

# Annual Legal Update

## Hunter College/National Center for the Study of Collective Bargaining in Higher Education 49th Annual Conference *The State of Collective Bargaining and Higher Education*

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Aaron Nisenson, Senior Counsel  
American Association of University Professors

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## **I. Introduction**

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

## **II. First Amendment and Speech Rights**

### **A. Faculty Speech**

*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. The parties' briefing will be completed in May, and amicus briefs are due on June 3, 2022.

***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 (Sept. 3, 2021)(amicus brief filed)***

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.

***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 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.

### C. Exclusive Representation

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

A number of anti-union organizations are advancing cases that assert that “exclusive representation” by public sector unions is unconstitutional. The Supreme Court has clearly held that exclusive representation is constitutional in a case involving college faculty members. *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984). However, plaintiffs have argued that the Court’s recent decision in *Janus* overruled, or at least brought into question, its holding in *Knight*. The lower courts have uniformly ruled against the challenges to exclusive representation, finding that *Knight* remained binding precedent, and that exclusive representation is constitutional. See *Mentele v. Inslee*, 916 F.3d 783, 789 (9th Cir. 2019) cert denied, 18-1492(U.S. Oct. 7, 2019) (“[W]e apply *Knight*’s more directly applicable precedent, rather than relying on the passage [plaintiff] cites from *Janus*, and hold that Washington [State]’s authorization of an exclusive bargaining representative does not infringe [plaintiff’s] First Amendment rights. . . . Even if we assume that *Knight* no longer governs the question presented by [plaintiff’s] appeal, we would reach the same result.”); See also *Branch v. Commonwealth Emp’t Relations Bd.*, 481 Mass. 810 (April 9, 2019) 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 Organization*, 2018 U.S. Dist. LEXIS 165951 (Sept. 27, 2018) cert denied, 18-3086 (U.S. April 29, 2019) and *Bierman, et. al., v. Tim Walz, Governor of Minnesota, et. al*, 900 F. 3d 570 (8<sup>th</sup> Cir. 2018) cert denied, 18-766 (U.S. May 13, 2019); *Thompson v. Marietta Educ. Ass’n*, 972 F.3d 809 (6th Cir. Aug. 25, 2020), cert denied, 20-1019 (U.S. June 7, 2021); *Reisman v. Associated Facs. of Univ. of Me.*, 939 F.3d 409, 414 (1st Cir. 2019), cert. denied, 141 S. Ct. 445, 208 L. Ed. 2d 137 (2020).

### D. Agency Fee

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

On June 27, 2018, the United States Supreme Court overruled a 41 year precedent, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and held that it is unconstitutional to collect fees for representational work from non-union members without their voluntary consent. As the AAUP argued in an amicus brief filed with the National Education Association (NEA), for over

four decades the Court had repeatedly found constitutional the agency fee system under which unions could charge an agency fee to public employees represented by those unions but who don't want to be union members. This system was applied in 22 states and across thousands of labor agreements covering millions of employees. The majority's decision (written by Justice Alito) overturned this precedent on the theory that collection of agency fees from non-members "violates the free speech rights of non-members by compelling them to subsidize private speech on matters of substantial public concern." The court did not delay the effective date of its decision and therefore public unions and employers generally cannot collect agency fees from non-members after June 27, 2018. The court did recognize that certain fees could be collected from non-members but only if the non-member "clearly and affirmatively consents before any money is taken from them."

### **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.

For state common-law tort claims, Plaintiffs argue that the federal courts must first look to the most analogous common-law tort, which is generally conversion. Conversion is the strict liability tort that is unconcerned whether the Unions acted in good faith. This argument (and arguments made for other state common-law torts, *i.e.*, unjust enrichment, trespass to chattels, and replevin) has failed in every federal court.

Since our last Legal Update other relevant cases were decided:

*Wenzig v. SEIU Local 668*, 426 F. Supp. 3d (2019), *appeal terminated* (Aug. 28, 2020), Plaintiffs brought a putative class action suit seeking a declaratory judgment that the Defendant Union violated their First Amendment rights to free speech and association and 42 U.S.C. § 1983, by requiring the payment of fair-share fees as a condition of employment and by collecting such fees. Additionally, Plaintiffs sought re-payment of all fair-share fees paid prior to the *Janus* ruling. The district dismissed Plaintiffs claims and held that, “[n]ineteen district courts, including this Court, and the Seventh Circuit have already rejected the same §1983 claim that Plaintiffs bring here based on the good faith defense. Despite Plaintiffs arguments that the good faith defense should not bar their suit for damages under §1983, the court finds the many cases to which SEIU cites persuasive and concurs with their conclusion that the good faith defense shields the union from liability with the respect to plaintiffs’ post-*Janus* claims for damages under §1983.” *See also Oliver v. SEIU Local 668*, 2:19-cv-00891 GAM, \_\_\_ F. Supp. 3d \_\_\_, 2019 WL 5964778 (E.D. Pa. 2019). In another Pennsylvania case, the district court dismissed Plaintiffs’ §1983 claim because of the Defendant Union’s good-faith belief that it was complying with statutory and constitutional law prior to *Janus*.

