

# AAUP/AAUP-CBC Summer Institute

July 24, 2019

## 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 Eleventh Circuit relied on too broad a reading of *Garcetti*. *Garcetti* does not transform citizen speech into employee speech simply because the speech involves subject matter acquired in the course of employment. The crucial component of *Garcetti* then, is, whether the speech "is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." (See Legal Update, July 2016 for further discussion.)

### B. Faculty Speech

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

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note, a previous opinion by the Ninth Circuit in this case dated September 4, 2013 and published at 729 F.3d 1011 was withdrawn and substituted with this opinion.***) Adopting an approach advanced in AAUP's *amicus* brief, the court emphasized the seminal importance of academic speech.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

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

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

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

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

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

***Buchanan v. Alexander*, No. 18-30148 (5<sup>th</sup> 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 has stated that he did not condone "any practices where sexual language and profanity are used educating students." Subsequently, a faculty hearing committee recommended unanimously against dismissal of Professor Buchanan, 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 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 (8<sup>th</sup> 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.

This term pending before the Court were petitions for review in, what one conservative blog opined were “Two Cases The Supreme Court Might Use To Crush Unions.” In the last two weeks, 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 (8<sup>th</sup> Cir. 2018) *cert denied*, 18-766 (U.S. May 13, 2019).

However, there are a number of other similar challenges that are wending their way through the lower courts. At least some of these will likely be appealed to the Supreme Court in the coming months and years. The legal department is monitoring these cases, and in the event that 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.”

The *Janus* decision arose as a result of a long term campaign by anti-union groups to get rid of agency fees and discourage union membership as part of their avowed goal to “deal a mortal blow” to unions. Under *Abood* public sector unions could charge agency fees to non-union members for the cost of the union negotiating and enforcing a collective bargaining agreement covering those individuals. Over the last forty years, the courts have repeatedly found that the agency fee system adequately balances the interests of the employees and the state in an

efficient labor relations system and the First Amendment interests of union members and nonmembers. However, in a 2014 decision, *Harris v. Quinn*, Justice Samuel Alito questioned whether *Abood* was good law and virtually invited challenges to the constitutionality of fair share fees.

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

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

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

However, the *Janus* decision was limited to the issue of whether non-members could be compelled to pay agency fees. The majority stated "we are not in any way questioning the foundations of modern labor law." Thus, *Janus* did not hold that the First Amendment is violated by collective bargaining through an exclusive employee representative. While the majority decision raised issues with the concept of exclusive recognition, it explicitly stated that "It is also

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

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

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

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

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

The federal Second Circuit Court of Appeals found that the Union was not obligated to make such a reimbursement as the union relied in good faith on the law at the time (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 40 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.

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.

*Danielson v. Am. Fed'n of State, Cty., & Mun. Emps., Council 28, AFL-CIO*, 340 F.Supp.3d 1083, 1084-87 (W.D. Wash. 2018). 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 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*. See also, *Diamond v. Penn. State Educ. Assoc.*, No. 18-cv-00128-KRG, \_\_\_ WL \_\_\_, at 26 (W.D. Pa. July 8, 2019) (“It was objectively reasonable for the Union Defendants to rely on a state statute that was constitutional under Supreme Court precedent when collecting fair-share fees from Plaintiffs. By establishing objective reasonableness as a matter of law, Union Defendants have met . . . the subjective standard. . .”).

*Cook v. Brown*, 364 F.Supp.3d 1184, 1192 (D. Or. 2019). Plaintiffs challenged the constitutionality of agency fees and sought declaratory and injunctive relief and damages for allegedly wrongfully seized agency fees. After the *Janus* ruling, the federal court in Oregon dismissed Plaintiff’s request for declaratory and injunctive relief because the Union fully complied with *Janus* and stopped collecting agency fees. The court further determined that the Union was entitled to the good-faith defense because it complied with the law--“Precluding a good-faith defense based on subjective predictions of when the Supreme Court would overrule precedent would also imperil the rule of law. State Officials are entitled to rely on Supreme Court precedent in their official conduct, even if that precedent’s reasoning is questioned.” See also, *Pinsky v. Duncan*, 79 F 3d 306,313 (2d Cir. 1996) (“[I]t is objectively reasonable to act on the basis of a statute not yet held invalid.”)

*Babb v. California Teachers Association*, 378 F.Supp.3d 857 (C.D. Cal. 2019). In May 2019, a substantive ruling in a set of California teacher-union challenges was issued by a federal judge in Los Angeles. Plaintiffs in the consolidated lawsuits sought two forms of relief: (1) that compulsory agency fees be declared unconstitutional and enjoined; and (2) that the Unions be required to repay all agency fees they received before *Janus* was decided. The federal court in California dismissed Plaintiffs’ claims and held that the Unions had a good-faith defense to liability under §1983 because they collected agency fees while state law and controlling Supreme Court precedent allowed those fees, they acted in good faith.



