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Annual Legal Update

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Annual Legal Update[1]

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I. Introduction

This was a year of great expectations in the field of higher education law, and it continues as such, with our expectations unfulfilled. There were some significant decisions issued shortly after the last Annual Conference. In June of 2013, the U.S Supreme Court issued five decisions of importance to faculty members and institutions: in *Fisher (infra* at pg. 12), the Court reaffirmed the legal standard applicable to affirmative action in higher education admissions; in two employment law cases, *Nassar* and *Vance, (infra* at pg. 14-15) the Court addressed the standard of proof in retaliation cases and the issue of supervisory authority; and in *Windsor* and *Hollingsworth, (infra* at pg. 5-6) the Court addressed the issue of gay marriage. Finally, there were a number of significant lower court decisions on issues including copyright law, First Amendment protections, FOIA requests and tenure contracts.

However, many of the major issues in higher education employment law are pending before the courts and the National Labor Relations Board. Pending before the Board are cases addressing whether faculty members are employees who are covered by the National Labor Relations Act (and can therefore unionize) or whether they are managers excluded from coverage (*Point Park University* and *Pacific Lutheran University, infra* at pg. 20); whether scholarship football players are employees covered by the Act (*Northwestern University, infra* at pg. 22); and whether and when religiously affiliated institutions are subject to Board jurisdiction (*Pacific Lutheran University, infra* at pg. 19). The Board case addressing whether graduate student assistants are employees under the NLRA was resolved by the parties and therefore withdrawn. (*NYU, infra* at pg. 22). In addition, the validity of a number of Board decisions are

[1]This outline is an illustrative, not exhaustive, list of higher education cases of interest to this audience that have come out over approximately the past twelve months. 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.

in doubt while the Supreme Court considers whether President Obama's recess appointments were constitutional. (*Noel Canning, infra* at pg. 18). Further, the U.S. Supreme Court previously signaled that the current agency fee system may be subject to challenge (*Knox, infra* at pg. 24) and it may have taken up this challenge this year. (*Harris infra* at pg. 25.) Similarly, other issues of importance to faculty are pending before the courts: issues related to copyright ownership of digital materials are pending before the second and eleventh circuits (*HathiTrust* and *Cambridge University Press, infra* at pg. 16-17); the protection of academic research from subpoenas is pending before the Virginia Supreme Court (*ATI, infra* pg. 6); and the issue of whether religious institutions are immune from suits to enforce university handbooks is pending before the Kentucky Supreme Court (*Kant, infra* at pg. 10).

II. First Amendment and Speech Rights for Faculty and other Academic Professionals

A. Speech Related to University Governance or Administrative Matters

Demers v. Austin, 2014 U.S. App. LEXIS 1811 (9th Cir. Wash. Jan. 29, 2014)(Important note, previous opinion dated September 4, 2013 and published at 729 F.3d 1011 was withdrawn and substituted with this opinion.)

Professor Demers became a faculty member at Washington State University (WSU) in 1996 and he obtained tenure in 1999. Demers taught journalism and mass communications studies at the university in the Edward R. Murrow School of Communication. Starting in 2008, Demers took issue with certain practices and policies of the School of Communication. Demers began to voice his criticism of the college and authored two publications entitled *7-Step Plan for Improving the Quality of the Edward R. Murrow School of Communication* and *The Ivory Tower of Babel*. Demers sued the university and claimed that the university retaliated against him by lowering his rating in his annual performance evaluations and subjected him to an unwarranted internal audit in response to his open criticisms of administration decisions and because of his publications.

The district court dismissed Demers' First Amendment claim, stating, primarily, that Demers made his comments in connection with his duties as a faculty member. Unlike most recent cases involving free speech infringement at public universities, the district court's analysis did not center on the language from *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Instead, the court applied a five part test set out by the Ninth Circuit in a series of public employee speech cases and found that Demers was not speaking as a private citizen on matters of public concern. Therefore, his speech was not protected by the First Amendment.

Demers appealed to the Ninth Circuit. The AAUP joined with the Thomas Jefferson Center for the Protection of Free Expression to file an amicus brief in support of Demers. The amicus brief argued that academic speech was not governed by the Garcetti analysis, but instead was governed by the balance test established in *Pickering v. Board of Education*, 391 US 563 (1968). The Ninth Circuit agreed and issued a ruling that vigorously affirmed that the First Amendment protects the academic speech of faculty members.

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The Ninth Circuit emphasized that "the Supreme Court has repeatedly stressed the importance of protecting academic freedom under the First Amendment." Thus, the Supreme Court recently explained, "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Citing Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). The Ninth Circuit also noted that in *Garcetti* the Supreme Court, concerned over the possible threat to academic freedom, reserved the question of whether the Garcetti analysis applied to speech related to scholarship or teaching.

Given the seminal importance of academic speech, the Ninth Circuit concluded that the *Garcetti* analysis did not apply to teaching and academic writing, even when undertaken "pursuant to the official duties" of a teacher and professor. Instead, as argued in the amicus brief, the court held that academic employee speech was protected under the Pickering balancing test. Applying this test, the court found that the speech was protected as it addressed a matter of public concern but that there were additional factual questions that required resolution. Therefore, the Ninth Circuit reversed the decision in favor of the University and remanded the case for further proceedings.