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

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

*Mooney v. Ill. Educ. Ass’n*, 942 F. 3d 368 (7<sup>th</sup> Cir. 2019), *writ of cert. denied*, 141 S. Ct. 1283, 209 L.Ed.18 (Jan. 25, 2021), Plaintiff filed a putative class action suit seeking restitution pursuant to 42 U.S.C. §1983 for the fees that had been deducted from her pay prior to *Janus*. The district court dismissed Plaintiff’s claims with prejudice. In so doing, it joined a consensus across the country concluding that Unions that collected fair-share fees prior to *Janus* are entitled to assert a good faith defense to § 1983 liability. The Seventh Circuit affirmed the district court’s decision and held, “. . . we agree with the district court’s analysis, which finds ample support in the law.”

*Danielson v. Am. Fed’n of State, Cty., & Mun. Emps., Council 28, AFL-CIO*, 340 F. Supp. 3d 1083 (2018), *affm’d*, 945 F. 3d 1096(9<sup>th</sup> Cir. 2019), *writ of cert. denied*, 141 S. Ct. 1265, 209

L. ED. 2d 7 (Jan. 25, 2021), Plaintiff argued that other recent Supreme Court decisions had demonstrated that collection of agency fees violated the First Amendment rights of public sector employees and should be returned to workers who paid them. The federal district court in Washington dismissed the lawsuit and held that the Unions collected the fees in good-faith and in accordance with state and federal laws. Further, the court noted that the Washington state government stopped deducting fair-share fees after the Supreme Court handed down its decision in *Janus*. The Ninth Circuit affirmed the district court decision by confirming the applicability of the good faith defense to public sector unions and dismissing Plaintiff's claims for retroactive agency fees paid prior to the Supreme Court's decision in *Janus*.

*Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, AFL-CIO*, 942 F. 3d 352 (7<sup>th</sup>. Cir. 2019), *writ of cert. denied*, 141 S. Ct. 1282, 209 L. Ed. 2d 17 (Jan. 25, 2021), Plaintiffs sought repayment of agency fees paid prior to the *Janus* ruling. A federal court in Illinois found that the Unions' actions were in accord with a constitutionally valid state statute and nothing presented by Plaintiffs prevented application of the good-faith defense. "Defendant AFSCME followed the law and could not reasonably anticipate that the law would change. Consequently, the Court concludes that the good-faith defense applies, and Plaintiffs are not entitled to damages." *Citations omitted*. The Seventh Circuit affirmed the district court decision by confirming the applicability of the good faith defense to public sector unions and dismissing Plaintiff's claims for retroactive agency fees paid prior to the Supreme Court's decision in *Janus*.

*Wholean v. CSEA SEIU Local 2001, et. al.*, 955 F. 3d 332 (2<sup>nd</sup> Cir. 2020), *writ of cert. denied*, 141 S. Ct. 1735, 209 L. Ed. 2d 503 (Mar. 29, 2021), in which the Second Circuit Court of Appeals affirmed the dismissal of claims against a union representing Connecticut state workers in which the plaintiffs sought to claw back fair-share fees the union had lawfully charged them before *Janus*. Joining the unanimous judicial consensus on the issue, the court recognized that the union defendant's good-faith reliance on state law barred the plaintiffs' attempts to extract refunds of fair-share fees that they had paid under then-valid state law and binding Supreme Court precedent.

### III. Academic Freedom

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

In one of the best decisions on academic freedom in decades, the Wisconsin Supreme Court, citing AAUP polices and an amicus brief filed by the AAUP, ruled that Marquette University wrongly disciplined Dr. John McAdams for comments he made on his personal blog in 2014. Dr. McAdams criticized a graduate teaching instructor by name for her refusal to allow a student to debate gay rights because "everybody agrees on this." The blog was publicized in the national press, and the instructor received numerous harassing communications from third parties. Marquette suspended Dr. McAdams, and demanded an apology as a condition of reinstatement.

Relying heavily on AAUP's standards and principles on academic freedom, as detailed in AAUP's amicus brief, the court held that "the University breached its contract with Dr. McAdams when it suspended him for engaging in activity protected by the contract's guarantee of academic freedom." Therefore, the court reversed and remanded this case with instructions that the lower court enter judgment in favor of Dr. McAdams and determine damages, and it ordered Marquette to immediately reinstate Dr. McAdams with unimpaired rank, tenure, compensation, and benefits.

