determine the full practical impact of the Court's decision. It will likely allow religious organizations to assert the Ministerial Exception as a defense and to seek dismissal early in litigation. However, the Court's decision also indicates that the determination of whether the Ministerial Exception applies is fact-specific to the circumstances involved to ascertain whether the individual's role is conveying the Church's message and carrying out its mission.

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.

***Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.),* Case No. 19-2005 (1st Cir. 2020)(appeal pending)**

The current case involving Harvard is the most recent in a series of lawsuits argued over the past four decades aimed at eliminating race as one factor among the many that universities can consider when choosing whom to admit. The AAUP had joined an amicus brief in the district court that argued in favor of the Harvard policy. The district court ruled in favor of Harvard, finding that its policy did not illegally discriminate. The plaintiffs appealed, and the appellate amicus brief again argues that the Harvard policy does not constitute illegal discrimination. A decision on the appeal will likely not be issued until at least late 2020.

In ruling in favor of Harvard, Judge Burroughs agreed with the amicus brief, noting that properly implemented race-conscious admissions programs "have an important place in society and help ensure that colleges and universities can offer a diverse atmosphere that fosters learning, improves scholarship, and encourages mutual respect and understanding." In the decision finding that Harvard did not discriminate, the court emphasized that while Harvard's admissions approach was "not perfect . . . the court will not dismantle a very fine admissions program that passes constitutional muster, solely because it could do better." The judge wrote in her conclusion,

> For purposes of this case, at least for now, ensuring diversity at Harvard relies, in part, on race conscious admissions. Harvard's admission program passes constitutional muster in that it satisfies the dictates of strict scrutiny. The students who are admitted to Harvard and choose to attend will live and learn surrounded by all sorts of people, with all sorts of experiences, beliefs, and talents. They will have the opportunity to know and understand one another beyond race, as whole individuals with unique histories and experiences.
>
> It is this, at Harvard and elsewhere that will move us, one day, to the point where we see that race is a fact, but not the defining fact and not the fact that tells us what is important, but we are not there yet. Until we are, race conscious admissions programs that survive strict scrutiny will have an important place in society and help ensure that colleges and

universities can offer a diverse atmosphere that fosters learning, improves scholarship, and encourages mutual respect and understanding.

The plaintiffs appealed to the First Circuit Court of Appeals. The AAUP again joined ACE and thirty-nine other higher education organizations in an amicus brief supporting the Harvard policy. The amicus brief on appeal is thematically similar to the earlier brief filed in the case. Among other things, the amicus brief emphasizes that diversity—including racial diversity—advances learning, enriches campus environments, and prepares students to thrive in an increasingly diverse workforce and society. The amicus brief underscores that the Supreme Court permits Harvard, like all colleges and universities, to pursue the version of diversity that best suits their mission and goals, including through the limited consideration of race. Finally, the amicus brief argues that the ordinary burden of proof in Title VI discrimination cases will be upended if courts require universities to disprove any claim of discrimination connected to higher-education admissions, rather than looking to plaintiffs to prove that the defendant acted with "racial animus" against members of a protected class. In addition, the discussion of "institutional academic freedom" appropriately defines this concept in a way that is consistent with judicial deference to institutions on academic matters that include diversity of student admissions, while it also explicitly recognizes academic freedom of faculty and students.

B. Sexual Misconduct – Title IX

Title IX Regulations: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106)

The final rule was the result of a lengthy process, though the implementation period was extremely short. The Department's Office for Civil Rights released its Notice of Proposed Rulemaking at the end of November 2018. That proposal sought broad comment on numerous crucial and highly complex issues of Title IX administration. In response to the Proposed Rule, affected stakeholders and members of the public submitted over 120,000 comments. The Final Rule was published in the Federal Register on May 19, 2020 and was effective on August 14, 2020. The final Rule was a massive sea change in Title IX processes and administration.

Regarding sexual harassment, the final regulations were: Define the conduct constituting sexual harassment for Title IX purposes; Specify the conditions that activate a recipient's obligation to respond to allegations of sexual harassment and impose a general standard for the sufficiency of a recipient's response, and specify requirements that such a response much include, such as offering supportive measures in response to a report or formal complaint of sexual harassment; Specify conditions that require a recipient to initiate a grievance process to investigate and adjudicate allegations of sexual harassment; and Establish procedural due process protections

that must be incorporated into a recipient's grievance process to ensure a fair and reliable factual determination when a recipient investigates and adjudicates a formal complaint of sexual harassment.

Additionally, the final regulations: affirm that the Department's Office for Civil Rights ("OCR") may require recipients to take remedial action for discriminating on the basis of sex or otherwise violating the Department's regulations implementing Title IX, consistent with 20 U.S.C. 1682; clarify that in responding to any claim of sex discrimination under Title IX, recipients are not required to deprive an individual of rights guaranteed under the U.S. Constitution; acknowledge the intersection of Title IX, Title VII, and FERPA, as well as the legal rights of parents or guardians to act on behalf of individuals with respect to Title IX rights; update the requirements for recipients to designate a Title IX Coordinator, disseminate the recipient's non-discrimination policy and the Title IX Coordinator's contact information, and notify students, employees, and others of the recipient's grievance procedures and grievance process for handling reports and complaints of sex discrimination, including sexual harassment; eliminate the requirement that religious institutions submit a written statement to the Assistant Secretary for Civil Rights to qualify for the Title IX religious exemption; and expressly prohibit retaliation against individuals for exercising rights under Title IX.

***Letter from Office of Civil Rights*, US 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. In the May 2020 final Title IX regulations, the Department of Education explained that "The 2017 Q&A along with the 2001 Guidance, and not the withdrawn 2011 Dear Colleague Letter, remain the baseline against which these final regulations make further changes to enforcement of Title IX obligations."

***AAUP Comments on Proposal to Amend Title IX Regulations*, US Department of Education (Jan. 28, 2019 and May 6, 2020)**

The AAUP has issued a response to revised Title IX regulations that the US Department of Education released on May 6, 2020. The AAUP had submitted comments in January 2019 during the public comment period on the Department of Education's proposed revisions to the regulations. Those comments build on recommendations made in the AAUP's 2016 report, *The History, Uses and Abuses of Title IX*, which urges the Department of Education and universities to

address and prevent sexual harassment in ways that protect academic freedom and due process, and in ways that enhance shared governance by faculty and students.

The AAUP response to the Department of Education's final regulations, prepared by a subcommittee of Committee A on Academic Freedom and Tenure and the Committee on Gender and Sexuality in the Academic Profession, comments on some aspects of the revised regulations that represent small steps forward and others that represent large steps backward. Overarching concerns about the regulations include the following:

Defining Sexual Harassment

- Parts of the new regulations will make it more difficult for victims of harassment to come forward and for the perpetrators to be held responsible, thus making it easier for harassment to be minimized. The standard for harassment has been overly narrowed. The final regulations define it as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive, that it denies a person equal access to the recipient's education program or activity." The AAUP recommended using a "severe or pervasive" standard because a hostile environment can be produced by severe conduct that is not pervasive and by pervasive conduct that is not deemed severe.