The *Babb* rulings are consistent with other federal court decisions within the jurisdiction of the Ninth Circuit Court of Appeals. On March 14, 2019, a federal court in Alaska granted various teacher unions' motions to dismiss a similar lawsuit. *Crockett v. NEA-Alaska* 367 F.Supp.3d 996 (D. Alaska 2019). In April, Plaintiffs in that case filed an appeal to the Court of Appeals for the Ninth Circuit. Likewise, on March 11, a federal court in the state of Washington denied Plaintiff's request for injunctive relief and damages against the Union *Carey v. Inslee*, 364 F.Supp.3d 1220 (W.D. Wash. 2019.) The Plaintiffs in that case have also appealed to the Ninth Circuit. And on April 16, a federal court in California, in a two-paragraph decision, dismissed a lawsuit against the Union under the same analysis. *Hough v. SEIU Local 521* 2019 WL 1785414 (N.D. Cal. 2019). In *Hough*, the federal court emphasized, "Moreover, considering this issue outside of the rubric of good-faith reliance, there is a strong argument that when the highest judicial authority has previously deemed conduct constitutional, reversal of course by that judicial authority should never, as a categorical matter, result in retrospective monetary relief based on that conduct. Perhaps that is why the Supreme Court did not address whether Mr. Janus himself was entitled to the refund he sought. . ."

*Hernandez v. AFSCME California*, No. 2:18-CV-2419 WBS EFB, 386 F.Supp.3d 1300 (E.D. Cal. June 20, 2019). Plaintiffs claim that the alleged class members are entitled to a full refund of all agency fees paid to the Union before *Janus*. Following the reasoning of the US Court of Appeals for the Ninth Circuit, the federal court held that private parties may be entitled to a good faith defense to a claim under § 1983 where they "did [their] best to follow the law and had no reason to suspect that there would be constitutional change to [their] actions." *Citation omitted*. Here, the Union not only had authority under state statute, but the practice of collecting fees has been upheld for decades by the Supreme Court. Because Plaintiffs proposed remedy was legal in nature, the Union's good-faith bars relief. Even if the court were to consider Plaintiffs claims as equitable in nature, allowing the recoupment of such a large sum of money would "have potentially disruptive consequences that could threaten the operations of unions and significantly deplete their treasuries." *Citation omitted*, and "would stand the equitable remedy on its head." *Citation omitted*. This case is ongoing but the court is addressing only narrowly drawn issues regarding the state common-law tort claims.

*Doughty v. State Emp.'s Ass'n of N.H., SEIU, Local 1984, CTW, CLC*, 19 cv 00053-PB (D. N.H. May 30, 2019). In an unprecedented decision from the bench after oral argument, a federal court in New Hampshire dismissed Plaintiff's claim for repayment of agency fees paid prior to *Janus*. The federal court did not distinguish this case from the other cases in which courts from around the country "have unanimously agreed that your cause of action [for repayment of agency fees paid prior to *Janus*] is subject to a good-faith defense."

*Wholean v. CSEA SEIU Local 2001*, 3:18-cv-01008-WWE, 2019 WL 1873021 (D. Conn. April 26, 2019). Plaintiffs brought a putative class action under §1983 challenging the constitutionality

of requiring non-union members to pay agency fees as a condition of state employment. Plaintiffs also alleges unjust enrichment. A federal court in Connecticut dismissed Plaintiffs' claims for declaratory judgment and injunctive relief as moot because the Supreme Court already determined the issue and the Unions demonstrated that the collection of agency fees had ceased and was unlikely to recur. The court further held that "Plaintiffs cannot assert a claim for prospective relief based on past unconstitutional conduct that has now ceased or based on a subjective belief that the unconstitutional conduct may recur."

Akers v. Md. State Educ. Ass'n, No. RDB-18-1797, 376 F. Supp. 3d 563 (D. Md. April 18, 2019). Plaintiffs sought declaratory and injunctive relief, alleging that the Unions' voluntary cessation of unconstitutional actions did not moot their lawsuit. Plaintiffs also requested repayment of all representation fees that had been previously collected. A federal court in Maryland rejected Plaintiffs' voluntary cessation argument and held that "Since the *Janus* decision, multiple courts have had an opportunity to address similar claims and arguments in their jurisdictions and have uniformly held that Plaintiffs' claims were rendered moot under similar circumstances." This case has been appealed to the US Circuit Court of Appeals for the Fourth Circuit. *See also e.g. Lee v. Ohio Educ. Ass'n*, 366 F. Supp. 3d 980, 982-83 (N.D. Ohio 2019)("[T]he Court joins an ever-growing number of courts that have found that causes of action seeking to enjoin collection of fair-share fees and recoup damages based on prior collection of those fees must be dismissed in light of *Janus*. . .")