Interestingly, on January 29, 2014, the U.S. Court of Appeals for the Ninth Circuit issued an opinion withdrawing and modifying its previous opinion in *Demers v. Austin*, 729 F.3d 1011 (September 6, 2013). Originally, the court held that "teaching and writing on academic matters" by publicly-employed teachers could be protected by the First Amendment because they are governed by *Pickering v. Board of Education*, not by *Garcetti v. Ceballos*. In its 2014 superseding opinion, the court defined the category of potentially protected speech as "speech related to scholarship or teaching." This description is arguably broader than the original phrasing and matches the language from the Supreme Court's *Garcetti* decision. *See Garcetti*, 547 U.S. at 425. The 2014 opinion also denied the University's petition for a rehearing and the petition for a rehearing en banc.

B. Extramural Speech

C. Other Recent First Amendment Cases

Golembiewski v. Logie, 516 Fed. Appx. 476 (6th Cir. May 27, 2013) (not recommended for publication), cert denied, 134 S. Ct. 213 (2013), rehearing denied, 134 S. Ct. 816 (2013)

A state university employee's petition to rescind her university's employee attendance policy was an employee grievance concerning internal office policy. Thus, it was not a matter of public concern upon which the employee could base a claim that she was terminated in violation of her First Amendment right to free speech. This was true although the employee submitted her petition to a state employment board and the petition was union related.

Turkish Coalition of America, Inc. v. Bruininks, 678 F.3d 617 (8th Cir. 2012)

In February 2012, the U.S. Court of Appeals for the Eighth Circuit ruled that the University of Minnesota (the University) did not violate the First Amendment rights of the Turkish Coalition of America (the Turkish Coalition) by labeling its website "unreliable" for the purposes of student research. Because the University did not block students' access to the Turkish Coalition's website, but instead only discouraged reliance on the website's materials, the court ruled that the tenets of academic freedom precluded the Turkish Coalition's First Amendment challenge. Noting an "absence of allegations that the challenged actions posed an obstacle to students' access to the materials on the [Turkish Coalition's] website or made those materials substantially unavailable at the university," the court found that academic freedom protected the actions of the defendants.

Palmer v. Penfield Central School District, 918 F. Supp. 2d 192 (W.D.N.Y. 2013)

The U.S. District Court for the Western District of New York found that an elementary school teacher's complaint that her school district discriminates against African American students was not protected speech under the First Amendment. Noting that the teacher's statements (i) were made during a mandatory grade-level meeting and (ii) were "related to a matter that was directly connected to, and arose out of, her duties as a teacher," the court held that the teacher did not speak as a citizen on a matter of public concern. As a result, the teacher's speech was not protected from discipline from the school district.

Mpoy v. Fenty, 901 F. Supp. 2d 144 (D.D.C. 2012)

The U.S. District Court for the District of Columbia held that a teacher's e-mail to the Chancellor of the D.C. public school system, which criticized the "classroom facilities, supplies, teaching assistants, and test scores" at the teacher's school, did not constitute protected speech under the First Amendment. Questioning whether the academic freedom exception outlined in *Garcetti* is applicable outside of the higher education context, the court held that the exception "surely would not apply in a case involving speech that does not relate to either scholarship or material taught." Further, citing the "form and context" in which the teacher's complaint was made, the court ruled that the teacher's e-mail was speech by a public employee; thus, the teacher was not protected from discipline as the result of his e-mail.

Garvin v. Detroit Board of Education, 2013 Mich. App. LEXIS 391 (Mich. Ct. App. 2013) appeal denied 494 Mich. 883 (Mich. 2013)

A Michigan Court of Appeals held that a public school teacher's speech, made in the form of a report of student sexual assault to Child Protective Services, was protected by the First Amendment. Finding that (i) the speech involved a matter of public concern, (ii) the speech was not made by the teacher in her professional capacity, and (iii) "the societal interests advanced by

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[the] speech outweighed the [school district's] interests in operating efficiently and effectively," the court held that the First Amendment protected the teacher from retaliation stemming from her speech.

D. Recent Supreme Court Decisions on Gay Marriage

United States v. Windsor, 133 S. Ct. 2675 (2013)

This case involved a challenge to the Defense of Marriage Act, a federal statute that defined marriage as only between a man and a woman. The statute limited federal benefits arising from marriage, such as the marriage benefits under the tax code, to such marriages. This limitation was in place even if gay couples were legally married in a given state. The Court ruled 5 to 4, with Justice Kennedy authoring the opinion, that this law was unconstitutional because it violated the Due Process clause of the Fifth Amendment. The Court found that the statute unconstitutionally singled out for adverse treatment a class of persons even though the individual states had decided to protect and honor such marriages. As the Court noted "DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." While this decision is an important one, the Court did not rule that gay persons had a right to be married, instead this is still a decision for individual state legislatures. Here is the concluding section of the decision.