University Responsibility

- The responsibility of the university to address harassment has been excessively limited, with the evaluation of institutional compliance based only on the standard of "actual knowledge," rather than that of "knew or should have known," about sexual harassment. The new regulations evaluate Title IX claims under a standard of whether the institution acted with "deliberate indifference" rather than "reasonableness," as the AAUP had recommended.
- The regulations leave it to universities to decide whether to require "mandatory reporting" by all employees about information regarding possible sexual harassment or instead restrict that function to designated reporters. The AAUP had recommended that the regulations prohibit university policies from making all faculty members mandatory reporters. Further, AAUP notes that administrators are not required to define "mandatory reporters" in consultation with faculty.

Academic Freedom

- As noted above, the final regulations too narrowly define hostile-environment sexual harassment as speech or conduct that is "severe, pervasive, and objectively offensive." At the same time, the regulations do not adequately protect faculty

academic freedom. In fact, there is an absence in the regulations of any reference to academic freedom.

Protecting Due Process

- The Department of Education leaves it to a university to determine the standard of evidence to be applied in sexual harassment cases (either preponderance of evidence or clear and convincing evidence). It further specifies that the standard chosen need not be the same as that used in other cases not involving sexual harassment. The final regulations appear to be an improvement because they enable universities to adopt the "clear and convincing" standard in sexual harassment cases and require a "live hearing." However, we object to the absence in the new regulations of any requirement that universities implement AAUP-recommended due-process protections in cases involving faculty members, including the right to a hearing by an elected faculty committee using the "clear and convincing evidence" standard of proof.

The AAUP response to the revised regulations concludes with "Some Final Comments on Political Hypocrisy," which note "the enormous hypocrisy with which the Department of Education has heralded its new regulations as a gift from President Trump to America's students: 'PRESIDENT DONALD J. TRUMP IS WORKING TO PROTECT STUDENTS FROM SEXUAL MISCONDUCT AND RESTORE FAIRNESS AND DUE PROCESS TO OUR CAMPUSES'…. *But these regulations come from a President who has never been formally called to account for his alleged sexual misconduct and for the (bad) example it sets for the nation's youth.* Some readers of these new regulations will argue that they unduly protect harassers and the hostile climates they create. We conclude that the department's emphasis on President Trump as the standard-bearer for sexual harassment regulations is likely to confirm those arguments."

The AAUP comments on the Education Department's proposed Title IX regulations emphasized AAUP's commitment to abolishing systemic discrimination in higher education and cautioned against the extraction of gender equity from more comprehensive assessments of the bases for inequality. In responding to the Education Department's final regulations, the AAUP objected to the absence of consideration of the ways gender equity intersects with other bases for inequality, including race, class, sexuality, gender identity, disability, and other dimensions of social difference.

***Pennsylvania v. DeVos,* No. 1:20-cv-1468 (D.D.C. August 12, 2020); *New York v. U.S. Dep't of Educ.*, 20-cv-4260, (S.D.N.Y. Aug. 9, 2020)**

In two similar cases in which the AAUP joined amicus briefs, the District Courts for the District of Columbia and for the Southern District of New York denied motions for preliminary

injunctions seeking to delay the August 14, 2020, deadline for the implementation of Title IX Regulations issued by the Trump Administration. On May 19, 2020 the Trump Administration issued new Title IX regulations, effective August 14, 2020, that significantly changed multiple aspects of Title IX as applied to higher education institutions, including significantly modifying the complaint investigation and hearing process, the definition of harassment, and the rights of the accused. In both cases, plaintiffs sued the administration claiming that the regulations should be invalidated, and they sought a preliminary injunction delaying the implementation of the regulations. Both courts denied the request for a preliminary injunction. The DC court explained that "Although Plaintiffs have raised serious arguments about certain aspects of the Rule, they have not established a likelihood of success on their claims, nor have they established that they are likely to suffer substantial irreparable harm pending further litigation." The courts' decisions are not a final ruling on the underlying claims that the regulations should be invalidated, and those claims will continue to be litigated.

The cases arose from the Trump administration's May 19, 2020 issuance of new Title IX regulations. These regulations mandated massive changes to the ways in which universities handle Title IX investigations, and to the rights of the parties in these investigations. The administration required compliance with the new regulations by August 14, 2020. In the DC case, eighteen state attorneys general sued the administration. In the New York case, the State of New York and the Board of Education for the City School District of the City of New York ("NYC DOE") sued the administration. In both cases plaintiffs claimed that the regulations should be invalidated, *inter alia*, as violating the Administrative Procedures Act and being arbitrary and capricious. They also filed motions for preliminary injunctions seeking to prevent the implementation of the Rule pending the resolution of the underlying challenge to the regulations.

In both cases ACE filed an amicus brief, joined by the AAUP and numerous other higher education association, supporting the plaintiffs' request for the preliminary injunction. The amicus briefs did not address the plaintiffs' claims that the regulations should be invalidated. The amicus briefs argued that the August 14, 2020, deadline is unreasonably short to implement the regulations, particularly in the context of the COVID-19 global pandemic. The briefs recognized the need to involve faculty in updating institution policies. "[T]here is the need to update faculty handbooks and manuals, which outline how disciplinary proceedings are conducted for both unionized and non-unionized faculty members. In keeping with established principles of shared governance, academic freedom, and tenure, faculty handbooks and manuals are developed through institution-specific, multi-layered governance bodies, often following extensive deliberative proceedings across the whole of the institution." Further, university "employees are often unionized, and their disciplinary processes are often written into existing collective-bargaining and other agreements, which in turn set predetermined time periods during which terms cannot be re-bargained." The briefs concluded that the short deadline for compliance, particularly during the COVID-19 crisis, did not enable institutions to meet their obligations, and "will almost assuredly

negatively affect the quality of the policies and procedures that institutions scramble to craft in order to meet the arbitrarily set deadline."

In their decisions the courts only addressed the plaintiffs' motions for a preliminary injunction, or a stay, that would have delayed the August 14, 2020 effective date of the regulations. The three most important factors in granting a preliminary injunction are whether plaintiffs can establish that they have a likelihood of success on the merits, whether plaintiffs have established that they will suffer imminent irreparable injury, and whether the balance of the hardships and the public interest warrant an injunction. Both courts found that plaintiffs did not establish a likelihood of success on the merits. The courts also found that plaintiffs failed to show that the Final Rule's implementation was likely to cause imminent irreparable harm, the issue addressed by the amicus brief, because the costs of compliance are not sufficiently substantial relative to recipients' overall budgets, and plaintiffs did not demonstrate that compliance with the Final Rule would impair their ability to respond to the COVID-19 Pandemic. Finally, the courts both found that the balance of hardships and the public interest did not warrant an injunction.

C. Discrimination Claims and Due Process

***Freyd v. University of Oregon*, No. 19-35428 (9th Cir. 2019)(appeal pending)**

On September 30, 2019, the AAUP filed an amicus brief in the Ninth Circuit Court of Appeals in support of Professor Jennifer Freyd, who sued the University of Oregon (UO) for pay discrimination based on significant pay disparities with male faculty members. The district court had dismissed the suit based, in part, on findings that Dr. Freyd and her male colleagues did not perform equal work, and that the reasons for the pay differentials did not have a disparate impact on women. AAUP's *amicus* brief provides an overview of gender-based wage discrimination in academia, explains that the common core of faculty job duties of teaching, research, and service are comparable, and rebuts the finding of the district court that the pay differentials were justified.