Mooney v. Ill. Educ. Ass'n, 1:18-cv-1439, 372 F. Supp. 3d 690 (C.D. Ill. April 11, 2019). Plaintiffs brought a putative class action under § 1983 seeking reimbursement of the fair-share fees she and the putative class members paid to the Unions. A federal court in Illinois dismissed Plaintiffs' claim for refund of agency fees and found that the good-faith defense was available to the Unions as this was an action founded in law and not equity. The court also concluded that it did not need to look to the most analogous tort once the good-faith defense was allowed.

Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, AFL-CIO, 15-cv-01235-RWG, 2019 WL 1239780 (*Janus II*)(N.D. Ill. Mar. 18. 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*. Plaintiffs in *Janus II* have appealed this decision to US Court of Appeals for the Seventh Circuit.

### 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.

This case arose from an appeal of a lawsuit filed by several UT faculty contesting a policy that had been promulgated as a result of the campus carry law that expressly permits concealed handguns on university campuses. In 2016, UT issued a Campus Carry Policy mandating that faculty permit concealed handguns in their classrooms. In their lawsuit before the United States District Court for the Western District of Texas, the faculty alleged that enforcement of the Campus Carry Policy profoundly changes the educational environment in which plaintiffs teach in violation of the First Amendment. The district court dismissed the case, concluding that the faculty failed to establish an injury-in-fact or that the alleged injury was traceable to any conduct of defendants. The court stated that the faculty cannot “establish standing by ‘simply claiming that they experienced a “chilling effect” that resulted from a governmental policy that does not regulate, constrain, or compel any action on their part.’” (Order at 4 (*citing Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1153 (2013).) It concluded that the faculty asked the court to find standing based only on “their self-imposed censoring of classroom discussions caused by their fear of the possibility of illegal activity by persons not joined in this lawsuit.” (Order at 6). The faculty challenged the district court’s holding and also argued that because the district court failed to provide any reasoning for the dismissal of their Second and Fourteenth Amendment claims, the federal appeals court should consider the merits of these claims.

In its [amicus](#) brief in support of the faculty the AAUP joined with the Giffords Law Center to Prevent Gun Violence and the Brady Center to Prevent Gun Violence and focused on the faculty’s First Amendment claim and argued that the law and policy infringed on the faculty’s academic freedom by creating an imminent cognizable injury that is neither hypothetical nor speculative. The brief explained that the deleterious impact of guns on education is widely recognized by university administrators and faculty, whose conclusions are confirmed by a significant body of social science research. The brief also argued that the “decision whether to permit or exclude handguns in a given classroom is, at bottom, a decision about educational

policy and pedagogical strategy. It predictably affects not only the choice of course materials, but how a particular professor can and should interact with her students—how far she should press a student or a class to wrestle with unsettling ideas, how trenchantly and forthrightly she can evaluate student work. Permitting handguns in the classroom also affects the extent to which faculty can or should prompt students to challenge each other. The law and policy thus implicate concerns at the very core of academic freedom: They compel faculty to alter their pedagogical choices, deprive them of the decision to exclude guns from their classrooms, and censor their protected speech.”

In August 2018, the federal appeals court upheld the district court’s ruling. On the First Amendment “standing” issue, the court determined that the faculty lacked standing because they could not show whether the harm threatened by the concealed-carrying students was “certainly impending.” “Because she [Plaintiffs] fails to allege certainty as to how these students will exercise their future judgment, the alleged harm is certainly not impending.” The court also rejected the faculty’s Second and Fourteenth Amendment claims. The court rejected the faculty’s interpretation of the Second Amendment’s prefatory clause and found that it cannot “limit or expand the scope” of an individual right. Finally, the court rejected the faculty’s claim that the law and policy violated their rights under the Equal Protection Clause under the Fourteenth Amendment because the faculty failed to meet its burden to establish that the law and policy lacked a rational basis.

