AAUP Summer Institute

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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. Pending Legislation Restricting Teaching, Controlling Higher Education, Limiting and Removing Tenure, and Punishing Teachers and Faculty

There has recently been a wave of legislation seeking to restrict teaching and learning about racial discrimination and generally creating legislative and political control over higher education. These bills have been termed "Educational Gag Orders." This legislation is focused on both higher education and K-12. As of June 22, 2023, PEN America had a list of **104 bills in state legislatures**, and the UCLA CRT Forward project had a list of **619 such measures**, which includes both state and local legislation and other measures (such as school board policies).

Sample Pending and Enacted Legislation

The legislation on these topics is rapidly evolving. Here is a list of state legislation, as of late June 2023, courtesy of PEN America.

- Pending Legislation:
    - Federal: House Resolution 9001. Educational gag order on teaching.
        - Referred to the Subcommittee on Crime, Terrorism, and Homeland Security
    - Minnesota HF 2019: Prohibits public K-12 schools, colleges, and universities from teaching or promoting certain ideas related to race or sex, or requiring students read a book that teaches or promotes those ideas.
        - Read and referred to Education Policy Committee.
    - Missouri SB 410: Prohibits public colleges and universities, as well as private ones that receive state funding, from requiring students to agree with or answer questions related to "antiracism, implicit bias, health equity, and any other related instructions

or that promote differential treatment based on race, gender, religion, ethnicity, and sexual preference." Students who take classwork related to these issues may not receive any benefit or compensation that may not also be received by students who decline to take such classwork.

        - Passed Education and Workforce Development Committee.

    - North Carolina HB 715: Eliminates tenure.

        - Read and referred to Education – Community Colleges Committee.

    - Texas HB 1006: Requires public universities to develop a policy that prohibits "the endorsement or dissuasion of, or interference with, any lifestyle, race, sex, religion, or culture." The policy must also prohibit any office that funds, promotes, sponsors, or supports diversity, equity, or inclusion beyond what is necessary to uphold the 14th Amendment of the Constitution.

        - Read and referred to Higher Education Committee

    - Texas HB 1033: Prohibits public K-12 schools and universities from requiring, or contracting with any organization that requires, any person to receive or participate in a training, identify a commitment to, or make a statement of personal belief supporting any specific partisan, political, or ideological set of beliefs, including an ideology or movement that promotes the differential treatment of any individual or group based on race or ethnicity, including initiatives related to diversity, equity, and inclusion or that assert that an institution that upholds equal protection under the law is racist, oppressive, or unjust.

        - Read and referred to State Affairs Committee

- Enacted Legislation:

    - Florida HB 999/SB 266: Public colleges and universities are prohibited from expending any state or federal funds on any program or campus activity that violates the Stop W.O.K.E. Act (HB 7), that advocates for diversity, equity, and inclusion, or that promotes or engages in political or social activism. Governing boards are required to review their institutions for violations of the Stop W.O.K.E. Act, as well as for programs that are "based on theories that systemic racism, sexism, oppression, or privilege are inherent in the institutions of the United States and were created to maintain social, political, or economic inequities." General education courses may not “distort significant historical events,” teach “identity politics,” violate the Stop W.O.K.E. Act, or be “based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities.”

- Texas HB 5127/SB 17: Prohibits public colleges and universities from establishing or maintaining DEI offices or from engaging in certain activities related to race, sex, color, or ethnicity.

- Texas SB 18: The granting of tenure does not create a property interest in any attribute of a faculty position beyond a faculty member's continuing employment. Tenure may be revoked due to "moral turpitude" or "unprofessional conduct" that "adversely affects the institution or the faculty member's performance of duties or meeting of responsibilities."

- Tennessee HB 1376/SB 0817: Prohibits public colleges and universities from using or approving for use state funds for membership, subscription, or travel-related expenses for an organization that endorses or promotes a "divisive concept," defined in statute as certain ideas related to race, sex, religion, creed, nonviolent political affiliation, social class, or class of people."

- North Dakota SB 2247: Prohibits public colleges and universities from compelling students or employees to endorse or oppose certain concepts related to race, sex, religion, creed, nonviolent political affiliation, social class, or class of people. Colleges may not ask any student or faculty member about their ideological or political viewpoint.

- Florida SB 244/H1035: Creates right of private action for students, teachers, and faculty who believe they have experienced discrimination under HB 7.

A. Resources and Websites

AAUP

The AAUP has developed resources to address a widespread attempt to suppress teaching about race in American history.

https://www.aaup.org/issues/educational-gag-orders-legislative-interference-teaching-about-race

https://www.aaup.org/issues/political-interference-florida

PEN America

Educational gag orders are state legislative efforts to restrict teaching about topics such as race, gender, American history, and LGBTQ+ identities in K–12 and higher education. PEN America tracks these bills in their Index of Educational Gag Orders, updated weekly.

https://pen.org/report/Americas-censored-classrooms/

https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=1505554870

PEN America and the American Council on Education have produced a resource to help higher education leaders "make the case against elected officials imposing restrictions on what is taught."

https://www.acenet.edu/Documents/Academic-Freedom-Resource-Guide.pdf

UCLA – CRT Forward Tracking Project

The UCLA School of Law Critical Race Studies Program (CRS) launched CRT Forward, an initiative to address the current attacks on Critical Race Theory (CRT) while also highlighting the past, present and future contributions of the theory. A critical component of CRT Forward, the Tracking Project tracks, identifies, and analyzes measures aimed at restricting access to truthful information about race and systemic racism. These anti-CRT measures are captured across all levels of government (including both higher education and K-12) and displayed on an interactive map.

https://crtforward.law.ucla.edu/

III. First Amendment and Speech Rights

A. Faculty Speech

***Pernell v. Fla. Bd. of Governors*, No. 4:22cv304 (N.D. Fla. Nov. 17, 2022), on appeal, No. 22-13992 (11th Cir. appeal filed Feb. 8, 2022)**

On June 23, 2023, the AAUP filed an amicus brief in the United States Court of Appeals for the Eleventh Circuit in support of Florida faculty who are challenging the state's "Stop WOKE" Act. That law, passed in 2022 and formally known as the Individual Freedom Act, prohibits professors at Florida's public universities from expressing certain disfavored viewpoints while teaching on topics including those involving racial and sexual discrimination and injustice. The AAUP's brief argues that the law violates the First Amendment and threatens to destroy academic freedom, sabotage higher education, and undermine democracy.