> The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.
>
> What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.
>
> The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See *Bolling*, 347 U. S., at 499–500; *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 217–218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.
>
> The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own

liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)

This case involved a challenge to California Proposition 8, which had overturned a gay marriage statute and had outlawed gay marriage in the State of California. There was a challenge brought to Proposition 8, and the US District Court found that Proposition 8 was unconstitutional. Importantly, the State of California did not appeal the decision, instead an outside group pursued the appeal. The Supreme Court ruled that the decision of the district court could not be challenged by this outside group. Therefore, the appellate courts had no jurisdiction to hear any appeals and the district court decision was final and binding.

While this case has the political effect of legalizing gay marriage in California, the Court's ruling was based on procedural grounds and the Court did not address the substance of whether Proposition 8 was unconstitutional. This distinction is exemplified by the differences in the Justices who made up the majority in Hollingsworth versus the Justices who ruled in the DOMA case: in particular, Justices Roberts and Scalia joined the majority in Hollingsworth but not in the DOMA case while Justices Kennedy and Sotomayor dissented in Hollingsworth. Thus while this case has important political implications, and may have a procedural impact on cases in general, it does not address the underlying issue of the constitutionality of gay marriage.

III. FOIA/Subpoenas and Academic Freedom

***The American Tradition Institute and Honorable Delegate Robert Marshall v. Rector & Visitors of the University of Virginia & Michael Mann,* Va. Cir. Case No.: CL-11-3236 (Circuit Court, Prince William County) *appeal granted No. 130934* (Va. 2013)**

In 2011, the American Tradition Institute served a FOIA request on the University of Virginia regarding Professor Mann's climate research. This request mirrored the subpoena previously served on the University by Attorney General Cuccinelli. (We previously reported on the conclusion of the *Cuccinelli v. UVA* case which was decided by the Virginia Supreme Court.) The University supplied some records, but took the position that the majority of the records were not subject to public disclosures. Thereafter, ATI petitioned to compel the production of these documents. Professor Michael Mann sought to intervene, arguing that the emails in question were his and therefore he should have standing in any litigation relevant to any document

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release. AAUP submitted a letter to the 31st Judicial Circuit Court of Virginia in support of Mann's intervention, and the court granted him standing.

AAUP and the Union of Concerned Scientists subsequently filed a joint amicus brief on July 24, 2012, in support of UVA and Professor Mann and urged that "in evaluating disclosure under FOIA, the public's right to know must be balanced against the significant risk of chilling academic freedom that FOIA requests may pose." The brief also argued that enforcement of broad FOIA requests that seek correspondence with other academics, as ATI sought here, "will invariably chill intellectual debate among researchers and scientists." Also, exposing researchers' "initial thoughts, suspicions, and hypotheses" to public scrutiny would "inhibit researchers from speaking freely with colleagues, with no discernible countervailing benefit." The brief further argued that allowing FOIA requests "to burden a university with broad-ranging document demands based on questions concerning the scientific validity of a researcher's work or on the potential that something might turn up would have the strong potential to 'direct the content of university discourse toward or away from particular subjects or points of view,' and will have a significant chilling effect on scientific and academic research and debate."

On April 2, 2013, the Virginia Circuit Court issued a written Order ruling that faculty email correspondence related to academic research constitutes a public record under Virginia's Freedom of Information Act (FOIA) when the faculty members are government employees on government property using government facilities for government purposes. The court held however, that all of the records sought by petitioners qualified for exclusion under the Virginia FOIA exemption for "data, records or information of a proprietary nature produced or collected by or for faculty of staff of public institutions of higher education….. in the conduct of or as a result of study or research on medical, scientific or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body, where such data, records or information has not been publicly released, copyrighted or patented" or under the exemption for personnel records. The court also ruled that purely personal email messages are not public records under the Virginia FOIA. Although the court did not rely on the academic freedom and First Amendment issues argued by the parties, it noted that the research exception in the Virginia FOIA does arise from the concept of academic freedom and from the interest in protecting research.

The Virginia Supreme Court granted a petition for review and oral arguments were heard on January 9, 2014. The AAUP, in partnership with the Union of Concerned Scientists, has filed a brief with the court supporting Professor Mann and UVA and arguing that granting access to the private materials would have a severe chilling effect on scientists and other scholars and researchers. While freedom of information laws are important tools for keeping public institutions accountable, the broad scope of the requests suggests that they are designed to harass and to interfere with scientists' ability to freely conduct research and correspond with other researchers.

In re Dolours Price, 685 F.3d 1 (1st Cir. 2012) and U.K. v. Trustees of Boston College, 718 F.3d 13 (1st Cir. 2013)

Referred to collectively as the "Boston College Subpoena" case, this complex litigation involves two separate federal appellate court decisions involving subpoenas served on Boston College for oral-history materials held in its John J. Burns Library. In the first decision, issued in 2012, the court held that there was no absolute privilege against the disclosure of research material. However, in the second decision, issued in 2013, the court held that in order to compel disclosure, the lower courts needed to review the subpoenas and conduct a balancing test, weighing the First Amendment concerns involved in releasing the materials against the obligation to provide evidence in a criminal case.