The case arose because Dr. Freyd is paid substantially less than her male colleagues in the psychology department who hold the same positions as full professors, have less seniority, and are no more accomplished. In 2016, the UO psychology department conducted a self-study finding that the department faced a "significant equity problem with respect to salaries at the full professor level." The UO psychology department also underwent an external review, which noted the "gender disparity in faculty salaries at the full professor level" and recommended that the department "continue pressing for gender equity in terms of pay at the senior levels of the faculty." Both reviews traced the disparity back to retention raises given to professors who pursued outside offers of employment. While UO policy provides for gender equity adjustments, UO failed to adjust Dr. Freyd's salary.

Dr. Freyd brought an action in the United States District Court for the District of Oregon, Eugene Division claiming that UO discriminated against her in violation of the Equal Pay Act, Title VII of the Civil Rights Act, Title IX, the Equal Protection Clause of the United States Constitution, the Equal Rights Amendment of the Oregon Constitution, and related state laws. The district court held that Dr. Freyd and her male colleagues did not perform equal work, based on differences in their grant funding and administrative duties. The court also concluded that their work was not comparable because faculty had "academic freedom" to "remake their job." Finally, the court held that the retention raises granted to male faculty did not create a disparate impact on female professors. Dr. Freyd filed an appeal with the Ninth Circuit, and AAUP filed an amicus brief in support of her appeal. On May 12, 2020, the Ninth Circuit heard oral arguments (via Zoom) in the appeal.

AAUP's amicus brief begins by outlining the broader context of unequal pay in academia. "The wage disparity in Professor Jennifer Freyd's case is an example of the ongoing gender-based salary inequalities in the academic profession, generally, and for women full professors in doctoral institutions, in particular." Rebutting the district court's holding that Dr. Freyd and her male colleagues do not perform equal work, the amicus brief explains the well-established definition of faculty work in the AAUP 1940 *Statement of Principles on Academic Freedom and Tenure*:

Since 1940, colleges and universities across the US, including UO, have adopted the AAUP's definitions of faculty work and thus have established the relevant standards of the academic profession—namely that the common core of faculty job duties are teaching, research, and service. Professor Freyd and the comparator full professors in the department do not perform identical work. They do perform "substantially equal work" and "work of comparable character" by carrying out their common core duties through a variety of teaching, research, and service activities, as is the norm in the academic profession.

Citing the seminal role that AAUP has played in establishing and defining academic freedom, the brief refutes the district court's reliance on academic freedom to justify the unequal pay. "Academic freedom does not enable faculty to create different jobs with unequal work. . . Academic freedom is a condition of employment that all faculty hold in common to enhance their ability to engage in teaching, research, and service. It is not a weapon to be wielded as a justification for gender-based inequalities." Finally, the brief argues that the UO retention raise practice is not a valid defense to the discrimination claims, particularly as "UO policy provides for gender-equity adjustments, [but] the Psychology Department and the UO administration failed to make such adjustments to rectify the disparate impact of its retention raises."

Bostock v. Clayton County, Georgia, et al.; R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, et al.; Altitude Express, Inc., et al. v. Zarda, Nos. 17-1618 (U.S. Jun. 15, 2020)

On June 15, 2020, in a case in which the AAUP joined an amicus brief, the Supreme Court ruled that Title VII of the Civil Rights Act of 1964, which prohibits workplace discrimination based on race, sex, religion, or national origin ("Title VII") protects gay and transgender workers. The court held that because sexual orientation and gender identity cannot be explained as traits that someone has without referring to the sex of the person, discriminating based on those traits constituted discrimination "because of sex," which is prohibited by Title VII. Thus, in affirming that Title VII's broad scope, the Supreme Court extended protection of a powerful federal anti-discrimination law to those individuals who identify as lesbian, gay, bisexual, or whose gender identity differs from their sex assigned at birth ("LGBTQ").

The case arose from three consolidated cases that involved LGBTQ individuals who were fired from their workplaces after their employer learned of their LGBTQ status. Three separate lawsuits were filed alleging that the terminations violated Title VII's prohibition against discrimination based on sex. The Courts of Appeals issued conflicting decisions in these cases. In the lead case, Gerald Bostock, a county employee in Clayton County, Georgia, was fired after his employer learned that he is gay. He sued the county under Title VII for employment discrimination, but the Eleventh Circuit held that Title VII does not prohibit firing because of sexual orientation. In the second case, Donald Zarda was fired from his work as an instructor with a skydiving company in New York, and the Second Circuit found that Title VII does prohibit discrimination based on sexual orientation. In the third case, Aimee Stephens, a transgender woman, was fired after informing her employer, Harris Funeral Homes, that she planned to transition. She brought her claim to the Equal Employment Opportunity Commission (EEOC), which investigated and then sued her employer. The Sixth Circuit held that Title VII protects against discrimination because of transgender status. Because the decisions addressed the same issue, the Supreme Court consolidated the cases.

The amicus brief that the AAUP joined (with the Lawyers Committee for Civil Rights) argued that Title VII applies to workplace discrimination based on LGBTQ status since it is discrimination because of an individual's sex. The amicus brief outlined how the history of Title VII has resulted in successful progress toward eradicating workplace discrimination and how it bars disparate treatment because of sexuality. As the amicus brief argued, carving out an exception in Title VII's protections for LGBTQ individuals would be contrary to its text and other precedents. It would also leave those most vulnerable to workplace discrimination without protection, rendering Title VII unable to fulfill its purpose of eradicating discrimination in the workplace.

In an opinion following textualism, Justice Gorsuch (joined by Chief Justice Roberts, Ginsburg, Kagan, Sotomayor and Breyer) queried "We must decide whether an employer can fire someone simply for being homosexual or transgender." The answer is definitively no. "An employer who fires an individual for being homosexual or transgender fires that person for traits

or actions it would not have questioned in members of a different sex. Sex plays a role in the decision exactly what Title VII forbids." The question whether the phrase "because of . . . sex" means what it says in the context of employer actions prohibited by Title VII has been definitively answered—it does. That is, because sexual orientation and gender identity cannot be explained as traits that someone has without referring to the sex of the person, discrimination based on sexual orientation or gender identity is also because of an individual's sex. The court also once again concluded that it makes no difference under the text of Title VII whether an employer intended also to discriminate based on an additional reason if sex is a basis for the decision. Discrimination "because of . . . sex" is simply prohibited.

Even though the ruling is a positive one, the court did not answer all potential questions about the experience of working LGBTQ people and the law. Questions remain about some practical details of workplace life, such as bathrooms and locker rooms, and about whether and how the rights of religious employers will interact with nondiscrimination laws in the future.