The case arose from a challenge to Florida's HB 7 — also known as the Stop Wrongs Against Our Kids and Employees ("Stop W.O.K.E. Act"). The plaintiffs are a multi-racial group of educators and a student in Florida colleges and universities, represented by the American Civil Liberties Union, the ACLU of Florida, and the Legal Defense Fund (LDF). They challenged the discriminatory classroom censorship law that severely restricts Florida educators and students from learning and talking about issues related to race and gender. Florida is one of over a dozen states across the country that have passed laws aimed at censoring discussions around race and

gender in the classroom. The court issued a preliminary injunction to plaintiffs. On November 17, 2022, the court order found the Stop W.O.K.E. Act violates the First and Fourteenth Amendments. The order explained, "The law officially bans professors from expressing disfavored viewpoints in university classrooms while permitting unfettered expression of the opposite viewpoints. Defendants argue that, under this Act, professors enjoy 'academic freedom' so long as they express only those viewpoints of which the State approves. This is positively dystopian. It should go without saying that '[i]f liberty means anything at all it means the right to tell people what they do not want to hear.'" The state then appealed to the Court of Appeals.

The AAUP's amicus brief, which urges the Eleventh Circuit to affirm the district court's preliminary injunction, consists of two main parts. The first part argues that the IFA violates the First Amendment and explains that if the law is allowed to go into effect, it will destroy academic freedom, sabotage higher education, and undermine democracy. Building on key Supreme Court precedents and important AAUP statements, including the 1915 *Declaration of Principles on Academic Freedom and Academic Tenure* and the 1940 *Statement of Principles on Academic Freedom and Tenure*, the brief argues that allowing politicians to ban the expression of viewpoints they dislike from the university classroom is antithetical to academic freedom, which the Supreme Court has long recognized to be "a special concern of the First Amendment." As the brief states, "An essential aspect of academic freedom is the freedom of college and university faculty to teach a given subject without the government invading the classroom to suppress the expression of certain viewpoints." If allowed to go into effect, the IFA would destroy academic freedom in Florida and would turn its universities from places where ideas are freely discussed and evaluated into "proprietary institutions" where professors are severely restricted in their teaching and students are indoctrinated with government-approved opinions. Stressing that "academic freedom is a non-partisan value that protects classroom instruction regardless of the ideological viewpoint of the ideas being discussed," the brief explains that while the IFA targets so-called "woke" ideas, a decision allowing it to stand would allow state politicians to censor any shade of opinion or thought they pleased, with disastrous consequences for higher education and democracy. "Higher education would be liable to devolving into a political free-for-all" in which politicians exploit public universities for their own partisan ends.

The second part of the AAUP's brief focuses on rebutting the state of Florida's radical claim that "classroom instruction in public universities is government speech and thus not entitled to First Amendment protection." As the brief explains, far from allowing state governments to co- opt public universities to serve as their partisan mouthpieces, legal precedents require adherence to academic freedom. Florida's assertion that the IFA does not have to comply with the First Amendment relies on the Supreme Court's 2006 decision in *Garcetti v. Ceballos* and the "government speech doctrine." In *Garcetti*, the court held that when public employees speak "pursuant to their official duties," their speech is not protected by the First Amendment and is therefore subject to discipline by their government employer. The government speech doctrine is

a legal principle stating that the First Amendment restricts the government's ability to regulate private speech but does not restrict the government when it is speaking for itself.

The AAUP's brief urges the Eleventh Circuit to join other federal courts of appeals in holding that *Garcetti* does not extend to university-level teaching and research, noting that the Supreme Court itself explicitly recognized that its holding may not apply to scholarship and teaching due to the importance of academic freedom "as a constitutional value." In addition, the brief explains that both *Garcetti* and the government speech doctrine are based on the notion that the state must be able to control its employees' speech for government programs to function at all—a rationale that does not apply to higher education. Colleges and universities require exactly the opposite: they require academic freedom and cannot function if the government is allowed to control the viewpoints expressed by faculty in the classroom. Applying well-established legal principles, the brief proceeds to demonstrate that the speech prohibited by the IFA involves "matters of public concern" and that the interest of faculty in being free to speak on those matters overwhelmingly outweighs the state's desire to dictate viewpoints expressed in the classroom. Finally, the brief refutes the state's assertion that classroom instruction is "government speech," stressing that the general public does not understand professors to be speaking for the state when they are teaching and that university-level teaching has long been recognized as being off-limits to the sort of control imposed by the IFA.

***Black Emergency Response Team v. O'Connor*, No. 5:21-cv-1022-G (W.D. Okla. complaint filed Oct. 19, 2021)**

A group of plaintiffs, including the University of Oklahoma Chapter of the American Association of University Professors (OU-AAUP), represented by the American Civil Liberties Union has filed a lawsuit challenging Oklahoma House Bill 1775, arguing that the law violates the First Amendment rights of students and educators in that state. The bill restricts educators and students from learning and talking about race and gender in the classroom. In particular, public universities are prohibited from offering "any orientation or requirement" that presents "any form of race or sex stereotyping" or "bias on the basis of race or sex," leaving educators and students to guess at the scope of such broad, undefined terms and how this impacts the principle of academic freedom in the state's universities. The law further prohibits elementary and secondary school teachers from "mak[ing] part of a course" a list of eight banned "concepts" copied verbatim from an executive order issued in September 2020 by then President Trump, which a federal court ultimately blocked as impermissibly vague. The plaintiffs' complaint identifies four separate claims: (1) a Fourteenth Amendment vagueness claim; (2) a First Amendment claim based on the right to receive information; (3) a First Amendment claim based on the law's overbreadth and the fact that it constitutes a viewpoint-based restriction on speech and academic freedom; and (4) a Fourteenth Amendment claim based on the law's racially discriminatory purpose. The plaintiffs have filed a motion for preliminary injunction, which is currently pending before the court.

***Austin v. Univ. of Fla. Bd. of Trs.*, No. 1:21cv184-MW/GRJ, 2022 U.S. Dist. LEXIS 11733 (N.D. Fla. Jan. 21, 2022), *on appeal*, No. 22-10448 (11th Cir. appeal filed Feb. 8, 2022)**

In 2020, the University of Florida adopted a "Conflicts of Commitment and Conflicts of Interest" policy restricting the ability of professors to engage in activities that "conflict, or appear to conflict, with their professional obligations" to UF. Among other things, the policy required professors to when they "serve or . . . are seeking approval to serve as an expert witness . . . in a legal matter like a lawsuit." In 2021, voting-rights groups and numerous other parties filed a federal lawsuit challenging Florida SB 90, a law that curtails the ability of voters to cast ballots in the state, and several UF professors agreed to serve as expert witnesses in the case. The professors disclosed their activity to UF, but despite supporting such work in the past, UF denied their requests this time. Initially, the university stated that the requests were denied because "UF is a state actor [and] litigation against the state is adverse to UF's interests." Later, the university claimed that it denied the requests because they involved "paid work that is adverse to the university's interests as a state of Florida institution." Another professor sought permission to participate in "cases involving masking an children" but was denied permission by UF, even though the professor had sought to testify for free. The university subsequently stated that the professors could engage in the activities identified if they did so "on their personal time, in their personal capacity, without the use of any [UF] resources and without compensation." Ultimately, UF changed its position and approved the professors' requests. In late November 2021, UF's president announced that he had "approved" the recommendations of a task force, which establish (1) a "strong presumption" that UF will allow professors to serve as experts in litigation involving the state of Florida, (2) that UF can only overcome that presumption "when clear and convincing evidence establishes that such testimony would conflict with an important and particularized interest of the university," and (3) an appeals process.