Between 2001 and 2006, scholars at Boston College recorded detailed interviews with former loyalist and republican paramilitary members who fought in Northern Ireland; this project is known formally as the Belfast Project. In order to make the interviewees feel safe (which was necessary to get their cooperation), the researchers promised the interviewees anonymity until the interviewees' death. The first interviews from the archive were published in the book, *Voices from the Grave*, and featured in the documentary of the same name, in 2010. These interviews, with former IRA leader Brendan Hughes and former UVF member David Ervine, were made public upon the death of these interviewees as per their agreement with Boston College. (http://bostoncollegesubpoena.wordpress.com/)

The Boston College subpoenas were issued on behalf of the British government based on the Mutual Legal Assistance Treaty (MLAT), which allows signing members to assist each other in international criminal investigations without going through diplomatic channels. The Boston College subpoenas are part of a criminal investigation by United Kingdom authorities into the 1972 abduction and death of Jean McConville, who was thought to have acted as an informer for the British authorities on the activities of republicans in Northern Ireland.

Boston College asked the United States District Court to quash the subpoenas as to records pertaining to the other still living interviewees on the grounds that release of the information could threaten the safety of interviewees, the continuing peace process in Northern Ireland, and the future of oral history. Boston College also argued that this type of forced disclosure could have a detrimental impact on academic freedom. In addition, the principal interviewers in the project, Ed Moloney and Anthony MacIntyre, together filed a motion to intervene in the district court case to protect the confidentiality of past and future contributors to the Belfast Project. In a December 2011 opinion, the District Court rejected both Boston College's motion to quash the subpoenas and the motion by Moloney and MacIntyre to intervene in the case, but did grant Boston College's request for an in camera review. Moloney and MacIntyre then filed individual complaints, which the District Court dismissed.

Moloney and MacIntyre appealed to the U.S. First Circuit Court of Appeals the dismissal of their individual complaints and asserted that the compelled disclosure of the interview violated the First Amendment. On July 6, 2012, the First Circuit court upheld the dismissal of Moloney and McIntyre's individual lawsuit. *In re Dolours Price*, 685 F.3d 1 (1st Cir. 2012).

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The court also analyzed Moloney/McIntyre's First Amendment claim that compelling production of the records violated their individual "constitutional right to freedom of speech, and in particular their right to impart historically important information for the benefit of the American public, without the threat of adverse government reaction." Moloney/McIntyre asserted that production of the subpoenaed interviews is contrary to the confidentiality they promised the interviewees and they asserted an "academic research privilege" to be evaluated similarly as a reporter's privilege. The court noted, however, that the United States Supreme Court has distinguished between "academic freedom" cases (involving government attempts to influence the content of academic speech and direct efforts by government to determine who teaches) on the one hand, from, on the other hand, the question of privilege in the academic setting to protect confidential peer review materials.

The court viewed this case as falling into the second category of cases, and as such, "is far attenuated from the academic freedom issue, and the claimed injury as to academic freedom is speculative." The court relied heavily on the decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), in which the Supreme Court rejected a general purpose reporter's privilege for confidential sources and held that the "government's strong interests in law enforcement precluded the creation of a special rule granting reporters a privilege which other citizens do not enjoy." The First Circuit pointed out that in *Branzburg* the court discussed the situation of reporters who promised confidentiality as well as of informants who had committed crimes and those innocent informants who had information pertinent to the investigation of crimes and found that the interests in confidentiality of both kinds of informants does not give rise to a *First Amendment* interest in the reporters to whom they had given the information under a promise of confidentiality. Thus, the court reasoned, "if the reporters' interests were insufficient in *Branzburg*, the academic researchers' interests necessarily are insufficient here," and therefore Moloney and McIntyre had no *First Amendment* basis to challenge the subpoenas. The court remanded the case for a determination on whether the individual interviews needed to be released pursuant to the subpoena.

In 2013, the First Circuit again addressed the matter to determine whether the District Court properly compelled the release of certain interviews. *U.K. v. Trs. of Boston College*, 718 F.3d 13 (1st Cir. Mass. 2013). The court rejected the position of the United States that federal courts do not have discretion to review for relevance subpoenas issued pursuant to a treaty between the United States and the United Kingdom. The court declared that enforcement of subpoenas is an inherent judicial function which, by virtue of the doctrine of separation of powers, cannot be constitutionally divested from the courts of the United States. The court further applies a "direct relevance" standard to its review of the material sought by the subpoena and explained that a "balancing of *First Amendment* concerns vis-à-vis the concerns asserted in favor of the compelled disclosure of academic and journalistic information is the law." Applying the balancing test the court ruled that the number of oral history interviews ordered to be produced by the District Court should be reduced from 85 to 11.

IV. Tenure, Due Process, and Breach of Contract

A. Tenure – Breach of Contract

Kant v. Lexington Theological Seminary, 2012 Ky. App. LEXIS 124 (Ky. Ct. App. 2012), appeal docketed, No. 2012-SC-000502 (Ky. Aug. 24, 2012)

Dr. Laurence Kant is the plaintiff-movant in this matter. Dr. Kant, who is of the Jewish faith, was an Associate Professor of the History of Religion at the Lexington Theological Seminary (LTS). LTS is affiliated with the Disciples of Christ, a denomination of the Christian faith, and does not provide classes with a secular purpose. Teaching at LTS in various capacities since 2000, LTS granted Dr. Kant tenure in March 2006. However, LTS terminated Dr. Kant's contract at the end of the spring 2009 semester, citing financial exigency as the impetus for its decision.