***Wade v. University of Michigan, SC: 156150 (Mich. Nov. 6, 2020)(appeal pending)***

On March 1, 2021, the AAUP joined an amicus brief with Brady: United Against Gun Violence (formerly the Brady Center) and Team ENOUGH filed in the State of Michigan Supreme Court in support of an appeal affirming that the University of Michigan's prohibition on firearms does not infringe on Second Amendment rights. The brief argues that the university's firearm prohibition furthers its compelling and critical interest in maintaining an environment that safeguards the free speech and academic freedom interests of university faculty to research and teach controversial topics and advance the university's core institutional objectives and the students' ability to freely exchange ideas, engage in political or issue activism, and peacefully protest on the university campus. In late December 2021, the supreme court granted the parties' joint stipulation to adjourn oral argument originally set for January 2022 but has not set a new date for oral argument.

#### **IV. Tenure, Due Process, Breach of Contract, and Pay**

##### **A. Tenure – Breach of Contract**

***Matter of Monaco v. N.Y. Univ.*, 145 A.D.3d 567, 43 N.Y.S.3d 328 (N.Y. App. Div., 2016) and 2020 N.Y. Misc. LEXIS 9622 (N.Y. Sup. Ct. 2020), modified in part and affirmed in part, Case No. 2021-00792, 2022 NY Slip Op 01125, 2022 N.Y. App. Div. LEXIS 1118, 2022 WL 516793 (N.Y. App. Div. Feb. 22, 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 handbook which, in its definition of tenure, "guarantees both freedom of research and economic security and thus prohibits a diminution in salary." NYU argued that it was not even bound by the Faculty Handbook. On December 15, 2016, the Supreme Court of the State of New York, Appellate Division, First Department found that Professors Monaco and Samuels sufficiently alleged that the policies contained in NYU's handbook, which "form part of the essential employment understandings between a member of the Faculty and the University have the force of contract."

On November 12, 2020, the trial court granted summary judgment in favor of the university on several claims. *Monaco v. New York University*, 2020 N.Y. Misc. LEXIS 9622 (N.Y. Sup. Ct. 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*, Case No. 2021-00792, 2022 NY Slip Op 01125, 2022 N.Y. App. Div. LEXIS 1118, 2022 WL 516793 (N.Y. App. Div. Feb. 22, 2022). In particular, the appeals court held that (1) the professors' claims against the university for breach of contract based on the Faculty Handbook failed because the phrase "economic security" in the Faculty Handbook did not confer any contractual rights or obligations; (2) the professors' claims for breach of contract based on the disciplinary process failed because the professors' failure to comply with the extramural funding goals was not conduct that was subject to discipline; and (3) one of the professors' breach of contract claim prevailed because his employment contract precluded the university from reducing his salary pursuant to the extramural funding policy below the amount stipulated in the contract.

## **B. Due Process**

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

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

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

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

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

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

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

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

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

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

the president must proceed after receiving the report.” And “once it reached the actual decision-maker (President Lovell), there were no procedures to govern the decision-making process.” The lack of a procedures governing appeals to the President were one area in which the Marquette’s grievance procedure did not track AAUP’s Recommended Institutional Regulations.

### **C. Faculty Handbooks**

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

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

The district court found that Plaintiff presented genuine issues of material fact regarding her breach of contract claim. Under Massachusetts law, a breach of contract claim requires a plaintiff to prove that “she had a binding contract, that the plaintiff was willing and able to perform under that contract, that defendant’s breach prevented the plaintiff from performing, and that the plaintiff suffered damages,” citation omitted. Massachusetts state courts have found that a college’s faculty handbook may constitute a binding contract between that college and its faculty, citations omitted. In this case, Defendant does not dispute that its handbook was a binding contract. In interpreting Defendant’s handbook as a contract, the court emphasized that, as a general matter, unless there is “arbitrary and capricious conduct” by the university, courts are not to intrude into university decision-making. In this case, however, the court determined that when Defendant unilaterally modified the terms of its handbook, a genuine issue of fact arose and must be further adjudicated.

#### ***Pagano v. Case Western Reserve 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 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. 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.

#### **D. Ministerial Exception**

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

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

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

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

The four factors identified were:

1. whether the individual was given the title of “minister, with a role distinct from that of most of its members”.
2. whether the individual’s position “reflected a significant degree of religious training followed by a formal process of commissioning”.

3. whether the individual held herself out as a minister of the Church by accepting the formal call to religious services and by claiming certain tax benefits; and
4. whether the individual's "job duties reflected a role in conveying the Church's message and carrying out its mission."