***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.

In late 2014, Dr. McAdams, a tenured professor at Marquette University, published a blog post on his personal blog, which criticized Cheryl Abbate, a graduate student and philosophy

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

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

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

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

AAUP submitted an *amicus* brief to the Wisconsin Supreme Court, which explained that "Such a formulation of limiting academic freedom to 'views' that do 'not infringe on the rights of others' vastly undermines academic freedom. The nature of offering opinions, particularly

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

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

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

Relying on AAUP’s standards and principles, the court determined that Dr. McAdam’s blog post was an “extramural comment,” a type of expression made in Dr. McAdams’ personal not professional, capacity. In the next step of its analysis, the court adopted the AAUP’s “analytical

structure” to analyze the impact of the blog post—the controlling principle, the court noted, is that a “faculty member’s expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness for his or her position. If the comment meets this standard, the second part of this analysis considers the broader context of the faculty member’s complete record before deciding whether the extramural comment is protected by the doctrine of academic freedom: ‘[A] final decision should take into account the faculty member’s entire record as a teacher and scholar.’” *quoting from AAUP’s 1940 Statement of Principles of Academic Freedom and Tenure with 1970 Interpretive Comments and Committee A Statement of Extramural Utterances*. Marquette failed to follow these long standing AAUP standards and principles.

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

***City & 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.

On January 25, 2017, the Trump administration issued Executive Order 13768 which declares that “(i)t is the policy of the executive branch to . . . (e)nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law.” Section 9 implements that policy by commanding executive branch officials to strip state and local governments deemed to be “sanctuary jurisdictions” of their eligibility “to receive grants.” The City and County of San Francisco and the County of Santa Clara filed suit in the US District Court for the Northern District of California against President Trump and other federal officials, alleging that the executive order violated the separation of powers doctrine, the Tenth Amendment, and due process guarantees.

On April 25, 2017, the district court determined that the city and county of San Francisco and county of Santa Clara had pre-enforcement standing to protect hundreds of millions of dollars of federal grants from the unconstitutionally broad sweep of the Executive Order. The district court entered a nationwide preliminary injunction against the executive order and enjoined the defendants-appellants from enforcing Section 9(a) of the executive order as such enforcement would continue to cause constitutional injury by violating the Separation of Powers doctrine and depriving plaintiffs-appellees of their Tenth and Fifth Amendment rights.

In February 2018, the AAUP joined with other groups, including members of the California Community College System, in filing an amicus brief opposing the executive order and supporting a permanent injunction preventing its enforcement. The AAUP’s interest in the case stemmed from the potential application of the executive order to colleges and universities. The amicus brief argues that such an extension would negatively impact colleges’ and universities’ ability to carry out their public mission and their interests in developing a diverse student body. The brief also emphasizes the harms caused by the Executive Order—undermining the critical interest that our society has in the education of all its residents regardless of immigration status; threatening higher education’s constitutional interest in educational independence to create the sort of diverse student body that is critical to the intellectual and academic life of the community; devastating university research opportunities by withdrawing federal funding for failure to participate in federal immigration enforcement; and penalizing students’ opportunities for higher education by withdrawing federal student scholarship funding.

The Ninth Circuit concluded that the Executive Order violates the Separation of Powers, and that the Administration has not even attempted to show that Congress authorized it to withdraw federal grant money from jurisdictions that do not agree with the current Administration’s immigration strategies. “Not only has the Administration claimed for itself Congress’s exclusive spending power, it has also attempted to coopt Congress’s power to



legislate.” Moreover, the president’s authority to act must stem from either an act of Congress or from the Constitution itself. Neither of which happened in this case.

From the start of the current administration, AAUP has supported the nationwide sanctuary movement in states, cities, and other localities and across college and university campuses. While the court did not directly address college and universities as sanctuary jurisdictions, the decision reinforces the argument that the administration cannot cut off federal funding to colleges and universities because they are sanctuary campuses.

#### 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<sup>1</sup> and a member of SEIU 925), particularly emails sent to and from Professor Woods university email address, [aaup@u.washington.edu](mailto: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 AAUP UW Chapter listserv; (3) personal emails and/or documents unrelated to any UW business; and (4) personal emails sent or received by Professor Wood in his capacity as AAUP UW chapter president and unrelated to UW business (the “Non-Public Records”). SEIU argued that the Non-Public Records were personal and private and thus not “public records” under the PRA because they do not relate to the conduct of government or a governmental or proprietary function. Following this reasoning, the trial court (in March 2017) entered a permanent injunction enjoining release of those because they are not “public records” under the PRA. The Foundation filed a Notice of Appeal with the Court of Appeals of the State of Washington, Division I (the “Court of Appeals”).