***Smock v. Bd. of Regents of Univ. of Mich.*, 2018 U.S. Dist. LEXIS 196608 (E.D. Mich. Nov. 19, 2018)**

Plaintiff Pamela Smock is a tenured Sociology professor at the University of Michigan. In spring 2016, all three of the graduate students whose work she supervised complained to the Chair of the Department of Sociology that she had made inappropriate jokes and had conversations of a sexual nature with them. After an eight-month investigation, the University concluded that, although Professor Smock's conduct had been inappropriate, it had not been severe enough to create a hostile environment. Nevertheless, the matter was reconsidered by her college's executive committee which, after allowing Professor Smock to submit additional documentation for consideration. The committee sanctioned Professor Smock for three years, freezing her salary and accrual of and right to use sabbatical.

When Professor Smock appealed, the appellate board who considered her appeal added a number of allegations to the list of charges against her that had not been considered at the initial stage. These allegations did not relate to the allegations of inappropriate joking and conversation raised by her graduate students. The appellate board upheld the initial findings and sanction, a decision confirmed by the provost on subsequent appeal.

Professor Smock sued the University, alleging that it had deprived her of her due process rights under the Fourteenth Amendment. The federal district court for the Eastern District of Michigan agreed, finding that while "Plaintiff had many opportunities to be heard in this case ... none were meaningful." After noting that she had been cleared by the investigation only to be effectively re-tried by a committee without any hearing, the court addressed the appeal hearing's two primary due process deficiencies: Professor Smock had not been provided notice of the charges against her until midway through the appellate process and she had not been provided the opportunity to cross-examine the witnesses presented against her.

While the first deficiency, failure to provide timely notice, is straightforward, the second matter, requiring an institution to provide the opportunity to cross-examine adverse witnesses, is not. Explicitly relying on the Sixth Circuit's decision in Doe v. Baum, in which the Circuit Court held that the University of Michigan violated a respondent student's procedural due process right when it found him responsible for sexual assault without providing him the opportunity to cross-examine the witnesses against him, the Smock court concluded that the University should have provided Professor Smock the same opportunity. On this basis, the court concluded, Professor Smock "adequately pled that the University deprived her, without due process, of her constitutionally protected interests."

***Ollie v. Univ. of Conn.*, 2019 U.S. Dist. LEXIS 17624 (D. Conn. Feb. 4, 2019)**

This dispute arose out of the termination of Kevin Ollie, the former head basketball coach for the University of Connecticut ("UConn") and involved the application of a collective bargaining agreement provision to an employee's right to seek judicial relief for a claim of discrimination. While his union, UConn's chapter of the American Association of University Professors, arbitrated the dispute as a breach of contract pursuant to the collective bargaining agreement that governed Ollie's employment, Ollie sought judicial intervention to preserve his rights to bring race discrimination claims against UConn as he feared the statutes of limitations would pass while the arbitration was pending. Ollie worried that, should he timely file a charge of discrimination with a government agency (such as Connecticut's Commission on Human Rights and Opportunities or the federal Equal Employment Opportunity Commission), UConn would invoke Section 10.3 of the collective bargaining agreement, which empowered UConn to discontinue the arbitration if Ollie simultaneously pursued judicial relief. The district court granted UConn's motion to dismiss on the ground that Ollie's claim was not ripe for adjudication.

While the court acknowledged that UConn may respond to Ollie's filing a charge with a relevant government agency by invoking Section 10.3, it found that this potential did not render the dispute justiciable. The dispute focused on whether Ollie had suffered an "injury in fact," as required under generally-applicable law on federal subject matter jurisdiction. Ollie advanced three arguments: that UConn's refusal to agree to not invoke Section 10.3 exerted a chilling effect on his filing with a government agency, that Section 10.3 presented a "credible threat" to him and caused him to engage in "coerced self-censorship." Ollie's last argument was that his harm was "actual or imminent," as required under the U.S. Supreme Court's decision in Lujan v. Defenders of Wildlife to establish standing, because the limitations period for some of his discrimination claims had already passed, which Ollie blamed on UConn's refusal to agree to not invoke Section 10.3.

The court rejected each of Ollie's arguments, finding instead that he needed to wait until UConn invoked Section 10.3 to seek judicial redress for any harm that might cause him. First, it found no legal support for applying the chilling effect argument outside of the First Amendment

context and declined to extend the doctrine to the filing of discrimination charges with governmental agencies. Next, it reasoned that UConn had done nothing to chill Ollie's recourse to filings with governmental agencies and declined to read into UConn's refusal to agree to not invoke Section 10.3 a threat to invoke it. Finally, it rejected Ollie's Lujan argument on the ground that the threatened harm was neither actual nor imminent as the statute of limitations under Title VII is not jurisdictional, meaning that Ollie could challenge any UConn statute of limitations argument in court on equitable grounds. As such, the court found that the threatened harm was "hypothetical at this stage." For these reasons, the district court dismissed Ollie's complaint for injunctive relief.

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 eight 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."

B. Deferred Action for Childhood Arrivals

***Department of Homeland Security v. Regents of the University of California*, No. 18-587 (U.S. S.Ct. June 18, 2020)**

On June 18, 2020, in a case for which the AAUP joined an amicus brief, the Supreme Court ruled the Trump administration's attempt to end the Deferred Action on Childhood Arrivals ("DACA") program was illegal, thereby preserving DACA. The DACA program prevents deportation of certain undocumented immigrants who were brought to the United States as children and provides specific federal benefits, including increased access to higher education such as eligibility for in-state tuition and state-funded grants and loans. DACA currently covers over 700,000 immigrants. The Court found that the Trump administration acted "arbitrarily and capriciously" by failing to justify why it believed the forbearance of removal, or deportation, was

illegal, and failing to consider how DACA recipients relied on the program. Since these omissions violated the Administrative Procedure Act ("APA"), the Court ruled the Department of Homeland Security ("DHS") had not lawfully terminated DACA and preserved its existence. Writing for the majority, Chief Justice John Roberts states, "Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew." This landmark decision provides welcome relief for DACA recipients and enforces the rule that federal agencies must comply with the law.

The case arose from DHS's attempt to end the DACA program in 2017. DACA has two key components. First it permits certain undocumented immigrants who arrived in the United States as children to apply for a two-year forbearance of removal from the country. Second, individuals granted forbearance become eligible for certain federal benefits, including work authorization, work-study programs, and a range of state-tuition benefits ("benefits component"). In 2017, DHS decided to terminate DACA and issued an explanatory legal memorandum arguing DACA was illegal, as the benefits component allegedly violated the Immigration and Nationality Act ("INA"). Plaintiffs argued the Trump administration violated the APA by failing to adequately justify its decision to end the DACA program, as well infringing on the equal protection guarantee in the Fifth Amendment's Due Process Clause. Defendants disputed Plaintiffs' claims and argued the courts lacked jurisdiction.

District courts in California (Regents, No. 18–587), New York (Batalla Vidal, No. 18–589), and the District of Columbia (NAACP, No. 18–588) all ruled for Plaintiffs. Each court rejected the Government's arguments that the claims were unreviewable. In *Regents* and *Batalla Vidal*, the District Courts further held that the Fifth Amendment claims were adequately alleged and entered nationwide preliminary injunctions based on the conclusion that the plaintiffs were likely to succeed on their APA claims. The district court in *NAACP* found that DHS failed to adequately explain why it thought DACA was unlawful, even after providing the agency a second chance to elaborate on their initial justifications. DHS then issued another memorandum that provided new justifications for its prior decision. In an unusual move, after appealing the rulings, the Trump administration filed for certiorari before judgment to the Supreme Court late last year and asked it to weigh in on two questions: whether the decision to end DACA is judicially reviewable; and, if so, whether the decision was legal. After the Ninth Circuit affirmed the *Regents* district court ruling, the Supreme Court granted certiorari and consolidated the three cases.