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

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

***DeWeese-Boyd v. Gordon College*, 487 Mass. 31, 163 N.E.3d 1000 (Mass. Sup. Ct. 2021), cert. denied, No. 21-145, 2022 U.S. LEXIS 1228 (Feb. 28, 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.

## V. Discrimination and Affirmative Action

### A. Affirmative Action in Admissions

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

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

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

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

#### *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 980 F.3d 157 (1<sup>st</sup> Cir. 2020) *cert granted*, No. 20-1199 (U.S. Jan. 24, 2022); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-707, 142 S. Ct. 896 (U.S. Jan. 24, 2022)(Cert. Granted)

The U.S. Supreme Court recently granted review in two cases which may result in a significant change in the law on affirmative action. Both cases, involving Harvard University and University of North Carolina, are among a series of lawsuits aimed at eliminating race as one factor among the many that universities can consider when choosing whom to admit. Both cases were brought by the same organization, "Students for Fair Admissions, Inc."

In the University of North Carolina case the plaintiffs argued that the university's consideration of race in its undergraduate admissions process violates both Title VI of the Civil Rights Act of 1964 and the Constitution. Since UNC is a public university it is covered by both federal anti-discrimination law and the 14th Amendment's guarantee of equal protection. The federal district court in North Carolina ruled against plaintiffs. Plaintiffs appealed to the U.S. Court of Appeals for the 4th Circuit. Before the Appeals Court could rule, plaintiffs requested review by the U.S. Supreme Court, which the Court granted.

In the Harvard case, the plaintiffs claimed that the Harvard admissions process violated Title VI (the constitutional claims do not apply to Harvard as it is a private University). The district court ruled in favor of Harvard, finding that its policy did not illegally discriminate. The plaintiffs appealed, and the AAUP had joined an amicus brief in the district court that argued in favor of the Harvard policy.

The First Circuit Court of Appeals affirmed that Harvard's admissions process, which considers race as one factor among many when reviewing applicants, satisfies strict scrutiny by being narrowly tailored to achieve the compelling interest of diversity in its student body. The appellate decision arose from plaintiffs' appeal of a district court judge's decision that held that Harvard's admissions policies do not discriminate against Asian American applicants. The AAUP, together with forty other higher education associations, signed on to an amicus brief, prepared by the American Council on Education in support of the district court's decision. The First Circuit upheld the district court and found that Harvard's race-conscious admissions program survives 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.

In finding for Harvard, the appeals court found that Harvard's "limited use of race" in admissions decisions "survives strict scrutiny," the legal standard required. "Harvard admits that it considers race in its admissions process and at times provides tips to applicants based on their race. Strict scrutiny applies regardless of racial animus. Strict scrutiny requires that the university's use of race must further a compelling interest," the decision said.

"Harvard has identified specific, measurable goals it seeks to achieve by considering race in admissions," the decision said. The goals are: "1) training future leaders in the public and private sectors as Harvard's mission statement requires; (2) equipping Harvard's graduates and Harvard itself to adapt to an increasingly pluralistic society; (3) better educating Harvard's students through diversity; and (4) producing new knowledge stemming from diverse outlooks."

"Harvard's interest in student body diversity and its consideration of race to attain it is also not unique. Many other colleges and universities consider an applicant's race, in addition to many other factors, in admissions. And the business community has communicated its interest in having

a well-educated, diverse hiring pool both in this case and in the prior governing Supreme Court cases."

On January 24, 2022, the Supreme Court granted SFFA's petition for certiorari and consolidated it with another case, *Students for Fair Admissions, Inc. v. University of North Carolina*, which challenges the use of race in undergraduate admissions at the University of North Carolina at Chapel Hill. The Supreme Court lists two questions presented in its grant of cert in the Harvard case: (1) "Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?"; (2) "Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?" The Court has set July 25, 2022 as the due date for the briefs of respondents Harvard and the University of North Carolina, and therefore any amicus brief filed in support of respondents will have to be filed by August 1, 2022.

## **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); Notice of Proposed Rule Making, RIN 1870-AA16 (Fall 2021)***

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

From the start of his administration, Biden has indicated a desire to revamp the Trump regulations. In the fall of 2021 the Department of Education issued formal notice of its plans to publish proposed regulations: “The Department plans to propose to amend its regulations implementing Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., consistent with the priorities of the Biden-Harris Administration. These priorities include those set forth in Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation and Executive Order 14021 on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity. We anticipate this rulemaking may include, but would not be limited to, amendments to 34 CFR 106.8 (Designation of coordinator, dissemination of policy, and adoption of grievance procedures), 106.30 (Definitions), 106.44 (Recipient’s response to sexual harassment), and 106.45 (Grievance process for formal complaints of sexual harassment).” The text of the proposed regulations is likely to be published in April or May 2022.