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

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<sup>1</sup> The Court of Appeals specifically noted that the “UW chapter of the national nonprofit organization, the American Association of University Professors, uses the UW e-mail account, [aaup@u.washington.edu](mailto:aaup@u.washington.edu). That account operates as an email ‘listserv’ and distributes messages to an e-mail subscriber list.”

## 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.*, 2018 U.S. Dist. LEXIS 70962 (M.D. Pa. April 27, 2018)**

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."

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.

***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**

***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 discussed in detail above. As explained above, the Wisconsin Supreme Court declined to defer to the university’s decision on the discipline of Dr. McAdams. One important reason was that the faculty hearing committee’s decision was only advisory and not binding on the administration. The court stated, “The Discipline Procedure produced advice [from the 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.

## 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. 1:2014-CV-14176 (D. Mass.)(pending)**

AAUP joined an amicus brief prepared by the American Council on Education (ACE) (and joined by thirty-six higher education organizations) for submission to the United States District Court for the District of Massachusetts, Boston Division, in opposition to the motion for summary judgment by Students for Fair Admissions (SAFFA), which challenges Harvard College's admissions policies. For many years, the AAUP has advocated in favor of affirmative action in higher education, emphasizing the educational value of diversity, through amicus briefs in Supreme Court cases from *Regents of the University of California v. Bakke* in 1978 to *Fisher v.*



Texas in 2016, and through AAUP policy. See “Affirmative Action Plans: Recommended Procedures for Increasing the Number of Minority Persons and Women on College and University Faculties,” AAUP, Policy Documents and Reports, 157-163 (11th ed. 2015). This amicus brief argues that “a diverse student body is essential to the educational objectives of colleges and universities, and that each institution should be able to exercise its academic judgment to determine within broad limits the diversity that will advance its individual mission.” The brief further argues that holistic review (of applications) remains a cornerstone for race-conscious admissions because it gives each applicant individualized consideration and reduces no one to her race.

The case arose in 2014 when SFFA filed a lawsuit alleging that Harvard College discriminates against Asian-American students in its admissions processes. In its complaint, SFFA claims Harvard uses “racially and ethnically discriminatory policies and procedures in administering the undergraduate admissions program at Harvard College in violation of Title VI of the Civil Rights Act of 1964.” Specifically, the suit alleges Harvard’s use of race in its admissions process holds Asian-American applicants to a higher standard, that Harvard engages in “racial balancing,” that it uses race as a dominant factor in its admissions decisions, and that it overlooks race-neutral alternatives when choosing which students to admit. In response to the claims, Harvard has consistently denied that it has engaged in racial discrimination or suppressed the number of Asian-American students. Instead, Harvard says that it reviews every aspect of each applicant’s background and experience in order to develop a diverse student body that university officials say helps better prepare undergraduates to succeed in a society where working with people who have different life experiences, perspectives, and backgrounds is increasingly essential; and that this review process comports with federal law and a string of previous US Supreme Court rulings. The parties filed pre-trial summary judgment motions and a trial in this case is scheduled for mid-October 2018.

SFFA’s motion for summary judgment, in substance, asks the court to require fundamental changes to university admissions processes and to mandate a more mechanical process in which educators’ ability to choose which academic and other criteria they wish to use, weigh and apply play next to no role. The brief argues that “that shift would undermine the recognized freedom of a university to assemble a class that, in the university’s judgment, will best advance that university’s particular mission.” In *Fisher II*, 136 S. Ct. 2198 (2016), our brief successfully argued that the importance of student diversity and its status as a compelling interest could not be seriously disputed. The current amicus relies on the US Supreme Court’s analysis set forth in *Fisher II*—“Considerable deference is owed to a university in defining. . . intangible characteristics, like student body diversity, that are central to its identity and educational mission.” 136 S. Ct. at 2214. The amicus further argues that court should “reject SFFA’s effort to upset decades of Supreme Court precedent and permit Harvard College to pursue

the version of diversity that best suits their mission and goals, including through the limited consideration of race.”

The amicus also argues that Harvard’s holistic review (of applications) is supported by Supreme Court precedent. “Because the holistic review focuses on individual applicants . . . consideration of race as one aspect of this process is permissible.” *Grutter v. Bollinger*, 539 U.S. 244, 337; *Fisher II*, 136 S. Ct. at 2205. Holistic review does not treat “an applicant’s race or ethnicity [as] the defining feature of his or her application.” *Grutter*, 539 U.S. at 337. Finally, the brief argues that the court should reject SFFA’s effort to upset decades of Supreme Court precedent that has approved of holistic and individualized admissions processes, “a victory for plaintiff could upend this evolved and evolving system. In a nation that is more connected and racially and ethnically diverse than ever, such an outcome would deprive many students of the critical benefits of campus diversity and thus education they will need as citizens and leaders in the 21st century.”