The plaintiffs filed suit in the United States District Court for the Northern District of Florida and moved for a preliminary injunction, claiming that the conflicts of interest policy is an unconstitutional prior restraint on speech and that the policy is unconstitutionally overbroad. The district court granted a preliminary injunction on January 21, 2022, holding, among other things, that the plaintiffs were likely to succeed on the merits of their prior restraint claim because: (1) even as revised, the policy gives UF unbridled discretion to restrict speech based on improper consideration of the viewpoint expressed by that speech; (2) there is no time limit for UF to grant or deny a professor's request; and (3) even if it were not for the previous two defects, the policy still allows for unconstitutional viewpoint-based discrimination.

The university defendants appealed the preliminary injunction to the Eleventh Circuit, however, on January 6, 2023, plaintiff-appellees filed their Motion to Dismiss Appeal as Moot, to which an order was entered granting said motion on March 20, 2023.

***Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021)**

The U.S. Court of Appeals for the Sixth Circuit reversed the dismissal of a philosophy professor's lawsuit challenging a university's gender identity policy that required faculty to respect students' gender pronouns. The court first held that *Garcetti v. Ceballos* did not bar the professor's free speech claim because *Garcetti* does not specifically apply to academic speech, and because other Supreme Court decisions, such as *Keyishian v. Bd. of Regents*, suggest an expansive view of the free speech rights of professors. The court characterized respect for gender autonomy as a "matter of public import" on which a professor could legitimately have a differing point of view, stating that "when the state stifles a professor's viewpoint on a matter of public import, much more than the professor's rights are at stake." The court stressed the importance of "academic freedom," concluding that "professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship." The court then applied the *Pickering-Connick* framework to the professor's claim. At the first step of that test, the court concluded that the professor's refusal to use the student's pronouns was a message in itself that was intended to convey his point of view that "one's sex cannot be changed" and was therefore speech on a matter of public concern. At the second step of the test, which required balancing the professor's interest in his speech with the university's interest as an employer in promoting the efficiency of the public services it provides, the court determined that the university's interests were "comparatively weak" in light of the professor's proposal to simply not use any pronouns at all when addressing the student.

A petition for en banc rehearing was denied by the full Sixth Circuit. 2021 U.S. App. LEXIS 20436 (6th Cir. July 8, 2021).

B. Educational Gag Orders

***Texas Attorney General*, Opinion Request No. 0421-KP (Aug. 3, 2021) (amicus brief filed Sept. 3, 2021)**

On September 3, 2021, the AAUP submitted a brief to the Texas attorney general arguing against a request from a state legislator for an opinion on whether teaching certain ideas about race, including critical race theory (CRT), would violate "Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, [or] Article 1, Section 3 and Section 8 of the Texas Constitution." This request is part of a broader attack on teaching and training on the issues of racism and racial justice, manifested in proposed state laws limiting teaching on "divisive subjects" and in requests for state attorney general opinions forbidding such teaching. In advocating against the attempt to circumscribe teaching about racism, the brief focuses on Supreme Court First Amendment decisions and AAUP policy concerning the societal role of education, academic freedom, and teachers' expertise in developing curriculum. Thus, the brief addressed the broader political themes that are behind many of these attacks on teaching and the AAUP policies applicable to these attempted infringements of academic freedom.

C. Exclusive Representation

***Uradnik v. Inter Faculty Org.*, No. 18-1895, 2018 U.S. Dist. LEXIS 165951 (D. Minn. Sept. 27, 2018), *cert. denied*, 139 S. Ct. 1618 (2019); and *Bierman v. Dayton*, 900 F. 3d 570 (8th Cir. 2018) *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (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 2018 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), *cert denied*, 140 S. Ct. 114 (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.*, 120 N.E.3d 1163 (Mass. 2019) and *Adams v. Teamsters Union Local 429*, No. 20-1824, 2022 U.S. App. LEXIS 1615, at *4 n.13 (3d Cir. Jan. 20, 2022) (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. The US Supreme Court has repeatedly denied petitions for a writ of certiorari in these cases. *See Uradnik v. Inter Faculty Org.*, No. 18-1895, 2018 U.S. Dist. LEXIS 165951 (D. Minn. Sept. 27, 2018), *cert. denied*, 139 S. Ct. 1618 (2019) and *Bierman v. Dayton*, 900 F. 3d 570 (8th Cir. 2018) *cert. denied sub nom. Bierman v. Walz*, 139 S. Ct. 2043 (2019); *Thompson v. Marietta Educ. Ass'n,* 972 F.3d 809 (6th Cir. 2020), *cert denied*, 141 S. Ct. 2721 (2021); *Reisman v. Associated Facs. of Univ. of Me.*, 939 F.3d 409, 414 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 445 (2020).

D. Agency Fee

***Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., 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."

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. We have previously reported that these lawsuits have not gained traction in the federal district courts and have been uniformly dismissed. As a general rule, the federal courts have found that the unions properly stopped collecting agency fees, refunded fees collected after *Janus*, and have not sought to collect fees going forward. Courts have found that Plaintiffs' request for injunctive relief prohibiting the collection of agency fees is moot because, given the *Janus* ruling, the Union permanent shift in policy and the challenged conduct cannot be reasonably expected to recur, and declaratory relief is moot because there is no immediate legal controversy. Further, on indistinguishable facts, the federal courts have uniformly ruled that Unions that collected agency fees prior to *Janus* have a good-faith defense. As the federal courts have stressed, the collection of agency fees was authorized by state statutes and pursuant to Supreme Court precedent, and as a result, the Unions were acting in good faith.

See, e.g., *Mooney v. Ill. Educ. Ass'n*, 942 F. 3d. 368 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 1283 (2021)**;** *Danielson v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 28, AFL-CIO*,

340 F. Supp. 3d 1083 (W.D. Wash. 2018), *affm'd*, 945 F. 3d 1096 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 1265 (2021); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, AFL-CIO*, 942 F. 3d 352 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 1282 (Jan. 25, 2021); and *Wholean v. CSEA SEIU Local 2001*, 955 F. 3d 332 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1735 (2021)**.**

IV. Academic Freedom

***McAdams v. Marquette Univ.*, 914 N.W.2d 708 (Wis. 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.

Wade v. Univ. of Mich.*, 905 N.W.2d 493 (Mich. Ct. App. 2017), *vacated*, 981 N.W.2d 56 (Mich. 2022), *remanded to* No. 330555 (Mich. Ct. App. Nov. 10, 2022) (amicus brief filed Mar. 9, 2023*)

On March 9, 2023, the AAUP joined Brady and Team Enough—two organizations dedicated to preventing gun violence—in filing an amicus brief in the Michigan Court of Appeals in support of the University of Michigan's ordinance prohibiting the possession of firearms and other dangerous weapons on university property. The brief argues that the university's prohibition does not violate the Second Amendment and instead protects the free speech rights of students and faculty, safeguards academic freedom, promotes the free exchange of ideas on campus, and furthers the university's core educational goals.