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

#### ***Freyd v. University of Oregon*, 990 F.3d 1211 (9th Cir. March 15, 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.

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

Freyd brought an action in the United States District Court for the District of Oregon, Eugene Division, claiming that UO discriminated against her in violation of the Equal Pay Act, Title VII of the Civil Rights Act, Title IX, the Equal Protection Clause of the United States Constitution, the Equal Rights Amendment of the Oregon Constitution, and related state laws. The district court held that Freyd and her male colleagues did not perform equal work or comparable work, that the retention raises did not create a disparate impact on female professors, and that any disparate impact was justified. Freyd filed an appeal with the Ninth Circuit, and the AAUP filed an amicus brief in support of her appeal.

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

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

variety of teaching, research, and service activities, as is the norm in the academic profession.

Finally, the brief argued that the retention raise practice had a discriminatory impact that could have been corrected by the University. As the AAUP report, *Salary-Setting Practices that Unfairly Disadvantage Women Faculty*, explains, where colleges and universities use retention raises, they can correct for gender-based wage disparities by giving “attention to internal equity in pay-setting. One solution would be to review internal equity analyses whenever pay adjustments are made to meet outside offers.” *Id.* The brief pointed out that OU had such a policy, yet it failed to institute it: “UO policy provides for gender-equity adjustments, [but] the Psychology Department and the UO administration failed to make such adjustments to rectify the disparate impact of its retention raises.”

The appeals court decision did not mention the AAUP amicus but did follow its reasoning. In particular, the court found that the jobs of the female and male faculty were “comparable” for legal purposes.

a reasonable jury could find that Freyd and her comparators perform a “‘common core’ of tasks” and do substantially equal work. . . . [and that they] share the same “overall job.” As full professors in the Psychology Department, Freyd and those three comparators all conduct research, teach classes, advise students, and “serve actively on departmental, college, and university committees and in other roles in service to the institution.”

The court also found that the University could have avoided the discriminatory impact of the retention raises by revisiting the pay of comparable faculty when the retention raises were given. The court explained:

Freyd is not challenging the practice of awarding retention raises; she challenges the practice of awarding retention raises to some professors without increasing the salaries of other professors of comparable merit and seniority. And as explained below, Freyd has proffered an alternative practice that may be equally effective in accomplishing the University’s goal of retaining talented faculty. . . . Freyd has proposed, as an alternative to the current practice, that “when [the University] gives a retention raise to a Psychology professor, it should evaluate the resulting salary disparity with others in the same rank with comparable merit and seniority, and give affected individuals a raise.”

Finally, the court found that the small statistical sample available did not preclude a finding that there was statistical evidence of pay discrimination. Therefore, the court reversed the lower court’s dismissal of Freyd’s Equal Pay Act claim and her claims for discrimination under Title VII and Oregon law.

***Bostock v. Clayton County, Georgia, et al.; R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, et al.; Altitude Express, Inc., et al. v. Zarda*, 140 S.Ct. 1731 (U.S. Jun. 15, 2020)**

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

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

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

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

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

***Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, E.O 13988 (Jan. 2021); 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, No. 21-2798 (3d Cir. appeal filed Sept. 24, 2021)***

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.

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

### A. NLRB Authority

#### 1. Religiously Affiliated Institutions

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

On June 10, 2020, a three-member panel of the National Labor Relations Board issued a decision limiting its own jurisdiction over the faculty of self-identified religious educational institutions. The Board’s decision in *Bethany College*, 369 NLRB No. 98 (2020) is the latest in a long line of cases reviewing the threshold of when the Board may exercise jurisdiction over the faculty of such institutions. *Bethany College* overrules, in relevant part, the Board’s earlier decision in *Pacific Lutheran University*, 361 NLRB 1404 (2014) and adopts the jurisdictional test first announced by the 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 easily found that Bethany College was exempt from the Board’s jurisdiction. With regard to the first prong, it was clear from the school’s handbook, job postings, and affiliation with the Evangelical Lutheran Church in America (ELCA) that it held itself out to students, faculty, and the community as providing a religious educational environment. Bethany College met the second prong because it is established as a 501(c)(3) nonprofit institution. Finally, the Board found that the third prong was met because Bethany College is owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod of the ELCA.

The *Bethany College* decision turns a new page in the jurisdictional arguments for self-identified religious educational institutions. In adopting the *Great Falls* objective standard, the Board sets forth a clear path for religious schools to determine with relative certainty whether 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.

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

In this case the National Labor Relations Board published a significant decision expanding the organizing rights of private-sector faculty members. The Board modified the standards used to determine two important issues affecting the ability of faculty members at private-sector higher education institutions to unionize under the National Labor Relations Act: first, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities; and second, whether certain faculty members are managers, who are excluded from

protection of the Act. (*see infra*) However, this ruling was overturned by the Board in *Bethany College*, 369 NLRB No. 98 (2020) *supra*.