Following his termination in 2009, Dr. Kant filed a complaint against LTS, "alleging that LTS had breached his contractual right to tenured employment and breached the implied duty of good faith and fair dealing." Dr. Kant's complaint sought both compensatory and punitive damages from LTS. Following a hearing on LTS' motion to dismiss the case as an "ecclesiastical matter," the district court sustained LTS' motion and concluded that Dr. Kant was a "ministerial employee" due to the subject matter of his course load. Concluding that the ministerial exception thus applied in the case, and "that the issues in the case also involved an ecclesiastical matter," the district court ruled that it lacked the requisite subject matter jurisdiction over the controversy.

Dr. Kant appealed the district court's decision to the Commonwealth of Kentucky Court of Appeals, arguing that both the "ecclesiastical matters rule" and the "ministerial exception" do not apply to this controversy. Ultimately, the court of appeals affirmed the district court's ruling that it had no subject matter jurisdiction in this case. First, the court of appeals found that LTS' "decision making as to who will teach its students . . . would be an inquiry into an ecclesiastical matter" and that such inquiries are prohibited—except for in rare circumstances—under the so-called ecclesiastical matters rule. Second, the court of appeals agreed that the ministerial exception barred Dr. Kant's claims because his "primary duties involved teaching religious-themed courses at a seminary . . . that prepared students for Christian ministry." Relying heavily on the U.S. Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), the court of appeals found that Dr. Kant's proffered cause of action (based in contract law principles) did "not trump constitutional protections and freedoms of the church."

Dr. Kant then petitioned to the Kentucky Supreme Court for a discretionary review of the Court of Appeals decision. On or about February 18, 2013, the Supreme Court granted Dr. Kant's petition for discretionary review of the Court of Appeals determination. The AAUP filed an *amicus* brief on behalf of Dr. Kant in April 2013. The brief argued that the school was bound by the contract that it had voluntarily entered into. Further, the issue at the heart of the case --

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whether LTS was permitted to eliminate tenure and terminate Dr. Kant due to a financial exigency -- is a narrowly tailored, non-religious question that will not require the Court to intrude on or analyze matters of church doctrine or governance. The Court heard oral arguments on August 23, 2013.

Branham v. Thomas M. Cooley Law School, 689 F.3d 558 (6th Cir. 2012)

Tenured law professor Lynn Branham was terminated from Thomas M. Cooley School of Law ("Cooley") and subsequently sued the law school in federal court on claims of violations of the Americans with Disabilities Act and Michigan Persons with Disabilities Civil Rights Act, intentional infliction of emotional distress, and breach of contract. The federal district court granted Cooley's motion for summary judgment on Branham's first three claims, but allowed her breach of contract claim to proceed. The district court went on to rule that Cooley had breached its employment contract with Branham because it failed to follow the specified procedures for dismissal and ordered Cooley to comply with that process. To comply with the Court's order, Cooley held a faculty conference to determine whether there was good cause to dismiss Branham from her position. The faculty concurred with the decision to dismiss Branham, and the Board of Directors unanimously upheld the faculty's decision. The district court then ruled that Cooley had fulfilled its due process obligations under the employment contract and that the process complied with Michigan law. The court then entered judgment against Branham.

Branham subsequently appealed to the U.S. Court of Appeals for the Sixth Circuit, arguing, among other things, that the district court erred in concluding that the tenure granted under her contract does not afford her rights beyond the one year term specified in her employment contract. The Sixth Circuit upheld the district court's decision, concluding that Branham's employment contract did not create an obligation of continuous employment, but rather expressly limited its term to one year. The Court reasoned that while Branham may have had tenure in the sense that she had academic freedom, she was due only the employment protection and process specified in her employment contract.

Branham's attorney subsequently filed a *Petition for Rehearing en Banc* on September 6, 2012. AAUP filed a motion and *amicus* brief in support of Branham's petition which was authored by AAUP Committee A member Matt Finkin. AAUP's brief argued that the district court ignored the well-developed body of law in which the courts have uniformly emphasized that tenure accords a continuing appointment until dismissal for cause. Additionally, the brief noted that the courts have stressed that in construing the content of academic tenure, attention has to be paid to the relationship of tenure to the protection of academic freedom. Thus,"it is permanence of appointment that protects academic freedom in a way that a sequence of annual contracts simply cannot."

The Sixth Circuit issued an order on October 3, 2012, denying Branham's petition for rehearing.

Grimmett v. University of Alaska, 303 P. 3d 482 (Alaska 2013)

This case involved the termination of two University employees, Yauna Taylor, an "Administrative Generalist," and Calvin Grimmett, a police officer. (While neither employee was a faculty member, this case is instructive as their terminations arose under the general Regents Policy and University Regulations.)