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

A. Tenure – Breach of Contract

***Matter of Monaco v. N.Y. Univ.*, 145 A.D.3d 567 (N.Y. App. Div., 2016); *Monaco v. N.Y. Univ.*, No. 100738/2014, 2020 N.Y. Misc. LEXIS 9622 (N.Y. Sup. Ct. Nov. 12, 2020), *modified in part and aff'd in part*, 204 A.D.3d 51 (N.Y. App. Div. 2022)**

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 Faculty Handbook which, the Professors argued defines tenure in a way that, "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 Faculty Handbook, which "form part of the essential employment understandings between a member of the Faculty and the University have the force of contract."

On November 12, 2020, the trial court granted summary judgment in favor of the university on several claims. *Monaco v. New York University*, No. 100738/2014, 2020 N.Y. Misc. LEXIS 9622 (N.Y. Sup. Ct. Nov. 12, 2020). On February 22, 2022, the Supreme Court of New York, Appellate Division, First Department, issued a decision modifying the trial court's decision in part and otherwise affirming. *Monaco v. New York University*, 204 A.D.3d 51 (N.Y. App. Div. 2022). In particular, the appeals court rejected two of the professors' breach of contract claims based on it findings that (1) the phrase "'economic security,' standing alone" in the Faculty Handbook did "not confer any contractual rights or obligations"; (2) the university did not violate Faculty Handbook's disciplinary process because "a faculty member's failure to comply with the [extramural funding policy]… [was] not conduct that is subject to discipline." However, the court found in favor of one of the professors' breach of contract claim because the "clear and unambiguous terms" of his appointment letter created an enforceable contract that "preclude[d] NYU from reducing his salary pursuant to the [extramural funding policy] below the amount stipulated" in the contract.

B. Due Process

***McAdams v. Marquette Univ.,* 914 N.W.2d 708 (Wis. 2018)**

(This case is also discussed in the Academic Freedom section above.) The Wisconsin Supreme Court declined to defer to the university's decision on the discipline of Dr. McAdams. One important reason was that the faculty hearing committee's decision was only advisory and not binding on the administration. The court stated, "The Discipline Procedure produced advice [from the FHC], not a decision. We do not defer to advice." In addition, the court noted there were no rules for the President on appeal, stating "The Discipline Procedure is silent with respect to how the president must proceed after receiving the report." And "once it reached the actual decision- maker (President Lovell), there were no procedures to govern the decision-making process." The

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

C. Faculty Handbooks

***Pagano v. Case W. Rsrv. Univ.*, 166 N.E.3d 654 (Ohio Ct. App. 2021)**

Plaintiff-appellant, Dr. Maria Pagano, appealed the trial court's grant of summary judgment in favor of her former employer defendant-appellee Case Western Reserve University (CWRU). The university denied plaintiff's application for tenure and the trial court upheld the university's decision holding, "Ohio Courts have been reluctant to intrude on tenure decisions" and that "'[a] court should intervene [in tenure decisions] only where an administration has acted fraudulently, in bad faith, abused its discretion, or where the candidate's constitutional rights have been infringed.'" (citations omitted). On appeal Plaintiff argued that since the tenure guidelines were incorporated by reference into the university's faculty handbook those guidelines were made part of her employment contract with the university. Further Plaintiff argued that the university breached the contract because the university failed to follow the procedures set forth in those contractual documents. As a result, plaintiff's tenure review could have been negatively impacted.

The appeals court agreed and found that the plaintiff presented genuine issues of material fact regarding her breach of contract claim. The court held that the university failed to follow its own procedures which in turn could have negatively impacted Plaintiff's tenure review stating, "It is essential that CWRU follow the procedures set forth in those contractual documents throughout the tenure review process."

***Joshi v. Trs. of Columbia Univ.*, 515 F. Supp. 3d 200 (S.D.N.Y 2021)**

Plaintiff, Dr. Shailendra Joshi, a physician, joined Columbia University in 1997. Upon accepting his initial offer of employment, plaintiff signed an employment agreement, but he did not enter into any other agreements. After a number of years at the university Plaintiff raised issues of suspected research misconduct pursuant to the university's Research Misconduct Policy which was issued in 2006 and found in the university's Faculty Handbook. The Research Misconduct Policy sets forth the process for addressing suspected research misconduct. The Faculty Handbook contains a disclaimer that reads, "This Faculty Handbook is intended only to provide information for the guidance of Columbia University faculty and officers of research Anyone who needs to rely on any particular matter is advised to verify it independently. The information is subject to change from time to time, and the University reserves the right to depart without notice from any policy or procedure referred to in this Handbook. The Handbook is not intended to and should not be regarded as a contract between the University and any faculty member or other person."

Plaintiff alleges that the university retaliated against him for raising the research misconduct issue by attempting to close his lab. The university's Non-Retaliation Policy was issued in March 2014, and is part of its "Essential Policies" that can be found on the university's

website. The Essential Policies protect those who raise research misconduct issues but contains the following disclaimers, "Information presented here is subject to change, and the University reserves the right to depart without notice from any policy or procedure referred to in this online reference. These Essential Policies are not intended to and should not be regarded as a contract between the University and any student or other person."

Plaintiff filed suit alleging, *inter alia,* that the university breached its contractual obligations set forth in the Research Misconduct and the Non-retaliation Policies ("Policies"). The university argued that the Policies cannot be interpreted as contracts because they were not in effect when Plaintiff signed his employment agreement and the disclaimers render the Policies unenforceable. The court disagreed and ruled for the Plaintiff on this point. Plaintiff renewed his employment with the university every two years and therefore the Policies existed for the Plaintiff. Further despite the disclaimer language, the court focused on the Plaintiff's reliance on the Policies. It reasoned that, "a reasonable person can infer Dr. Joshi's reliance on the Policies from Dr. Joshi's compliance with those policies by reporting his concerns of suspected research misconduct." (citation omitted). Therefore, the Plaintiff's reliance on the Policies is a disputed material fact. However, the court granted the defendant university's motion for summary judgment based on the court's finding that even if the Policies created an enforceable contract, the evidence that was not in dispute showed that the university did not breach its obligations set forth in the Policies.