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

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

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

On appeal Duquesne argued that the faculty at religiously affiliated universities, including Duquesne, were exempt from board jurisdiction. The principles regarding the religious exemption were established by the Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (*Catholic Bishop*) where the court held that the Board could not assert jurisdiction over the petitioned-for lay teachers because to do so would create a “significant risk” that First Amendment religious rights would be infringed. *Id.* at 502, 507. However, the Supreme Court did not provide

a specific test for applying the exemption. The DC Circuit subsequently advanced a bright-line test for the exemption in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) and *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). The NLRB advanced a more nuanced test in *Pacific Lutheran*. In *Duquesne*, the DC Circuit's majority decision reiterated that the test from its earlier decisions applied, and foreclosed NLRB jurisdiction.

This case begins and ends with our decisions in *Great Falls* and *Carroll College*. In *Great Falls*, we established a "bright-line" test for determining whether the NLRA authorizes the Board to exercise jurisdiction in cases involving religious schools and their teachers or faculty. 278 F.3d at 1347. Under this test, the Board lacks jurisdiction if the school (1) holds itself out to the public as a religious institution (i.e., as providing a "religious educational environment"); (2) is nonprofit; and (3) is religiously affiliated. *Id.* at 1343-44. Seven years after *Great Falls*, we reiterated in *Carroll College* that this test governs the Board's jurisdiction, 558 F.3d at 572, 574, and we do so again today. This case involves faculty members and *Duquesne* satisfies the *Great Falls* test. The NLRA therefore does not empower the Board to exercise jurisdiction.

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

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

## 2. Faculty as Managers

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

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

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

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

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

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

In *Pacific Lutheran*, the Board sought to create a simpler framework for determining whether faculty members served as managers. The Board explained that under the new standard,

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

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

***University of Southern California v. National Labor Relations Board*, 918 F.3d 126  
(D.C. Cir. March 12, 2019)**

On March 12, 2019, the District of Columbia Circuit Court of Appeals issued a decision upholding the *Pacific Lutheran* framework for managerial exemption, but limiting a portion of this holding. On December 28, 2017 AAUP submitted an *amicus* brief, written primarily by Risa Lieberwitz, to the US Court of Appeals for the DC Circuit urging the court to uphold the NLRB’s determination that non-tenure-track faculty at USC are not managerial employees. The brief supported the legal framework established by the NLRB in *Pacific Lutheran University* and describes in detail the significant changes in university hierarchical and decision-making models since the US Supreme Court ruled in 1980 that faculty at Yeshiva University were managerial employees and thus ineligible to unionize under the National Labor Relations Act. In its decision, the DC Circuit Court generally upheld the *Pacific Lutheran University* framework, it found that the Board erred when it held that the faculty in the proposed unit alone must effectively control university committees.

This case arose when SEIU filed a petition to represent non-tenure-track full-time and part-time faculty in two colleges within USC. USC objected to the petition, arguing that the faculty

were managers under *Yeshiva*. The Board applied the test established in *Pacific Lutheran University*, 361 NLRB 1404 (2014) (in which AAUP had also filed an *amicus* brief) and found that the faculty in the units were not managerial and therefore were eligible to unionize. One key factor in this finding was that the NTT faculty did not constitute a majority of university committees and therefore did not exercise effective control over the committees. After the union won the election in the Roski School of Art and Design, USC refused to bargain, citing its objection, and the Board ordered USC to bargain. USC appealed to the US Court of Appeals for the DC Circuit, arguing that the faculty had no right to unionize as they were managerial employees.

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

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

The Court also addressed the arguments advanced by the AAUP.

A final observation: in *Pacific Lutheran*, the Board emphasized that since the Court decided *Yeshiva* some four decades ago, universities "are increasingly run by administrators" and rely more and more on non-tenure-track faculty "who, unlike traditional faculty, have been appointed with no prospect of tenure and often no guarantee of employment." *Pacific Lutheran*, 361 N.L.R.B. at 1422. According to the Board, these trends "ha[ve] the effect of concentrating and centering authority away from the faculty." *Id.* Building on this point, amicus American Association of University Professors points out that "[r]ather than relying on faculty expertise and recommendations, the growing ranks of administrators increasingly make unilateral decisions on university policies and programs, often influenced by considerations of external market forces and revenue generation." American Association of University Professors' Br. 10. By contrast, the American Council on Education, though acknowledging these trends, emphasizes "the continued primacy of shared governance." ACE Br. 13. This is an interesting debate, and it may even be relevant. Regardless of national trends, however, the Board must not lose sight of the fact that the question before it in any case in which a faculty subgroup seeks recognition is whether that university has delegated managerial authority to a faculty body and, if so, whether the petitioning faculty subgroup is a part of that body. As we explained in *Point Park*, this requires "an exacting analysis of the particular institution and faculty at issue." 457 F.3d at 48 (emphasis added).