The AAUP, together with forty-three educational associations, signed onto an amicus brief prepared by the American Council on Education to the Supreme Court of the United States in support of upholding the Deferred Action for Childhood Arrivals ("DACA") program in the consolidated DACA (also known as "Dreamers") cases, *Dep't of Homeland Sec. v. Regents of*

Univ. of Cal.et.al., 2019 U.S. LEXIS 4407 (9th Cir. 2018). The amicus brief supports upholding DACA, emphasizing that "DACA has been a symbol of tolerance and openness of our university campuses," and warning that rescinding DACA would broadcast to other foreign-born students and potential students from around the globe a "message of exclusion" and "irreparably damage the reputation of America's higher education system in the eyes of the world." The brief argues that if the Supreme Court allows the administration to end DACA all those gains would be reversed: "In an instant, it would send a message of exclusion that would irreparably harm our institutions' ability to recruit and retain foreign-born students. It would tear at the fabric of our campus communities. Most importantly, it would pull the rug out from under the Dreamers themselves, who have upended their lives—taking out loans, earning degrees, and taking the risk of revealing their undocumented status—in reliance on DACA. In the words of one DACA recipient, the rescission would mean that 'all the hard work I have put into my goals would be for nothing, and I would be back to the bottom where I started.'"

The amicus brief also speaks to the government's contention that the executive branch's decision to rescind DACA is wholly exempt from judicial review. "Sanctioning that remarkable argument would threaten to immunize from legal scrutiny numerous other major decisions disguised as 'enforcement policies' that impact our higher education system," the brief says. The brief urges the Supreme Court to affirm the lower court judgments keeping DACA in place, saying that, "The Court should not write the Administration a blank check to make this monumental policy choice without even a patina of judicial review." Finally, the brief endorses DACA as "an unmitigated good for this country, its higher education system, and the young persons whom it has benefited."

The decision to end DACA violated the APA because it was "arbitrary and capricious," as the justification provided at the time DHS made the decision to terminate the entire program was based solely on the alleged illegality of the benefits component, without consideration of the elimination of the forbearance component. Though DHS provided other justifications, the Court did not consider them because Defendant was "limited to the agency's original reasons" and those justifications were not included in the original memorandum. DHS's conclusion that of the benefits component was illegal is insufficient to terminate DACA because, even with such a finding, DHS still has discretion to preserve the forbearance component while ending the benefits component. As "[the] defining feature of deferred action is the decision to defer removal," DHS must justify why it is rescinding the forbearance component. The agency's failure to provide such rationale in its original memorandum terminating DACA renders the decision "arbitrary and capricious," thereby violating the APA.

DACA is preserved for now, providing a respite for the 700,000 Dreamers. Key to the Court's decision is that federal agencies must follow the law when dismantling enacted programs. DHS is on notice that it must engage in "reasoned decision-making" and the Court will prevent enactment of "arbitrary" or "capricious" agency decisions.

C. ICE Directive

***Harvard and Massachusetts Institute of Technology v. Department of Homeland Security*, No. 1:20-cv-11283 (D.C. MA, July 13, 2020)**

Following a legal challenge, supported by an amicus brief in which the AAUP joined, the US Department of Homeland Security (DHS) rescinded a directive that, during the COVID-19 crisis, foreign students engaged entirely in online study would not be allowed in the United States. In March 2020, DHS and Immigration and Customs Enforcement (ICE), issued guidance that, for the duration of the COVID-19 emergency, F-1 and M-1 visa holders were allowed to participate in online education while remaining in the United States. On July 6, 2020, DHS issued a new directive that rescinded this COVID-19 exemption for international students, requiring all students on F-1 visas whose university curricula are entirely online to depart the country and barring any such students currently outside the United States from entering or reentering the United States. Shortly after DHS issued the directive, Harvard University and the Massachusetts Institute of Technology filed a complaint in the US District Court in Massachusetts for declaratory and injunctive relief, to prevent the directive from taking effect so that thousands of international students can continue to participate in educational opportunities in the United States, even if their course of study is online.

The amicus brief was prepared by the American Council of Education (ACE) and was joined by over seventy higher education organizations. The brief emphasized the harm caused to the foreign students and to the reputation of the US higher education system. "With the stroke of a pen, the global standing of our nation and its preeminent higher educational system will needlessly suffer again from exclusionary policies that—contrary to long-held national values of openness and interconnection—single out international students and arbitrarily threaten their eligibility to collaborate, learn, and share their many talents at American colleges and universities." The brief also called out the administration for seeking to compel a Hobson's choice between the safety of those on campus and the removal of foreign students: "if . . . the public health and safety of . . . campuses and communities counsels in favor of completely virtual courses in the fall, the cost of doing so—under DHS's about-face—is that their international students will be subject to immediate removal from this country." All of this was done by the administration on extremely short notice, and with virtually no explanation or apparent consideration of the impacts of the directive. Thus, the directive violated fundamental concepts of fairness, was arbitrary and capricious, and did not comport with the tenets of administrative law.

On July 14, 2020, federal district court judge Allison Burroughs held a hearing on the plaintiffs' motion for injunctive relief that sought to prevent the government from implementing the directive. At the start of the hearing Judge Burroughs announced that the government had agreed to rescind the July 6 directive, and the related July 7 FAQs, and to cease all implementation

of that guidance. Thus, the directive was voided, and ICE will revert to the guidance it issued in March that allows students taking online courses to reside in the United States on F-1 visas. The administration could seek to reissue guidance that reiterates, in whole or part, the July 6 directive. However, there are strong legal objections to the underlying basis for any similar guidance. Further, the court has retained jurisdiction, which would help promptly resolve the legality of any future guidance.

VIII. Collective Bargaining Cases and Issues – Private Sector

A. NLRB Authority

1. Religiously Affiliated Institutions

***Bethany College*, 369 NLRB No. 98 (2020)**

On June 10, 2020, a three-member panel of the National Labor Relations Board issued a decision limiting its own jurisdiction over the faculty of self-identified religious educational institutions. The Board's decision in *Bethany College,* 369 NLRB No. 98 (2020) is the latest in a long line of cases reviewing the threshold of when the Board may exercise jurisdiction over the faculty of such institutions. *Bethany College* overrules, in relevant part, the Board's earlier decision in *Pacific Lutheran University*, 361 NLRB 1404 (2014) and adopts the jurisdictional test first announced by the US Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB,* 278 F.3d 1335 (D.C. Cir. 2002).