D. Ministerial Exception

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

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

In the two underlying cases that were consolidated before the Supreme Court, the two plaintiffs were educators in Catholic elementary schools. As part of their employment, both teachers signed employment agreements that expressly stated that their role was to promote the religious mission of the school and received employee handbooks that stated the same. The teachers' employment agreements were not renewed, and they each filed Charges of Discrimination with the U.S. Equal Employment Opportunity Commission (EEOC)—one under

the Age Discrimination in Employment Act (ADEA) and the other under the Americans with Disabilities Act (ADA). The District Court granted summary judgment to the schools applying the Ministerial Exception. The Ninth Circuit Court of Appeals reversed, holding the Ministerial Exception did not apply because the schools did not satisfy the four factors identified in *Hosanna- Tabor*.

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

The four factors identified were:

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

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

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

***DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000 (Mass. Sup. Ct. 2021), *cert. denied*, 142 S. Ct. 952 (2022)**

The Massachusetts Supreme Court held that plaintiff Margaret DeWeese-Boyd is not a minister of defendant Gordon College for the purposes of the First Amendment "ministerial exception" and thus was entitled to protection of Massachusetts employment laws. Agreeing with the AAUP's amicus brief, the court found that the "ministerial exception" did not apply because,

while Gordon College was a religious institution, DeWeese-Boyd was not a minister based on what "DeWeese-Boyd actually did, and what she did not do" as a faculty member. In its decision, the court criticized Gordon's use of the term "minister" in its faculty handbook, quoting the Gordon chapter of AAUP.

On August 2, 2021, Gordon College petitioned the U.S. Supreme Court to review the Massachusetts Supreme Court's decision. On February 28, 2022, the Supreme Court denied the petition for certiorari. Justice Alito, joined by Justices Thomas, Kavanaugh, and Barrett, issued a statement concurring in the denial due to "the preliminary posture of the litigation" but calling the state court's "understanding of religious education" "troubling" and suggesting that they would push for revisiting the issue presented.

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. 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.*, 600 US --, No. 20-1199 (June 29, 2023); and *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 600 US ---, No. 21-707 (June 29, 2023)**

The Supreme Court recently held in *Students for Fair Admission v. Harvard* and *Students for Fair Admissions v. University of North Carolina* that race can no longer be used as a factor for consideration in college admissions. The Court determined that the race-conscious admissions policies employed by Harvard and University of North Carolina at Chapel Hill violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The decision runs contrary to over forty years of precedent and the arguments and cautions presented by AAUP in the amicus brief filed jointly with thirty-nine other higher education associations.

The decision arose from two cases, involving Harvard University and University of North Carolina, that were among a series of lawsuits aimed at eliminating race as one factor among many that universities can consider when choosing whom to admit. Both cases were brought by the same organization, "Students for Fair Admissions, Inc." seeking to overturn over forty years of precedent permitting consideration of race as part of a holistic review of student applications. The district courts ruled in favor of both universities, and the First Circuit Court of Appeals also ruled in favor of Harvard. The First Circuit found that Harvard's race-conscious admissions program survived strict scrutiny and does not violate Title VI of the Civil Rights Act of 1964. Harvard identified the specific, compelling goals that it achieves from diversity. The First Circuit also held, giving no deference to Harvard, that its admissions program is narrowly tailored and that it legitimately concluded that the alternatives were not workable. The Supreme Court granted SFFA's petition for certiorari in the *Harvard* case and consolidated it with *University of North Carolina*, case.

The AAUP joined, with thirty-nine other higher education associations, an amicus brief that supported the affirmative action admissions policies of Harvard and the University of North Carolina–Chapel Hill. In joining the brief, the AAUP continued its many years of advocating in favor of affirmative action in higher education through amicus briefs emphasizing the educational value of diversity 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.

The brief, authored by the American Council on Education, echoes this emphasis on the importance of affirmative action in higher education: "Amici believe that a diverse student body is essential to important educational objectives of colleges and universities." It recognizes that "applicants' racial or ethnic identities have affected their path to higher education and . . . their life experiences will enrich the student body and the university as a whole." The brief also recognizes that academic freedom under the "First Amendment guards the right of teachers and students 'to inquire, to study, and to evaluate.'" Thus, "the First Amendment affords colleges and universities substantial deference on matters involving academic judgment and, as a result, safeguards the role of America's colleges and universities as incubators for creative thought, productive dialogue, and

innovative discovery. It is the pluralism of institutions across the country that makes our system of higher education the greatest in the world."

The brief also explains the perverse results of the argument advanced by the plaintiffs, which would create a "dual-track admissions that advantage one group over another based on applicants' racial or ethnic identity. Along one track, many applicants will present, and have considered, the full range of their background and lived experiences. On the other, applicants whose lives have been indisputably molded by their race or ethnicity must leave out a key part of their story or present it and have it ignored." And it emphasized that "Black Americans, by no slim margin, have the most to lose from an admissions process which intentionally removes racial experience and identity from considerations for admission."

The Republican-appointed majority on the US Supreme Court issued a 6–3 decision holding that the race-conscious admissions policies used by Harvard University and the University of North Carolina violate the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964. The decision overturns what had been settled law for more than forty years. In its landmark 1978 ruling in Regents of the University of California v. Bakke, the Supreme Court held that the goal of achieving a diverse student body is a compelling interest that can justify college and university policies allowing for the consideration of race in admissions decisions. Twenty-five years later, in Grutter v. Bollinger, the court reaffirmed the constitutionality of race- conscious university admissions policies, emphasizing the importance of a diverse student body to achieving important educational benefits, promoting cross-racial understanding, breaking down racial stereotypes, and preparing students for participation in a diverse workforce and society. In 2013 and 2016, the court reaffirmed this holding twice more in Fisher v. University of Texas.

Although the court majority recognized that the educational benefits that flow from achieving a diverse student body are "commendable goals," it found that Harvard and UNC failed to meet their burden of demonstrating that their admissions programs achieve compelling interests through narrowly tailored means. While scarcely acknowledging the existence of discrimination against minorities, Chief Justice John Roberts, writing for the majority, emphasized the importance of eliminating all forms of racial discrimination in college admissions. Roberts writes, "College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." According to the majority, the admissions policies at Harvard and University of North Carolina at Chapel Hill as applied gave certain applicants a favorable decision over others on the basis of their race. Chief Justice Roberts writes, "Eliminating racial discrimination means eliminating all of it." Chief Justice Roberts notes, however, that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." This at least allows candidates to discuss the impacts of race on their lives, as the amicus brief argued.

Justice Sonia Sotomayor writes in her dissent that the majority's decision rolled back "decades of precedent and momentous progress" and implemented a rule of "colorblindness as a

constitutional principle in an endemically segregated society." Justice Ketanji Brown Jackson's dissent in the Harvard decision made a compelling case regarding the continuing existence of racism and the racial disparities it causes. She then argued that the "only way out of this morass— for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish."