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

### **3. Graduate Assistants' Right to Organize**

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

Echoing arguments made by the AAUP in an *amicus* brief, the National Labor Relations Board held that student assistants working at private colleges and universities are statutory employees covered by the National Labor Relations Act. The 3–1 decision overrules a 2004 decision in *Brown University*, which had found that graduate assistants were not employees and

therefore did not have statutory rights to unionize. However, this decision maybe reversed as a result of the Board’s proposed rules University Students/Employees discussed *infra*.

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

***Proposed Rule, University Student/Employees, 84 FR 55265 (NLRB March 2019), withdrawn 86 FR 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 NLRB No. 20 (July 3, 2019)***

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

The employer's obligation to recognize and bargain with the union is based on the presumption that the union has support of the majority of the employees. This majority support is initially determined by an election. Subsequently, so long as the contract remains in effect, the union's majority status is irrebuttably presumed, and the employer cannot refuse to recognize or bargain with the union. A union typically enjoys a presumption of majority support post-contract. This presumption can be rebutted if the employer receives evidence that the union has lost support of the majority of the employees, typically in the form of a petition signed by a majority of the unit indicating their nonsupport of the union.

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

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

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

the union.” Thus, the election will be held in circumstances that themselves undermine support for the union.

## **B. Bargaining Units**

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

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

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

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

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

The Act requires only that a petitioner seek representation of employees in an appropriate unit, not in the most appropriate unit possible. *Overnite Transportation Co.*,

322 NLRB 723 (1996). Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. When the Board determines that the employees in the unit sought by a petitioner share a community of interest, the Board must next evaluate whether the interests of that group are “sufficiently distinct from those of other [excluded] employees to warrant establishment of a separate unit.” *PCC Structural*s, 365 NLRB No. 160, slip op. at 7 (Dec. 15, 2017) quoting *Wheeling Island Gaming*, 355 NLRB 637, 642 fn. 2 (2010). Specifically, the inquiry is whether “excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.” *PCC Structural*s, *supra*, slip op. at 11, quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016). In making this assessment, PCC Structurals instructs the decision-maker to assess [w]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *Id.*, slip op. at 5 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002). Particularly important in considering whether the unit sought is appropriate are the organization of the facility and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, 1069 fn. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

*Id.* at 21.

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

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

*Id.* at 2.

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

***President and Trustees of Bates College, NLRB Case No. 01-RC-28438 (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 NLRB 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. The NLRB’s final decision on the two unit issues in this case could impact future wall-to-wall collective bargaining at private higher education institutions.

**C. NLRB Elections**

***Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18366 (Apr. 1, 2020); AFL-CIO v. NLRB, No. 1:20-cv-01909 (BAH) (D.D.C. filed July 15, 2020)***

On August 12, 2019, the NLRB published a Notice of Proposed Rulemaking (NPRM) proposing three amendments to the representation election regulations located at 29 CFR part 103. The NPRM proposed revisions to three of the Board’s discretionary bars to the timely processing of a validly supported election petition: the blocking charge policy, the immediate imposition of a voluntary recognition bar, and the contract bar created by the establishment of a Section 9(a) relationship in the construction industry based solely on contract recognition language. On April 1, 2020, the Board issued a final rule. The final rule includes some changes and clarifications to the NPRM.

First, the final rule changes and essentially eliminates the Board’s longstanding “blocking charge” doctrine, which permitted certain unfair labor practice charges to “block” a Board-scheduled election until the ULP allegations were resolved. The new rule provides that pre-election ULP charges will *not* block an election, which will occur as scheduled. Depending on the particular type of alleged violation, the Board will either immediately open and count the ballots or impound

the ballots for up to 60 days and open them only after the charge is withdrawn or dismissed, or if a complaint issues during the 60-day period, after a final determination regarding the charge and its effect. The certification of results will not issue until the Board makes a final disposition of the charge and its effect.

Second, the rule changes the extent to which an employer's voluntary union recognition may "bar" the processing of a representation petition. The Board's prior voluntary recognition bar immediately prevented the processing of any decertification or rival election petition until a reasonable period of time had elapsed, and if the parties entered into a collective bargaining agreement, the Board's contract bar doctrine would then bar any decertification or rival election petition for the agreement's duration up to a maximum limit of three years. The new rule reinstates the notice/45-day window approach adopted by the Board in *Dana/Metaldyne*, 351 NLRB 434 (2007). Under the rule, an employer's voluntary recognition of a union will *not* immediately bar any decertification or rival petition; however, if the employer and/or union notifies an NLRB Regional Office that voluntary recognition has been granted *and* the employer prominently posts a notice of recognition advising employees they have a 45-day window in which to file an election petition, then, upon expiration of the 45-day window and if no petition is filed, any subsequent petition will be barred by the employer's voluntary recognition for a reasonable period, and by any first collective bargaining agreement entered into by the employer and union

Third, the rule changes the treatment of construction industry "prehire" agreements entered into under Section 8(f) of the National Labor Relations Act.