## **B. Sexual Misconduct – 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.

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

On November 16, 2018, the Department of Education issued its highly-anticipated proposed regulations governing Title IX and the institutional response to campus sexual harassment and sexual violence. The Department of Education explained that “The proposed regulations would clarify and modify Title IX regulatory requirements pertaining to the availability of remedies for violations, the effect of Constitutional protections, the designation of a coordinator to address sex discrimination issues, the dissemination of a nondiscrimination policy, the adoption of grievance procedures, and the process to claim a religious exemption. The proposed regulations would also specify how recipient schools and institutions covered by Title IX (hereinafter collectively referred to as recipients or schools) must respond to incidents of sexual harassment consistent with Title IX’s prohibition against sex discrimination.”

On January 28, 2019, AAUP submitted comments in response to a proposal by the US Department of Education to amend Title IX regulations concerning sexual harassment. The AAUP responded, in particular, to a question posed by the department about “whether there are any unique circumstances that apply to processes involving employees.” The AAUP’s comments are directed to the unique circumstance of faculty in higher education.

The proposed regulations ultimately fail to specify the importance of academic freedom and shared governance for Title IX proceedings. Moreover, we object to proposed regulations that unduly narrow the scope of protections against sexual harassment.

The AAUP urges the Department of Education to adopt regulations that do the following:

- Define sexual harassment broadly enough to prohibit conduct that creates a hostile environment
- Protect freedom of speech and, in particular, academic freedom of faculty in teaching and research
- Protect due process in investigations and hearings
- Endorse shared governance to bring faculty expertise and institutional knowledge into developing and implementing policies related to Title IX

In 2016, the AAUP published *The History, Uses, and Abuses of Title IX*. This report urges the education department and universities to address and prevent sexual harassment in ways that also fully protect academic freedom and due process, and in ways that enhance shared governance by faculty and students.

While some of the Department of Education's proposed regulatory changes technically comport with recommendations made in the AAUP’s 2016 report, narrow agreement on a legal rule or standard is not indicative of agreement about what counts as inequality and how to redress it. The AAUP is committed to abolishing systemic discrimination in higher education. As our 2016 report notes, while colleges, universities, and the education department focus on the sexual dimensions of sex discrimination, the plain language of Title IX is meant to protect those on campus more broadly from unequal access to educational resources, wage disparities, and inequitable representation across the university system. To these ends, we again caution against the extraction of gender equity from more comprehensive assessments of the bases for inequality—including race, class, sexuality, disability, and other dimensions of social difference—both on and off campus.

The AAUP encouraged the Department of Education, as well as colleges and universities, to take note of the recommendations in our 2016 Title IX report and to work to improve the working and learning conditions of all campus constituents. Such improvements should include fully committing to interdisciplinary learning on campus by adequately funding gender, feminist, and sexuality studies, as well as allied disciplines, as part of an effort to teach about all forms of inequality, including inequalities based on race, gender identity, disability, class, geographic

location, and sexual orientation. A more detailed summary of AAUP's comments can be found at <https://www.aaup.org/report/history-uses-and-abuses-title-ix>.

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

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

### **C. Discrimination Claims and Due Process**

***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, 17-1623, 18-107 (U.S. 2019)(appeal pending)**

AAUP joined an amicus brief prepared primarily by the Lawyers' Committee for Civil Rights Under Law (and joined by other civil rights organizations) that was filed in the Supreme Court of the United States arguing that LGBTQ discrimination in the workplace violates Title VII of the Civil Rights Act. The brief involves three separate cases that have been consolidated by the court arising from the termination of employees based on their LGBTQ status. The amicus brief argues that workplace discrimination against LGBTQ people is discrimination "because of ... sex" and therefore is prohibited by Title VII. A decision from the court is expected by June 2020.

Each of these three consolidated cases 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 would transition to live as a woman. She brought her claim to the Equal Employment Opportunity Commission (EEOC), which investigated and then brought suit against 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 court will now have the opportunity to determine whether Title VII applies to sexual orientation and transgender status.

The amicus brief AAUP has joined argues that Title VII applies to workplace discrimination based on LGBTQ status since it is discrimination because of an individual's sex. The amicus brief outlines how the history Title VII has resulted in successful progress toward eradicating workplace discrimination and how it bars disparate treatment because of sexuality. It also explains that a decision to exclude LGBTQ status from Title VII's protections would leave LGBTQ people of color unprotected from pretextual racial discrimination because of the intersectionality of identities. As the amicus brief argues, 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. 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.