B. Sexual Misconduct – Title IX

Title IX Regulations: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 30 CFR 106 (May 19, 2020); and *Notice of Proposed Rule Making, 87 Fed. Reg. 41390 (July 12, 2022)*

The future of the Title IX regulations is uncertain. The Trump administration issued new Title IX regulations in May of 2020. On July 12, 2022, the Biden administration released proposed regulations which, if put into effect, would substantially change the current Trump administration regulations. However, the regulatory process can be lengthy and there may be changes to the proposed regulations in the process. Moreover, there will almost certainly be legal challenges to any proposed regulations. Therefore, it will likely be at least a year before any new regulation becomes effective.

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

Regarding sexual harassment, the final regulations issued in May 2020, by the Department of Education: Define the conduct constituting sexual harassment for Title IX purposes; Specify the conditions that activate a recipient's obligation to respond to allegations of sexual harassment and impose a general standard for the sufficiency of a recipient's response, and specify requirements that such a response must include, such as offering supportive measures in response to a report or formal complaint of sexual harassment; Specify conditions that require a recipient to initiate a grievance process to investigate and adjudicate allegations of sexual harassment; and establish procedural due process protections that must be incorporated into a recipient's grievance process to ensure a fair and reliable factual determination when a recipient investigates and adjudicates a formal complaint of sexual harassment.

Additionally, the final regulations issued in May 2020: affirm that the Department of Education's Office for Civil Rights ("OCR") may require recipients to take remedial action for discriminating on the basis of sex or otherwise violating the Department's regulations implementing Title IX, consistent with 20 U.S.C. 1682; clarify that in responding to any claim of sex discrimination under Title IX, recipients are not required to deprive an individual of rights guaranteed under the U.S. Constitution; acknowledge the intersection of Title IX, Title VII, and FERPA, as well as the legal rights of parents or guardians to act on behalf of individuals with respect to Title IX rights; update the requirements for recipients to designate a Title IX Coordinator, disseminate the recipient's non-discrimination policy and the Title IX Coordinator's contact information, and notify students, employees, and others of the recipient's grievance procedures and grievance process for handling reports and complaints of sex discrimination, including sexual harassment; eliminate the requirement that religious institutions submit a written statement to the Assistant Secretary for Civil Rights to qualify for the Title IX religious exemption; and expressly prohibit retaliation against individuals for exercising rights under Title IX.

From the start of his administration, Biden has indicated a desire to revamp the Trump regulations. In Fall 2021 the Department of Education issued formal notice of its plans to publish proposed regulations. The text of the proposed regulations was finally issued in late June 2022. The proposed regulations would make major changes to the Trump regulations. In some instances, they return to the Obama Title IX regulations and practices, in some instances they are broader, and in some instances they are narrower. However, whether and to what extent the proposed regulations will become binding is uncertain. First, the regulations are only "proposed" and may change in the regulatory process. The Department of Education opened a public comment period for the proposed regulations, through the Federal Register website, which were due by September 12, 2022. Second, any final regulations will undoubtedly be subject to legal challenges. Third, a number of the proposed provisions, such as allowing the use of the "single investigator model," may be contrary to court rulings in certain states.

In September 2022, AAUP submitted public comments to the Department of Education concerning its proposed revised Title IX regulations. The Department of Education initially announced a timetable of May 2023 to issue the final regulations, but recently announced that issuance has been delayed until October 2023.

C. Discrimination Claims and Due Process

***Freyd v. Univ. of Or.*, 990 F.3d 1211 (9th Cir. 2021)**

On March 15, 2021, in a case in which the AAUP filed an amicus brief, the Ninth Circuit Court of Appeals ruled in favor of Jennifer Freyd, finding that she had alleged sufficient facts to proceed with a suit against the University of Oregon for pay discrimination based on significant pay disparities with male faculty members. The lower court had dismissed the suit based, in part, on findings that Freyd and her male colleagues did not perform equal work, and that any disparate

impact on women was justified. The AAUP's amicus brief provides an overview of gender-based wage discrimination in academia, explains that the common core of faculty job duties of teaching, research, and service are comparable, and explains that the pay differentials were not justified. The Court of Appeals reversed and remanded the case for trial, finding that the jobs of the relevant female and male faculty could be found "comparable" for legal purposes, that the retention raises resulted in a disparate impact on women, and that the university could have avoided the disparate impact by revisiting the pay of comparable faculty when the retention raises were given.

***Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)**

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

***Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, E.O 13988 (Jan. 2021); and *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity*, E.O. 14021 (March 2021)**

On January 20, 2021, President Biden issued an executive order extending protection against discrimination based on sex to LGBTQ+ individuals. "It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation. It is also the policy of my Administration to address overlapping forms of discrimination."

On March 8, 2021, President Biden issued an executive order outlining his administration's policy ""that all students shall be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity." And discrimination, he said, includes sexual harassment and violence, as well as discrimination based on sexual orientation or gender identity. He also ordered Education Secretary Miguel Cardona to review within 100 days the Education Department's regulations and policies to make sure they comply with the antidiscrimination policy.

***Xi v. Haugen*, 68 F.4th 824 (3d Cir. 2023)**

On February 14, 2022, the AAUP joined an amicus brief challenging the federal government's discriminatory targeting and surveillance of Asian American and Asian immigrant scientists and researchers—especially those of Chinese descent. The brief, authored by Asian Americans Advancing Justice-AAJC and Asian Americans Advancing Justice-Asian Law Caucus and joined by seventy other organizations, provides important context about the FBI and other federal agencies' history of engaging in racially motivated investigations and prosecutions of Asian American scientists and academics and describes the immense harm this discriminatory treatment causes individuals and Asian American communities throughout the United States.

In May 2023, the U.S. Court of Appeals for the Third Circuit affirmed the federal district court's dismissal of plaintiff Xi's constitutional claims against the FBI, but reversed the lower court's dismissal of Xi's Federal Tort Claims Act claims against the FBI, and remanded the case to the lower court for further proceedings.

VII. Collective Bargaining Cases and Issues – Private Sector

A. NLRB Authority

1. Religiously Affiliated Institutions

***Bethany College*, 369 N.L.R.B No. 98 (2020)**

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

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

Board's jurisdiction." *Id*. at 1411. The Board articulated that it would be unfair to deny those faculty in a religious school the same rights under the National Labor Relations Act as enjoyed by faculty in secular schools.

The *Bethany College* panel disagreed and held that *Pacific Lutheran* must be overruled as inherently inconsistent with the binding rationale of the Supreme Court in *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court held that the Board's exercise of jurisdiction over teachers at faith-based schools would present serious constitutional questions. In overruling *Pacific Lutheran*, the Board adopted the *Great Falls* test in an attempt to ensure that the Board's jurisdiction does not become entangled with the First Amendment's fundamental directive that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The *Great Falls* test involves a three-part, objective test under which the Board "must decline to exercise jurisdiction" over an institution that:

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

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

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

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

2. Faculty as Managers

***Pac. Lutheran Univ.*, 361 N.L.R.B. No. 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.

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."