On July 15, 2020, the AFL-CIO filed lawsuit challenging the validity of this rule, particularly the blocking charge policy and the data cited by the Board as the basis for the rule. The AFL-CIO has also argued that the rule violates the Administrative Procedure Act because the Board moved forward with new policies that were significantly different from the original proposals in the notice of proposed rulemaking. This litigation is currently pending, with the district court holding the matter in abeyance until the D.C. Circuit issues a decision in another case involving a challenge to other changes to the Board's election rules (see below).

***Representation-Case Procedures*, 84 Fed. Reg. 69524 (Dec. 18, 2019); *AFL-CIO v. NLRB*, 471 F. Supp. 3d 228 (D.D.C. 2020), and *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68 (D.D.C. 2020), appeal pending, No. 20-5223 (D.C. Cir. filed July 16, 2020)**

On December 14, 2017, the Trump NLRB issued a Request for Information seeking comments on the public's experience under the 2014 Election Rule previously adopted by the Board. 82 Fed. Reg. 58783 (Dec. 14, 2017). The Board requested public input on what it saw as three options: retain the 2014 Rule without change; retain the 2014 Rule with modifications; or rescind the 2014 Rule, possibly while making changes to the prior Election Regulations that were in place before the Rule's adoption.

On December 18, 2019, the NLRB issued a series of changes to its representation case procedures as a [final rule](#), without notice and comment. The rule undoes many of the 2014 changes that had been designed to eliminate excessive delays between the time when a petition is filed and an election is held. The rule contains some fifteen changes, including changes relating to pre-election litigation and resolution of unit scope and voter eligibility issues, and the time parties have to comply with the various pre-election requirements that became effective in 2015. For example, while the 2014 Rule had authorized *post*-election resolution of questions of individual eligibility and unit-inclusion, the 2019 Rule states that, normally, such questions are to be litigated during a *pre*-election hearing and adjudicated prior to the election. The 2014 rule had also provided that the regional director shall schedule the election for the earliest date practicable consistent with the rules, but the 2019 Rule adds that "the Regional Director will normally not schedule an election before the 20th business day after the date of the direction of election," so as to permit the Board to rule on any request for review which may be filed. Furthermore, instead of requiring the Regional Director to issue a certification of the results of the election "forthwith," as was previously the case, the 2019 Rule provides that Regional Directors will issue certifications of election results only after the Board had decided a request for review or after the time for filing a request for review has passed. The 2019 Rule also delays the employer's deadline to provide the voter list to the petitioner. Under the 2014 Rule, the employer was required to provide the voter list within 2 business days after issuance of the direction of an election, while the 2019 Rule gives employers up to five business days to tender that record. Moreover, rather than allowing parties to choose an election observer of their choice, the 2019 Election Rule provides that, whenever possible, a party will select as its election observer either a current member of the voting unit or a current nonsupervisory employee.

On May 30, 2020, Judge Ketanji Brown Jackson of the United States District Court for the District of Columbia issued an order in *AFL-CIO v. NLRB*, Civ. No. 20-CV-0675, enjoining implementation of five aspects of the 2019 Rule. Those sections, which cannot be implemented while the injunction is in place, include changes that (1) give parties the right to litigate most voter eligibility and inclusion issues prior to the election; (2) instruct that the Regional Director normally will not schedule an election before the 20<sup>th</sup> business day after the date of the direction of election; (3) mandate that employers furnish the required voter list to the Regional Director and other parties within five business days (rather than the two business days under the 2014 Rules) following the issuance of a direction of election; (4) limit a party's selection of election observers to individuals who are current members of the voting unit whenever possible; and (5) instruct that the Regional Director will no longer issue certifications following elections if a request for review is pending or before the time has passed during which a request for review could be filed.

The district court's decision was appealed to the D.C. Circuit by both the NLRB and the AFL-CIO, which heard argument in May of 2021. No decision has been issued by the appeals court yet.

## VII. Collective Bargaining Cases and Issues – Public Sector

### A. Faculty Collective Bargaining Rights

*United Academics of Oregon State University v. Oregon State University*, CA No. A174198 (Or. Ct. of App.)

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 appeal arose from an Oregon Employment Relations Board decision 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. 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.