Both employees were found to have their terms of "appointment and other terms of employment governed by the Board of Regents Policy, University Regulations, and applicable campus rules and procedures." The Regents Policy and University regulations provided that if an employee was not designated as an at will employee, then the employees could only be terminated "for cause." Another Regents Policy allowed the University to discontinue or not renew an existing employee through "nonretention." The University terminated both employees pursuant to the "nonretention" clause, and also alternatively terminated Grimmett for cause. The University did not provide Taylor with an opportunity to contest her termination at a hearing. The University did hold a hearing on Grimmett's termination and found that the "nonretention" was substantively valid and that there was just cause for termination.

The employees sued for violation of their due process rights and breach of contract. The employees alleged that the University had attempted to use the nonretention provision to avoid demonstrating that they had been terminated for cause. The lower court issued a decision in the employees' favor and an appeal followed. On June 28, 2013, the Alaska Supreme Court issued a decision finding that the employees were entitled to due process prior to a performance-based dismissal, and the termination of the employees without a due process hearing was reversed and the employees were awarded back pay. The court found that the employees both held for-cause employment and that that the non-retention clause could not be used for a performance-based dismissal of the employee. Further, the context of the non-retention clause suggested that the non-retention functioned in a way similar to layoff and financial exigency. Therefore non-retention, like those two procedures, was limited to reductions in force or similar non-performance-related exigencies.

V. Discrimination and Affirmative Action

A. Affirmative Action in Admissions

Fisher v. University of Texas, 133 S. Ct. 2411 (2013)

In this case, the U.S. Supreme Court generally upheld the constitutionally of affirmative action plans as implemented under the Court's previous decisions. The Court generally reaffirmed its prior holdings that found that diversity in educational institutions was a compelling state interest that could necessitate the use of an affirmative action program. However, the Court returned the case to the appeals court finding that the lower court had applied the wrong standard

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of proof in determining whether the affirmative action plan was necessary to attain the goal of diversity.

The case arose out of the University of Texas' admissions plan. The UT system had previously determined that diversity was essential to its educational mission. In an attempt to attain diversity, the UT system replaced an earlier admissions plan which had explicitly considered race with a "Personal Achievement Index" (PAI). The PAI is produced through a holistic review of applications intended to identify students whose achievements are not accurately reflected by their test scores and grades alone. The PAI includes an evaluation of required written essays and a "personal achievement score," which is made up of factors such as socio-economic status, languages at home, and whether the student lives in a single-parent household. In addition, the state legislature and the university adopted a variety of other initiatives to increase diversity.

The AAUP filed an amicus brief with the Fifth Circuit in support of the UT system. Specifically, the brief focused on the benefits of a diverse student body and pointed out that the University of Texas specifically modeled its admissions policy on a similar policy endorsed by the Supreme Court. The brief also argued that academic freedom depends on the right of universities to freely choose who is admitted to their communities because universities have the educational expertise to design and fulfill their own academic missions.

Relying on the Supreme Court's 2003 decision in *Grutter v. Bollinger, 539 U.S. 306 (2003)*, the Fifth Circuit ruled in favor of the university, affirming that the university has "a compelling interest in obtaining the educational benefits of diversity." In doing so, the Fifth Circuit also held that deference should be granted to the university's educational judgment that diversity is essential to its educational mission, and that deference should be granted to the university's decision to use race as a factor to attain this diversity.

The case was appealed to the Supreme Court. In August 2012, the AAUP again joined in a coalition *amicus* brief submitted to the Supreme Court and drafted by the American Council on Education. On June 24, 2013, the Supreme Court ruled 7 to 1 to remand the case because the lower court did not apply to proper standard of proof when evaluating the claims. In particular, the Court found that the Fifth Circuit erred in granting deference to the University's decision to use race as a factor to attain diversity. As the Court explained, the "University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference." Slip op. at 10.

However, most importantly, the Court did NOT rule that affirmative action was inherently unconstitutional, as many had feared. Instead, the Court primarily reaffirmed its 2003 holding in *Grutter*, which has been the law of the land for the last 10 years. The Court also reaffirmed some of the fundamental holdings of *Grutter*. For example, the Court reiterated that "student body diversity is a compelling state interest that can justify the use of race in university admissions." Slip op. at 7 (*Quoting Grutter* at 325.) Similarly, the Court found that it was appropriate to accord universities deference on whether "such diversity is essential to its educational mission." Slip op. at 9.

While this decision does not change the legal standard, it may embolden those challenging these policies or may prompt reconsideration of their use by some higher education institutions. Thus the decision may provide political fodder to some, but it should not significantly alter the legal standards applicable in affirmative action cases.

B. "Mixed Motive" Instructions and Discrimination Statutes

Nassar v. University of Texas Southwestern Medical Center, 133 S. Ct. 2517 (2013)

In this case, the Supreme Court limited the standard of proof in retaliation cases to the narrower "but for" causation standard.

Naiel Nassar, M.D. served as an Assistant Professor of Internal Medicine and Associate Medical Director with the University of Texas Southwestern Medical Center (UTSW) Clinic. Dr. Nassar complained that he allegedly was being harassed by a supervisor, Dr. Levine, and sought transfer to another role that would take him out of her line of supervision. He stepped down from his faculty post when he received a job offer working for Parkland, an affiliated clinic, effective July 10, 2006. On July 3, he submitted a letter of resignation in which he asserted that his "primary reason" for resigning was because of Dr. Levine's harassing and discriminatory behavior. Shortly thereafter, Parkland withdrew its job offer.