In *Pacific Lutheran*, the Board crafted a two-part, union-friendly jurisdictional test wherein, the Board would decline to exercise jurisdiction over a unit of faculty members at a school claiming to be a religious institution only if the school demonstrated that it: (1) held itself out as providing a religious educational environment; and (2) held out the petitioned-for faculty members as performing a specific role in creating or maintaining school's religious educational environment. *Pacific Lutheran,* 361 NLRB at 1414. The second step in the inquiry effectively became the focal point of the new jurisdictional test, with the Board reasoning that "[f]aculty members who are not expected to perform a specific role in creating or maintaining the school's religious educational environment are indistinguishable from faculty at colleges and universities that do not identify themselves as religious institutions and that are indisputably subject to the Board's jurisdiction." *Id*. at 1411. The Board articulated that it would be unfair to deny those faculty in a religious school the same rights under the National Labor Relations Act as enjoyed by faculty in secular schools.

The *Bethany College* panel disagreed and held that *Pacific Lutheran* must be overruled as inherently inconsistent with the binding rationale of the Supreme Court in *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court held that the Board's exercise of jurisdiction over

teachers at faith-based schools would present serious constitutional questions. In overruling *Pacific Lutheran*, the Board adopted the *Great Falls* test in an attempt to ensure that the Board's jurisdiction does not become entangled with the First Amendment's fundamental directive that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The *Great Falls* test involves a three-part, objective test under which the Board "must decline to exercise jurisdiction" over an institution that:

1. "holds itself out to students, faculty, and community as providing a religious educational environment";
2. is "organized as a nonprofit"; and
3. is "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion."

In adopting the *Great Falls* test, the Board rejects the urge to make its own determinations on whether an institution's activities are secular or religious. Instead, that determination now sits "precisely where it has always belonged: with the religiously affiliated institutions themselves, as well as their affiliated churches and, where applicable, the relevant religious community."

Applying the *Great Falls* test, the Board easily found that Bethany College was exempt from the Board's jurisdiction. With regard to the first prong, it was clear from the school's handbook, job postings, and affiliation with the Evangelical Lutheran Church in America (ELCA) that it held itself out to students, faculty, and the community as providing a religious educational environment. Bethany College met the second prong because it is established as a 501(c)(3) nonprofit institution. Finally, the Board found that the third prong was met because Bethany College is owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod of the ELCA.

The *Bethany College* decision turns a new page in the jurisdictional arguments for self-identified religious educational institutions. In adopting the *Great Falls* objective standard, the Board sets forth a clear path for religious schools to determine with relative certainty whether the Board may exercise jurisdiction over its faculty. The decision is likely to have broad implications not only for religious colleges and universities, but also for parochial and other religious elementary and secondary schools that have seen organization efforts in the past. It is now exceedingly unlikely that the Board will find it appropriate to exercise jurisdiction over such institutions and their faculty.

***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, this ruling was overturned by the Board in *Bethany College*, 369 NLRB No. 98 (2020) *supra*.

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.

***Duquesne University v. National Labor Relations Board,* 947 F.3d 824 (D.C. Cir. 2020)**

On January 28, 2020, in a case in which the AAUP filed an amicus brief, the United States Court of Appeals for the District of Columbia Circuit (the "DC Circuit") issued a decision finding that adjunct faculty did not have the right to unionize at a religiously affiliated university under federal labor law. *Duquesne University v. National Labor Relations Board, 947 F.3d 824* (D.C. Cir. 2020) ("Duquesne"). The core issue was whether in applying federal labor law, the National Labor Relations Act (NLRA), to the faculty, the NLRB and the courts would risk interfering in the religious affairs of Duquesne, thereby violating the Religion Clauses of the First Amendment. The NLRB used the test it set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014)*("Pacific Lutheran"*), and found there was no danger of unconstitutional entanglement because the faculty in question did not perform a specific role in creating or maintaining Duquesne's religious educational environment. The amicus brief supported the NLRB test and pointed to the AAUP's limitations clause as an example of how a comparable test has been applied in higher education. However, in a 2 to 1 decision, the DC Circuit rejected the *Pacific Lutheran* test, and applying a narrower bright-line test held that the NLRB did not have jurisdiction and therefore the adjunct faculty could not unionize under the NLRA.

This case stemmed from Duquesne's refusal to recognize a group of unionized adjunct faculty in the McAnulty College of Liberal Arts. While the faculty overwhelmingly voted for the union, Duquesne refused to deal with the union, asserting that requiring it to do so would constitute government entanglement in its religious activities in violation of the US Constitution. The NLRB applied the test it set forth in *Pacific Lutheran*, the primary component being whether Duquesne "holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment," and particularly whether the faculty were "held out as performing a specific religious function." *Pacific Lutheran*, at 1410-1411. The NLRB found that Duquesne did not hold out its adjunct faculty (other than those in the department of theology) as performing a "specific religious function" and determined that Duquesne committed an unfair labor practice by refusing to bargain with the union. The NLRB rejected Duquesne's claim of a religious exemption and Duquesne appealed to the DC Circuit.

The AAUP filed an amicus brief that focused primarily on the AAUP's pivotal 1940 *Statement of Principles on Academic Freedom and Tenure* and the 1940 *Statement*'s "limitations clause" and argued that these provide support for the position that the NLRB can assert jurisdiction over religiously affiliated universities under the jurisdictional test outlined in *Pacific Lutheran.* "The relevance of the 1940 *Statement's* limitations clause to the issues before this Court goes beyond simply a description of its similarity to the Board's *Pacific Lutheran* test . . . the 1940 *Statement*—with its limitations clause—has been adopted by hundreds of colleges and universities, including many religiously affiliated universities. In adopting the 1940 *Statement,*

religiously affiliated universities have recognized the central importance of adhering to the norms of faculty academic freedom that are shared by the community of institutions of higher education. At the same time, religiously affiliated universities recognize that the 1940 *Statement*'s limitations clause protects their institutional autonomy to define faculty positions that entail specifically articulated religiously based job functions."

The amicus brief demonstrated that the AAUP's "limitations clause" is comparable to the NLRB's *Pacific Lutheran* standard for determining whether to assert jurisdiction over religiously affiliated universities. Both use an objective "holding out" standard that "defers to the university's definition of faculty functions that are religious-based functions." The AAUP's "limitations clause" relies on the university's decision to inform a faculty member at the time of appointment of the specific religious functions required for the faculty position; and the NLRB's jurisdictional test follows similar logic—it protects the autonomy of religiously affiliated universities to define faculty positions that require the performance of "religious function." The amicus brief argued that both tests provide a clear and workable framework to determine the scope of an exemption from AAUP standards or NLRB jurisdiction. Both tests respect the autonomy of the religiously affiliated university to define religious-based functions of its faculty, while also protecting rights of faculty outside the scope of a religious-based exemption.