***Univ. of S. Cal. v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019)**

On March 12, 2019, the District of Columbia Circuit Court of Appeals issued a decision upholding the *Pacific Lutheran* framework for managerial exemption, but limiting a portion of this holding. On December 28, 2017 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.

Elon Univ., 370 N.L.R.B No. 91 (2021)

A 3-member Board panel consisting entirely of Republican appointees (Kaplan, Emanuel, Ring) modified the 2014 *Pacific Lutheran University* standard for evaluating whether a petitioned- for faculty subgroup at a college or university is "managerial." Under the revised framework, which the panel took from the D.C. Circuit's decision in *University of Southern California v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019), a faculty subgroup consisting of non-tenure-track faculty will be found to be "managerial" when: (1) the faculty body exercises effective control over the five key areas of consideration identified in *Pacific Lutheran* (academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions); and (2) based on the faculty's structure and operations, the petitioning faculty subgroup is included in that managerial faculty body. The panel found that the university employer in this case failed to meet its burden of proof, under the new test's second prong, of establishing that the petitioned-for

faculty members serve on any of the employer's committees overseeing the five areas of consideration. Accordingly, the panel concluded that the faculty subgroup was not managerial and that it was unnecessary to consider the first prong of the new standard. Although the panel rejected a bright-line majority status rule, it nevertheless stated that it may continue to consider whether a specific petitioned-for subgroup holds a majority of seats on the employer's collegial faculty bodies, especially where the interests of the subgroup fundamentally diverge from the interests of the majority.

3. Graduate Assistants' Right to Organize

***Columbia Univ.*, 364 N.L.R.B. No. 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.

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.

***Proposed Rule, University Student/Employees*, 84 Fed. Reg. 55265 (NLRB March 2019), *withdrawn* 86 Fed. Reg. 14297 (NLRB March 2021)**

In a major victory for graduate employees at private universities, the National Labor Relations Board withdrew a rule proposed in late 2019 that would have barred graduate assistants from engaging in union organizing and collective bargaining under the protection of federal law. The proposed rule would have established that students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are not "employees" within the meaning of the National Labor Relations Act. The proposed rule was opposed by the AAUP and numerous other organizations. Currently, graduate teaching and research assistants, and other students receiving compensation from their university, can organize and bargain in unions at many private universities under the

federal National Labor Relations Act (NLRA) as explained in *Columbia University*, 364 N.L.R.B. 90 (2016).

4. Union Recognition

***Johnson Controls, Inc.*, 368 N.L.R.B No. 20 (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. 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.

The *Johnson Controls* decision one of the many cases from the Trump Board that current NLRB General Counsel Abruzzo has identified as warranting reconsideration by the current Board. See, GC Memorandum 23-04 (March 20, 2023).

B. Bargaining Units

***Am. Steel Constr., Inc.*, 372 N.L.R.B No. 233 (2022) (overruling *PCC Structurals, Inc.*, 365 N.L.R.B. No. 160 (2017)).**

Another area in which there was significant change by the Board under the Trump administration was in the standard for determining the appropriate bargaining unit for collective bargaining. In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B No. 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.* The Board ruled that 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 a recent decision, *American Steel Construction, Inc.,* 372 N.L.R.B No. 233 (Dec. 2022), the Board returned to its prior test under *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B No. 934 (2011). *American Steel Construction* overruled *PCC Structurals*, 365 N.L.R.B No. 160 (2017). In *American Steel Construction*, the Board returned to and reaffirmed its use of the "community of interest" standard for determining appropriate bargaining units. Where the employer argues that the union's proposed unit must include additional employees, the employer has the burden to show that the additional employees share an "overwhelming community of interest" to mandate their inclusion in the bargaining unit.

***President and Trs. of Bates Coll.*, NLRB No. 01-RC-28438, 2022 NLRB LEXIS 96 (Mar. 18, 2022)**

On March 18, 2022, the National Labor Relations Board, by a panel vote of 2-1, granted a request for review by Bates College seeking to challenge the regional director's decision and direction of election, which found that a unit of all full-time and regular part-time professional employees—including adjunct faculty and non-professional employees—was presumptively appropriate and met the traditional community of interest standards to constitute an appropriate unit. Over Chairman McFerran's dissent, the panel majority (Members Kaplan and Ring) wrote that the regional director's decision raised "substantial issues warranting review, particularly with respect to (1) whether the long-standing principle that a petitioned-for wall-to-wall unit is presumptively appropriate should be applied to units in higher education that include both faculty and staff; and (2) whether the petitioned-for unit is appropriately considered a wall-to-wall unit as contemplated by, e.g., *Kalamazoo Paper Box Corp*., 136 N.L.R.B 134 (1962)." The regional director ruled that the college could not meet its burden of demonstrating that the wall-to-wall unit was inappropriate because it had failed to raise that issue in a timely manner under the NLRB's rules and regulations. The Board upheld that ruling. However, as the regional director noted, the hearing officer in the case took record evidence on the issue because of the Board's affirmative

statutory obligation to base a finding of unit appropriateness on "some record evidence" before directing an election.

Due to the employer's challenge to the bargaining unit, the ballots had been impounded pursuant to an election rule issued by the Trump NLRB. Before the NLRB issued a decision, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision in *AFL-CIO v. NLRB*, 57 F.4th 1023 (D.C. Cir. 2023), vacating the Trump rule. Consistent with that decision, the NLRB in March of 2023 repealed the automatic impoundment provision and granted the union's motion to open and count the ballots. When the vote was counted, a majority of the professional employees voted in favor of being included in the same unit with the nonprofessional employees. However, a majority of all employees in the unit voted against union representation. As a result, no union was certified, and the NLRB did not issue a decision on the issues concerning the appropriateness of the bargaining unit.

C. Bargaining Subjects – Return to Work Policies

***Goddard Coll. Corp.*, 372 N.L.R.B No. 85 (May 3, 2023)**

The NLRB recently affirmed an administrative law judge's decision finding that Goddard College violated Section 8(a)(5) and (1) of the Act when it modified its remote work and mask policies without first bargaining with the union and when it revoked an out-of-state employee's remote-work status without giving prior notice to the union or bargaining over the change and its effects, resulting in the employee's effective termination. The union, United Auto Workers Local 2322, represents administrative, clerical, technical, maintenance and service employees at Goddard's campus in Plainfield, Vermont. In August and September 2021, Goddard refused to reach a compromise with the union during negotiations over remote work and mask policies. The union and college met six times to discuss the potential changes, but after the last meeting, the college proceeded with its proposals—implementing a return-to-work policy and changing a mask mandate to a mask recommendation—without the union's consent and without even indicating that the parties had arrived at an impasse. The Board agreed with the ALJ that this amounted to bad faith bargaining. In addition, Goddard's decision to revoke a Florida-based employee's ability to work remotely without the union's consent was an unfair labor practice. The college claimed that it had done this so that the employee could directly interface with potential donors after the college entered a financial crisis. The Board affirmed the ALJ's decision rejecting the college's arguments and ordered Goddard to reinstate the employee with back pay and compensation for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful furloughs. As the ALJ explained, "The circumstances by which the [college] modified the work location of [the employee] constituted a material change without providing the union with timely notice and a meaningful opportunity to bargain."