***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 or 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 8 countries, most of which are predominately Muslim. In an opinion by Chief Justice Roberts, the majority relied on the national security

justifications for the ruling, and held that the travel ban is fully consistent with Congress's Immigration and Nationality Act as well as the Establishment Clause of the U.S. Constitution. Justice Sonia Sotomayor, in dissent, lamented that the court had "blindly" endorsed "a discriminatory policy motivated by animosity toward Muslims."

## **B. Deferred Action for Childhood Arrivals**

### ***Department of Homeland Security v. Regents of the University of California*, No. 18-587 (U.S. June 28, 2019)(petition for writ of certiorari granted)**

The Supreme Court recently announced that it will take up the challenge to the Trump administration's decision to end the program known as "Deferred Action for Childhood Arrivals," or "DACA" in three consolidated cases: *Department of Homeland Security v. Regents of the University of California*, No. 18-587, 2019 U.S. LEXIS 4407 (June 28, 2019), *Trump v. NAACP* (with Princeton University also a party) No. 18-588, 2019 U.S. LEXIS 4421 (June 28, 2019), and *McAleenan v. Vidal*, No. 18-589, 2019 U.S. LEXIS 4424 (June 28, 2019).

Established by the Obama administration in 2012, DACA allowed undocumented immigrants who had been brought to the United States as children to apply for protection from deportation and (among other things) permission to work in this country. In 2017, the Trump administration revealed its plans to terminate DACA, which would make some of the 800,000 young adults who qualified for the program eligible for deportation once again.

In the lead case, the University of California sued the administration and sought to block the government from rescinding DACA. The government argued that the courts had no authority to review its decision to end DACA, and that it was justified in ending the program as DACA was unlawful. In January 2018, a federal judge in California issued an order that blocked the government from ending the program; similar orders from two other courts soon followed.

In November of 2018, the U.S. Court of Appeals for the 9th Circuit upheld the district court's order requiring the Trump administration to keep the DACA program in place, *Regents of the Univ. of Cal. V. U.S. Dept. of Homeland Security*, 908 F.3d 476 (9th Cir. 2018). First, the court concluded that it had authority to review the decision to rescind DACA. Next, the court concluded that, because the Acting Secretary was incorrect in her belief that DACA was illegal and had to be rescinded, plaintiffs are likely to succeed in demonstrating that the rescission must be set aside as arbitrary and capricious.

The Trump administration appealed this decision and two others—*NAACP v. Trump*, 315 F. Supp. 3d 457 (D.D.C. 2018), *Vidal v. Duke*, 295 F. Supp. 3d 127 (E.D.N.Y. 2017)—to the Supreme Court. On June 28, 2019, the Supreme Court agreed to hear the three cases and consolidated them under the name of the University of California case. The Court identified the issues it will consider as (1) whether the Department of Homeland Security's decision to wind down the



Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

The Supreme Court has set oral argument for November 12th. The AAUP anticipates joining an amicus brief opposing the Trump administration's decision to terminate DACA. The brief will likely be filed in late September. A decision is expected prior to July of 2020.

## VIII. Collective Bargaining Cases and Issues – Private Sector

### A. NLRB Authority

#### 1. Religiously Affiliated Institutions

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

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

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

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

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

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

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

***Duquesne University v. National Labor Relations Board*, No. 18-1063 (D.C. Cir. 2018)(appeal pending)**

On September 24, 2018, the AAUP filed an amicus brief in the United States Court of Appeals for the District of Columbia Circuit (the "DC Circuit") in support of a National Labor Relations Board ("NLRB") decision enforcing adjunct faculty rights to unionize at a religiously affiliated university. *Duquesne University ("Duquesne") v. National Labor Relations Board*, No.-18-1063 (D.C. Cir. 2018)(appeal pending). The amicus brief argues that there would be no unconstitutional entanglement with religion if the NLRB's analysis in *Pacific Lutheran University*,

361 NLRB 1404 (2014)(“Pacific Lutheran”) were applied to determine whether Duquesne’s adjunct faculty performed a specific role in creating or maintaining Duquesne’s religious educational environment. The amicus brief also outlines how the AAUP’s longstanding principles and standards on religious exemptions (or its “limitations clause”) can provide guidance to the court in its analysis.

This case stems 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 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 amicus brief focuses primarily on AAUP’s pivotal 1940 Statement of Principles on Academic Freedom and Tenure and the 1940 Statement’s “limitations clause” and argues 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 demonstrates 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 argues 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.