On appeal Duquesne argued that the faculty at religiously affiliated universities, including Duquesne, were exempt from board jurisdiction. The principles regarding the religious exemption were established by the Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)(*Catholic Bishop*) where the court held that the Board could not assert jurisdiction over the petitioned-for lay teachers because to do so would create a "significant risk" that First Amendment religious rights would be infringed. Id. at 502, 507. However, the Supreme Court did not provide a specific test for applying the exemption. The DC Circuit subsequently advanced a bright-line test for the exemption in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) and *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). The NLRB advanced a more nuanced test in *Pacific Lutheran*. In *Duquesne*, the DC Circuit's majority decision reiterated that the test from its earlier decisions applied, and foreclosed NLRB jurisdiction:

> This case begins and ends with our decisions in *Great Falls* and *Carroll College*. In *Great Falls*, we established a "bright-line" test for determining whether the NLRA authorizes the Board to exercise jurisdiction in cases involving religious schools and their teachers or faculty. 278 F.3d at 1347. Under this test, the Board lacks jurisdiction if the school (1) holds itself out to the public as a religious institution (i.e., as providing a "religious educational environment"); (2) is nonprofit; and (3) is religiously affiliated. Id. at 1343-44. Seven years after *Great Falls*, we reiterated in *Carroll College* that this test governs the Board's jurisdiction, 558 F.3d at 572, 574, and we do so again today. This case involves

faculty members and Duquesne satisfies the *Great Falls* test. The NLRA therefore does not empower the Board to exercise jurisdiction.

The majority explicitly noted that this ruling did not apply to non-faculty employees, or to the power of other agencies in cases involving different statutes or constitutional provisions.

In a dissent, Judge Pillard argued that the decision of the NLRB allowing the adjunct faculty to unionize should have been upheld. She noted that *Catholic Bishop* had not articulated a specific test, nor required the bright line test advanced by the majority, and that some of the force of *Catholic Bishop* had been undermined by subsequent Supreme Court decisions. Judge Pillard also pointed out that the NLRB's approach in *Pacific Lutheran* appropriately balanced the desires of the university to maintain its religious autonomy and the desires of the adjunct faculty to organize under the protection of the NLRA.

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 or modification 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*, 918 F.3d 126 (D.C. Cir. March 12, 2019)**

On March 12, 2019, the District of Columbia Circuit Court of Appeals issued a decision upholding the *Pacific Lutheran* framework for managerial exemption, but limiting a portion of this holding. On December 28, 2017 the AAUP submitted an amicus brief, written primarily by Risa Lieberwitz, 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. In its decision, the DC Circuit Court generally upheld the *Pacific Lutheran University* framework, it found that the Board erred when it held that the faculty in the proposed unit alone must effectively control university committees.

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. One key factor in this finding was that the NTT faculty did not constitute a majority of university committees and therefore did not exercise effective control over the committees. 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 court held that the Board had appropriately followed the instructions of the courts in creating a more detailed and specific test for determining whether faculty were managerial. However, the court focused on one particular factor in overturning the Board's decision: namely,

whether the faculty in the petitioned for unit (called a "subgroup), not just the faculty as a whole, exercised control over committees by constituting a majority on the committees. Instead the court said "the focus should be whether the faculty body writ large exercised effective control, and whether the particular subgroup seeking certification was included in that faculty body." Thus, it stated "the question the Board must ask is not a numerical one—does the subgroup seeking recognition comprise a majority of a committee—but rather a broader, structural one: has the university included the subgroup in a faculty body vested with managerial responsibilities?" The court recognized that non-tenure track faculty might not actually participate in committees, or might have conflicts with other faculty, such that they did not exercise any managerial control. Thus, the court summarized the Board's error and its understanding of an appropriate standard.

> Pacific Lutheran, as interpreted by the Board in this case, runs afoul of Yeshiva by using . . . a determination focused on whether the petitioning subgroup alone exercises effective control. The Board should instead, as required by Yeshiva, think of this analysis as having two distinct inquiries: whether a faculty body exercises effective control and, if so, whether, based on the faculty's structure and operations, the petitioning subgroup is included in that managerial faculty body. Only as part of the latter analysis should the Board dig into whether a subgroup's actual interests diverge so substantially from those championed by the rest of the faculty that holding a minority of seats on the relevant committees is akin to having no managerial role at all, or whether a subgroup's low participation rates stem from a tenuous employment relationship that vitiates any managerial role the university expects the subgroup to perform.

The Court also addressed the arguments advanced by the AAUP.

> A final observation: in Pacific Lutheran, the Board emphasized that since the Court decided Yeshiva some four decades ago, universities "are increasingly run by administrators" and rely more and more on non-tenure-track faculty "who, unlike traditional faculty, have been appointed with no prospect of tenure and often no guarantee of employment." Pacific Lutheran, 361 N.L.R.B. at 1422. According to the Board, these trends "ha[ve] the effect of concentrating and centering authority away from the faculty." Id. Building on this point, amicus American Association of University Professors points out that "[r]ather than relying on faculty expertise and recommendations, the growing ranks of administrators increasingly make unilateral decisions on university policies and programs, often influenced by considerations of external market forces and revenue generation." American Association of University Professors' Br. 10. By contrast, the American Council on Education, though acknowledging these trends, emphasizes "the continued primacy of shared governance." ACE Br. 13. This is an interesting debate, and it may even be relevant.

> Regardless of national trends, however, the Board must not lose sight of the fact that the question before it in any case in which a faculty subgroup seeks recognition is whether that university has delegated managerial authority to a faculty body and, if so, whether the petitioning faculty subgroup is a part of that body. As we explained in Point Park, this requires "an exacting analysis of the particular institution and faculty at issue." 457 F.3d at 48 (emphasis added).

Finally, the court rejected challenges by USC to the *Pacific Lutheran University* decision more broadly, to the *Pacific Lutheran University* standard for "effective" control, and to the *Pacific Lutheran University* categorization of work by the faculty. Because the court overturned the Board's decision it remanded the case to the Board to "reconsider the case afresh." Unfortunately, this could open the door to the new Board substantially altering the current *Pacific Lutheran University* standard. Following the court's remand to the Board, however, the SEIU disclaimed of interest in the USC bargaining unit and requested to withdraw the unfair labor practice charges. On July 12, 2019, the Board remanded the case to the NLRB Regional Office to take action consistent with the Union request. Therefore, it appears that the Board will not consider this case further.

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 maybe reversed as a result of the Board's proposed rules University Students/Employees discussed *infra*.

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. Nonetheless, some unions were successful in organizing graduate students by compelling Universities to recognize graduate student unions outside of the board process. They did so by engaging corporate campaigns, gaining student support, and engaging in work actions. This compelled previously oppositional universities, like Columbia, to voluntarily recognize graduate student unions.

Notice of Proposed Rule Making, University Student/Employees, RIN 3142-AA15, U.S. National Labor Relations Board (March 2019)

On January 15, 2020, the AAUP submitted comments opposing a National Labor Relations Board ("NLRB" or "Board") proposed rule that any students who are also teaching or research assistants at private colleges or universities are not "employees", and are therefore not entitled to unionize, under the National Labor Relations Act ("NLRA" or the "Act"). The comments were drafted by Risa Lieberwitz, AAUP General Counsel and Professor of Labor and Employment Law, School of Industrial Relations, Cornell University and Dr. Rana M. Jaleel, Assistant Professor, Gender, Sexuality, & Women's Studies, University of California, Davis; and signed onto by former AAUP General Counsel Robert Gorman, Kenneth W. Gemmill Professor Emeritus, University of Pennsylvania Law School. The AAUP's comments are based on its long history representing the interests of the profession, including the AAUP's position as the preeminent authority on the meaning, scope and promotion of academic freedom and its extensive experience representing faculty and graduate employees in collective bargaining. The AAUP's comments clearly demonstrate that graduate assistants have the right to unionize because they are employees under the Act, and that such unionization advances their academic freedom.