VIII. Collective Bargaining Cases and Issues – Public Sector

A. Faculty Collective Bargaining Rights

***United Acads. of Or. State Univ. v. Or. State Univ.*, 502 P.3d 254 (Or. Ct. App. 2021)**

The Oregon Court of Appeals upheld a decision of the Oregon Employment Relations Board finding that Oregon State University had violated a state law requiring neutrality in union organizing drives by authoring FAQs and distributing them to faculty. The university and an amicus brief submitted in support of its case argued that the FAQs were protected by shared governance. On March 16, 2021, the AAUP submitted an amicus brief in the Oregon Court of Appeals explaining that "shared governance" did not protect an administration's distribution of material violating Oregon's union neutrality law. The AAUP amicus brief explains the importance of shared governance, that it establishes a system for faculty participation in shared decision making, and that the university FAQs did not constitute shared governance.

The Court upheld the Employee Relations Board finding that its final order that the university attempted to influence faculty members' decisions on whether to support union representation in violation of Or. Rev. Stat. §§ 243.670 and 243.672 was proper because the order contained a detailed and reasonable explanation of its inferences. The Court further affirmed that the Oregon Code did not immunize the university from liability because the university's conduct went beyond supplying an opinion in response to requests from employees by actively soliciting requests from employees, writing questions of its own and distributing answers, and maintaining those answers on a webpage.

IX. Miscellaneous

A. Student Debt Relief

***Biden v. Nebraska*, 600 U.S. _, No. 22-506 (June 30, 2023)**

The Supreme Court recently ruled that the Biden administration overstepped its authority when it announced that it would cancel up to $20,000 of an individual's student loans, a debt forgiveness totaling up to $400 billion and covering approximately 43 million Americans. The AAUP joined the American Federation of Teachers (AFT) and the American Federation of State, County, and Municipal Employees (AFSCME) in filing an amicus brief, where AAUP argued that the proposed plan was a lawful exercise of the HEROES Act and highlighted the impacts that Covid-19 had on teachers, nurses, and student borrowers alike. In its decision, the Court held that the Biden administration could not implement a debt-forgiveness program under the HEROES Act which gave the Secretary of Education the power to "waive or modify" any statutory or regulatory provision in times of national emergencies.

The Biden administration sought to implement is debt-forgiveness program under the HEROES Act, a law passed in the wake of the September 11th attacks which gave the secretary of education the power to "waive or modify" any statutory or regulatory provision in times of national emergencies. The intention of the Biden administration was to provide relief for loan borrowers in light of the Covid-19 pandemic. The decision arose from a suit brought by six states with Republican attorney generals who asked the Court to strike down the administration's debt-relief program as it does not comply with the HEROES Act. A federal district court dismissed the case, holding that the states lacked standing to sue. The States appealed, and the Eighth Circuit issued a nationwide preliminary injunction pending resolution of the appeal. The Secretary of Education asked the Supreme Court to either vacate the injunction or grant certiorari. The Supreme Court granted the Secretary's petition for certiorari on the questions of standing and the legality of the proposed plan.

The AAUP joined the American Federation of Teachers (AFT) and the American Federation of State, County, and Municipal Employees (AFSCME) in filing an amicus brief that supported the administration's plan to provide up to $20,000 in student loan forgiveness. In joining the brief, the AAUP committed to its mission of advancing the economic security of faculty and other academic workers, and ensuring higher education's contribution to the common good.

The brief emphasized the burden that the Covid-19 pandemic placed American workers, educators, healthcare workers, and students alike. The brief states that Amici "have a strong interest in ensuring that workers with student loan debt are not left in a worse position as to their student loans by the COVID-19 pandemic." The brief argued that the proposed plan was a lawful exercise of the HEROES Act, highlighting that the HEROES Act plainly allows for recipients of loans to obtain relief so as to not be in a worse position financially in relation to their loans in light of a national emergency. Amici argue that the HEROES Act is the proper vehicle to provide this relief and to target the range of "ill effects that will last far beyond the pandemic." The brief also pushes back against the proposed alternatives to the proposed plan such as temporary deferment or continued pause on interest rates, arguing that a permanent, realistic solution was the only feasible approach that could meaningfully subdue the long-term economic impacts of the pandemic.

The Court first answered the question of whether the six states had standing to sue. The question focused on Missouri's Higher Education Loan Authority and whether Missouri could bring suit on behalf of their program, arguing that the proposed debt-forgiveness would cost the Loan Authority upwards of $44 million and would impact the state's ability to support the state's higher education programs. The Court held that the Loan Authority had standing to sue because the anticipated financial impact created an injury-in-fact, therefore Missouri and the other five states who sued the Biden administration also had standing to sue the proposed debt-relief program.

The Court then turned to the heart of the question: whether the Biden administration's proposed plan complies with federal law. Chief Justice John Roberts wrote the majority opinion

for the Court, holding that the Secretary of Education in the Biden administration exceeded statutory authority by establishing the student debt-forgiveness plan under the HEROES Act. Chief Justice Roberts opined that the administration did not seek to "waive or modify," but rather "transform" entirely the nature of student loans. The HEROES Act does not allow the Secretary to manipulate the statute "to the extent of canceling $430 billion of student loan principal." The debt-relief program sought to create a "novel and fundamentally different loan forgiveness program" than what was imagined when the HEROES Act was passed into law that gave "nearly every borrower in the country" access to relief. Therefore, the majority held that the Secretary of Education does not have the authority under the HEROES Act to modify or waive existing statutory or regulatory provisions that existed prior to the Covid-19 pandemic in order to implement the loan forgiveness program.

Because the administration did not have the authority under the HEROES Act, they needed to have authorization from Congress to implement such a program. Chief Justice Roberts invoked what is known as the major questions doctrine, which dictates that in decisions of such magnitude and consequence economically and/or politically, on a matter of profound debate across the country, only Congress or an agency acting pursuant to a clear delegation from Congress can make such decision. The Court held that Congress made no such decision to implement a debt-relief program and made no explicit delegation of power to the administration, and therefore the Court refused to uphold as a matter of law the legality of the relief plan.

Justice Kagan dissented, pushing back on the ruling of standing by and through Missouri's Higher Education Loan Authority, which is its own entity. She further wrote that the HEROES Act intentionally provided the Secretary of Education with broad authority, and that the majority sought to "picking the statute apart" to reach their conclusion, effectively leaving the Act "with no ability to respond to large-scale emergencies in commensurate ways."

President Biden issued a statement expressing his disagreement with the Court's decision. He stated that his administration plans to work around this decision and announce next steps that they will take.