Dr. Nassar brought suit in federal court, accusing UTSW of orchestrating Parkland's refusal to hire him in retaliation for his discrimination complaints, in violation of Title VII. The jury found that UTSW constructively discharged and retaliated against Dr. Nassar, and awarded him $ 3.4 million in back pay and compensatory damages. UTSW appealed to a three-judge panel of the Circuit Court of Appeals for the Fifth Circuit, arguing among other things that Dr. Nassar failed to prove that retaliation was the "but for" cause of Parkland's decision not to hire him. Citing to its 2010 ruling in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), which held that the mixed-motive framework is available to Title VII retaliation plaintiffs, the Fifth Circuit court panel, without further analysis, affirmed the district court's judgment regarding liability for retaliation. UTSW appealed to the Supreme Court.

The Supreme Court held that the appropriate standard of proof in retaliation cases was the narrower "but for" causation standard. On June 24, 2013 the Court ruled 5 to 4 to vacate the decision of the Fifth Circuit finding it was appropriate to use "but for" causation, and not mixed motive causation, in Title VII retaliation cases. This ruling benefits employers and was contrary to the position argued by the AAUP in an amicus brief. The American Council on Education (ACE) filed an amicus brief in support of UTSW arguing that AAUP policies supported the higher burden of proof. The AAUP filed an *amicus* brief in response, arguing that ACE had misinterpreted AAUP policies and that in fact AAUP policies supported the "but for" standard in retaliation cases. The Court did not reach the issue of whether there a different standard should be applied to faculty members based on AAUP policies. That said, it is a relatively modest change in the burden of proof in such cases. In addition, the Court did not take the invitation from some *amicus* briefs to find that all similarly worded statutes would be interpreted in the

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same fashion. Such a ruling would have constituted a major change for legal claims under other statutes, such as the NLRA or the FLSA.

C. **Supervisor Liability Under Title VII**

Vance v. Ball State University, 133 S. Ct. 2434 (2013)

In *Vance v. Ball State*, the Supreme Court addressed a claim of harassment brought by a cafeteria worker against another employee. The issue in Vance was whether the employee engaging in the harassment was a supervisor or a co-worker. Generally, an employer is accountable under Title VII when one of its supervisors harasses an employee. However, if the harasser was only a co-worker, the employer would be liable only if it was negligent in failing to prevent the harassment.

The case began when Maetta Vance, an African-American woman, sued her employer, Ball State University (BSU) alleging that a fellow employee, Saundra Davis, created a racially hostile work environment in violation of Title VII. During the time in question, Vance was employed as a catering assistant in the University Banquet and Catering division and Davis, a white woman, was employed as a catering specialist. The parties vigorously disputed the precise nature and scope of Davis' duties, but they agreed that Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance. Vance's workplace strife persisted despite BSU's attempts to address the problem. As a result, Vance filed suit claiming that Davis was her supervisor and that BSU was liable for Davis' creation of a racially hostile work environment in violation of Title VII.

The district court ruled against Vance explaining that BSU could not be held vicariously liable for Davis' alleged racial harassment because Davis could not "'hire, fire, demote, promote, transfer, or discipline'" Vance and, as a result, was not Vance's supervisor. The Seventh Circuit affirmed. 646 F.3d 461. It explained that, under its settled precedent, supervisor status requires "'the power to hire, fire, demote, promote, transfer, or discipline an employee.'" Id., at 470. The court concluded that Davis was not Vance's supervisor and thus that Vance could not recover from BSU unless she could prove negligence. Finding that BSU was not negligent with respect to Davis' conduct, the court affirmed.

The Supreme Court upheld the lower court decisions. In so doing, the Court adopted a relatively narrow definition of supervisor, finding that that because the alleged harasser did not have the power to make certain formal employment decisions, such as hiring, firing, or promoting, she was not a "supervisor" under Title VII, even though she did direct Ms. Vance's day-to-day activities. Notably the Court's narrow definition does not apply when there is a tangible employment action such as a termination or a demotion.

VI. Intellectual Property

A. Patent and Copyright Cases

Cambridge University Press v. Becker, 2012 U.S. Dist. LEXIS 123154 (N.D. Ga. 2012), appeal docketed, No. 12-14676 (11th Cir. Sept. 12, 2012)

This case arose when professors at Georgia State University (GSU) engaged in the copying and distribution of excerpts of copyrighted academic works through GSU's course management system for use in their courses. In April 2008, Cambridge University Press, Oxford University Press, and Sage Publishers (the Publishers) filed a copyright infringement action challenging these uses. Among the affirmative defenses that GSU asserted in their Answer was that any copying of the material was a fair use.