The proposed rule was advanced in a Notice of Proposed Rulemaking ("NPRM") issued by the NLRB and excludes graduate assistants, as a class, from employee status under the Act as being "primarily students" and therefore not employees covered by the Act. The rule argues that "academic freedom" supports the exclusion of graduate students from unionization and collective bargaining under the NLRA. The comments refute this assertion and argue: "Supreme Court precedents addressing institutional academic freedom do not support the NPRM's assertion. The collective bargaining between the university and the union representing graduate assistants is not

a coercive governmental action against the university or its employees. The NLRA supports employee rights to choose whether to unionize and engage in collective bargaining." The comments further argue:

> Collective bargaining by faculty and graduate assistants is one of several ways to promote academic freedom on campus, as it allows faculty, students, and administrators to discuss collectively how best to do their shared work of teaching and research. Collective bargaining provides university administrations and unions with the flexibility to reach agreements that fit the circumstances of their institutions and the bargaining unit. Collective bargaining agreements are not 'one size fits all,' as shown by the variety of contract provisions addressing universities' institutional academic freedom and the individual academic freedom of faculty and graduate assistants.

The AAUP comments argue, further, that the NPRM misinterprets the meaning and depth of academic freedom. The comments enunciate AAUP's standards and principles:

> The NPRM presents a narrow and partial view of the scope of academic freedom. The full scope of academic freedom includes individual academic freedom of those who work for the university by engaging in teaching and research – that is, faculty and graduate assistants. Indeed, the educational mission of the university depends on respecting the individual academic freedom of faculty and graduate assistants. The AAUP has long recognized that faculty and graduate students are both entitled to academic freedom. The AAUP *1940 Statement of Principles on Academic Freedom and Tenure* states: "Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time tenured and probationary faculty teacher, but also to all others, such as part-time faculty and teaching assistants, who exercise teaching responsibilities." Further, the AAUP *Statement on Collective Bargaining* "promotes collective bargaining to reinforce the best features of higher education" and describes collective bargaining as "an effective instrument for achieving" and "securing" the objectives of the Association, including "to protect academic freedom." AAUP's *Statement on Graduate Students* provides that "graduate student assistants like other employees should have the right to organize to bargain collectively."

Finally, the comments argue that graduate assistants are employees as construed under Section 2(3) of the Act. The NLRB properly found in *Columbia University*, based in part on arguments advanced by AAUP, "'[A]mple evidence exists to find that graduate assistants plainly and literally fall within the meaning of 'employee' as defined in Section 2(3)(of the Act)' and by the common law," which defines a "master/servant" relationship as one where "a servant performs

services for another, under the other's control or right of control, and in return for payment.'" *(citations omitted)*. Supreme Court precedent leaves no doubt that Section 2(3) provides broad coverage in the statutory language of "any employee."

Further, the NPRM attempts to exclude the entire category of "students who perform any services for compensation" based on the view that graduate assistants are "primarily students with a primarily educational, not economic, relationship with their university. As the comments observe:

> [T]he NPRM's proposed wholesale exclusion of graduate assistants from Section 2(3) finds no support in the statutory provisions of the NLRA, Supreme Court precedents interpreting the NLRA, and Board precedents finding educational/economic relationships to be consistent with employee status under Section 2(3). To the contrary, the coverage of graduate assistants as Section 2(3) employees is far more consistent with the statutory language, common law, Supreme Court precedent, and the purposes of the NLRA to encourage collective bargaining. As the Board stated in *Columbia University*, "The unequivocal policy of the Act…is to 'encourag[e] the practice and procedure of collective bargaining' and to 'protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.' Given this policy, coupled with the very broad statutory definitions of both 'employee' and 'employer,' it is appropriate to extend statutory coverage to students working for universities covered by the Act unless there are strong reasons *not* to do so."

The NLRB will need to respond to the comments submitted and will potentially issue a final rule. We will keep you apprised.

4. Union Recognition

***Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019)**

In Johnson Controls, Inc., 368 NLRB No. 20 (July 3, 2019), the three member Republican majority of the NLRB adopted a new framework making it easier for an employer to withdraw recognition and refuse to bargain with the union based on evidence that the union has lost support of the majority of the employees. As the Democratic member, McFerran, stated in her dissent, "No party to this case has asked the Board to reverse well-established, consistently-applied, and judicially-approved precedent. But the majority does so anyway, without providing public notice or inviting briefs, in a move that by now has become its unfortunate signature."

The employer's obligation to recognize and bargain with the union is based on the presumption that the union has support of the majority of the employees. This majority support is initially determined by an election. Subsequently, so long as the contract remains in effect, the

union's majority status is irrebuttably presumed, and the employer cannot refuse to recognize or bargain with the union. A union typically enjoys a presumption of majority support post-contract. This presumption can be rebutted if the employer receives evidence that the union has lost support of the majority of the employees, typically in the form of a petition signed by a majority of the unit indicating their nonsupport of the union.

If within a reasonable time before an existing collective-bargaining agreement expires, an employer receives evidence that the union has lost majority status, the employer may inform the union that it will withdraw recognition when the contract expires, and it may refuse to bargain or suspend bargaining for a successor contract (called an "anticipatory withdrawal of recognition"). As the Board explained, "A union that receives such notice of anticipatory withdrawal has a variety of options. Assuming it has grounds to do so, it may file an unfair labor practice charge alleging that the employer initiated the union-disaffection petition or unlawfully assisted it, that the petition fails to make the employees' representational wishes sufficiently clear, that the petition is tainted by serious unremedied unfair labor practices, or that the number of valid signatures on the disaffection petition fails to establish loss of majority status." If such unfair labor practices exist, any anticipatory withdrawal of recognition would be unlawful.

Previously, the Board also permitted a union to provide evidence that it had not lost majority support, such as a counter petition supporting the union signed by a majority of employees. Such evidence that the union has not lost majority status will no longer be considered. Additionally, as member McFerran explained, the prior standard let "employers obtain a Board election to test the union's status, if they can establish simply a good-faith reasonable uncertainty of the union's continuing majority support--a lesser showing than required to withdraw recognition unilaterally. . . . Thus, the [previous] framework is clearly designed to encourage employers to pursue the preferred route of a Board election rather than the riskier--and more destabilizing path of withdrawing recognition unilaterally."

However, under the new standard, the employer can unilaterally announce an anticipatory withdrawal no more than 90 days before the contract expires. "[I]f an incumbent union wishes to attempt to re-establish its majority status following an anticipatory withdrawal of recognition, it must file an election petition within 45 days from the date the employer announces its anticipatory withdrawal." A rival union can also intervene in the election if they submit the requisite showing of interest. While the election petition is pending, the employer may (but is not required to) refuse to recognize or bargain with the union. The employer's obligation to bargain with the union is not revived until the union wins the election. However, as even the majority recognized, "[t]ypically, a withdrawal of recognition is conduct that reasonably tends to cause employee disaffection from the union." Thus, the election will be held in circumstances that themselves undermine support for the union.

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 Structurals, 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 Structurals*.

> 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 Structurals*, 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 Structurals, 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 Structurals 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 Structurals, 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 ten and twenty 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 McFerran 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.