## 2. Faculty as Managers

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

In this case the National Labor Relations Board published a significant decision expanding the organizing rights of private-sector faculty members. The Board modified the standards used to determine two important issues affecting the ability of faculty members at private-sector higher education institutions to unionize under the National Labor Relations Act: first, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities (*see supra*); and second, whether certain faculty members are managers, who are excluded from protection of the Act. In addressing this second issue, the Board specifically highlighted, as AAUP had in its *amicus* brief submitted in the case, the increasing corporatization of the university. However, this holding is susceptible to reversal under a newly constituted Board.

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

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

the administration and the faculty reflects a lack of alignment of administration and faculty interests.

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

Further, in explaining the need for the new standard, the Board specifically highlighted, as AAUP had in its *amicus* brief, the increasing corporatization of the university. The Board stated, "Indeed our experience applying *Yeshiva* has generally shown that colleges and universities are increasingly run by administrators, which has the effect of concentrating and centering authority away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself. Such considerations are relevant to our assessment of whether the faculty constitute managerial employees."

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

The Board emphasized that to be found managers, faculty must in fact have actual control or make effective recommendations over policy areas. This requires that "the party asserting managerial status must prove actual—rather than mere paper—authority. . . . A faculty handbook may state that the faculty has authority over or responsibility for a particular decision-making area, but it must be demonstrated that the faculty exercises such authority *in fact*." Proof requires "specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision making area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally

followed.” Further, the Board used strong language in defining “effective” as meaning that “recommendations must almost always be followed by the administration” or “routinely become operative without independent review by the administration.”

***University of Southern California v. National Labor Relations Board, No. 17-1149 (D.C. Cir. March 12, 2019)***

On March 12, 2019, the District of Columbia Circuit Court of Appeals issued a decision in this case. On December 28, 2017 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 is susceptible to reversal under a newly constituted Board.

The AAUP filed an *amicus* brief with the Board arguing that extending collective bargaining rights to student employees promotes academic freedom and does not harm faculty-student mentoring relationships, and instead would reflect the reality that the student employees were performing the work of the university when fulfilling their duties. In reversing *Brown*, the majority said that the earlier decision “deprived an entire category of workers of the protections of the Act without a convincing justification.” The Board found that granting collective bargaining rights to student employees would not infringe on First Amendment academic freedom and, citing the AAUP *amicus* brief, would not seriously harm the ability of universities to function. The Board also relied on the AAUP *amicus* brief when it found that the duties of graduate assistant constituted work for the university and were not primarily educational.

Despite the instability that this would add to the NLRB’s precedents, the newly constituted NLRB could overrule *Columbia University* and return to the *Brown University* holding that graduate assistants are not employees under the NLRA. In *Columbia*, Republican-appointed member Miscimarra filed a vigorous dissent arguing that the Board’s earlier decision and



reasoning in *Brown* were correct. *Id.* at 24-25. The position in this dissent would likely represent the position of the majority of the new Republican-dominated Board.

Unions representing graduate student employees have withdrawn pending NLRB petitions and charges, and are not filing new petitions or charges, which would result in the NLRB not having the opportunity to review and reverse or modify the *Columbia University* decision. 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)***

In March 2019, the NLRB issued a notice that “The National Labor Relations Board will be engaging in rulemaking to establish the standard for determining whether students who perform services at a private college or university in connection with their studies are "employees" within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. 153(3)).” This notice likely means that the NLRB is seeking to reverse or revise the ruling in *Columbia University*, 364 N.L.R.B. 90 (2016), recognizing the rights of graduate students to organize.

Under the rule making process, the NLRB will next issue a proposed rule, which will be subject to comment prior to being finalized. The earliest the rule will be proposed is in September of 2019. Once the rule is proposed, the AAUP expects to submit comments supporting the rights of graduate students to organize. The ultimate form of any rule, and its effective date, are uncertain. Even if the NLRB issues a rule finding that graduate students cannot organize under the protection of federal labor law, graduate students will be able to continue to organize outside of the board process.

**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 10 and 20 days.

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

revised rules and prepared for the hearing and election process prior to filing any election petition with the NLRB.

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

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

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

The Request for Information was approved by former Board Chairman Philip A. Miscimarra and Board Members Marvin E. Kaplan (now Chairman) and William J. Emanuel. Board Members Mark Gaston Pearce and Lauren McFerran dissented. The majority noted that the request "does not suggest even a single specific change in current representation election procedures." *Id.* at 3. However, member McFerren in a dissent argued that "the nature and timing of this [request], along with its faulty justifications, suggests that the majority's interest lies . . . in manufacturing a rationale for a subsequent rollback of the Rule in light of the change in the composition of the Board." *Id.* at 11.