During the course of the case, more than twenty professors were accused of infringement and deposed to justify their use of electronic reserves. In September 2010, the court directed that the Publishers prove "a sufficient number of instances of infringement of Plaintiffs' copyrights to show such ongoing and continuous misuse." In May 2012, the district court issued a 350-page decision. It found only 74 claimed uses from 64 of Plaintiffs' works even potentially infringing, and applied its conception of fair-use principles to these claims. The district court held that nearly all of the uses in question were fair use, and non-infringing, as GSU faculty used modest amounts of the texts in question for non-profit educational purposes. Ultimately the court found that the Publisher's had proven only five infringements and even these were "caused" by the 2009 Policy's failure to limit copying to "decidedly small excerpts" (as defined by the court); to prohibit the use of multiple chapters from the same book; or to "provide sufficient guidance in determining the 'actual or potential effect on the market or the value for the copyrighted work.'"

In August 2012, the court issued an order providing for declaratory and injunctive relief, essentially limited to ordering GSU to "maintain copyright policies for Georgia State University which are not inconsistent" with the court's previous orders. The court also held that the GSU was the "prevailing party" under 17 U.S.C. § 505 because they "prevailed on all but five of the 99 copyright claims which were at issue" when the trial began. This conclusion led the court to find that GSU were entitled to reasonable attorneys' fees and costs because the Publishers' "failure to narrow their individual infringement claims significantly increased the cost of defending the suit." In September 2012, the district court awarded the GSU $2,861,348.71 in attorneys' fees and $85,746.39 in costs and entered a final judgment that also incorporated its prior rulings on the merits.

The Publishers filed an appeal to the Eleventh Circuit Court of Appeals. In April 2013, the AAUP submitted an *amicus* brief in support of GSU. The AAUP urged the Court to affirm the district court's judgment, but also to clarify that district courts assessing fair use claims may alternatively conduct a transformative use analysis to determine whether the use was fair. A transformative use analysis compares the purpose for which the professors use copyrighted material in their teaching with the original purpose for which the work was intended. The brief explained that in cases where the materials encompass more than a modest excerpt, the use may

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nonetheless be transformative, and the failure to consider whether the use was transformative would burden or restrict countless highly expressive uses that have long been an essential teaching tool. No decision has yet been issued by the Eleventh Circuit.

Author's Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012), appeal docketed (2nd Cir. Nov. 14, 2012)

In October 2012, the U.S. district court for the Southern District of New York ruled that various universities (collectively referred to as "HathiTrust") did not violate the Copyright Act of 1976 when they digitally reproduced books, owned by the universities' respective libraries, for the purpose of aiding print-disabled students.

HathiTrust, a collection of universities including the University of Michigan, the University of California, the University of Wisconsin, Indiana University, and Cornell University, has agreements with Google, Inc. that permits "Google to create digital copies of works in the Universities' libraries in exchange for which Google provides digital copies to [HathiTrust]." HathiTrust stores the digital copies of the works in the HathiTrust Digital Library (HDL), which is used by its member institutions in three ways: for "(1) full-text searches; (2) preservation; and (3) access for people with certified print disabilities." (There is no indication from the court's opinion that digital copies in the HDL are used outside of the library setting for purposes other than those enumerated.) The full-text search function allows users to conduct term-based searches across all the works in the HDL; however, where works are not in the public domain or have not been authorized for use by the copyright owner, the term-based search only indicates the page number on which the term appears. Digital preservation of the works in the HDL helps member universities "preserve their collections in the face of normal deterioration during circulation, natural disasters, or other catastrophes." Finally, the function providing access to print-disabled individuals, or individuals with visual disabilities, allows disabled "students to navigate [materials] . . . just as a sighted person would."

The plaintiffs asserted that HathiTrust's digital reproduction of the universities' works constituted copyright infringement. The U.S. district court for the Southern District of New York, however, disagreed with this assertion. While acknowledging that the plaintiffs had established a *prima facie* case of copyright infringement, the court found that HathiTrust successfully defended its right to use the works under the fair use exception outlined in the Copyright Act. Weighing four factors relevant to evaluating a claim of fair use—namely, (i) the purpose and character of the use of the works, (ii) the nature of the copyrighted works, (iii) the amount of the work copied, and (iv) the impact on the market for or value of the works—the court held that the uses of the works in the HDL constituted fair use and, thus, did not constitute copyright infringement. The court weighed heavily the fact that the digital reproduction of the works was for educational purposes, noting that "[w]here the purpose of the use is for scholarship and research . . . [the evaluation] 'tilts in the defendant's favor.'" Further, the court acknowledged that a subset of the HDL's collection—"previously published non-dramatic literary works"—were specifically protected by the Chafee Amendment to the Copyright Act.

The Chafee Amendment, when read in conjunction with the Americans with Disabilities Act, requires educational institutions to make such works available in special formats for persons with disabilities.

The Authors have appealed and the case is now pending before the Second Circuit Court of Appeals. Oral argument was heard by the court on October 30, 2013.

VII. Collective Bargaining Cases and Issues

A. NLRB Authority

Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), cert granted, 133 S. Ct. 2861 (U.S. June 7, 2013)

This important case involves the authority of the President to make recess appointments to the NLRB and the validity of decisions made by the Board, while such recess appointees were on the Board. To render decisions, the NLRB must have a quorum of at least three Board members. On January 4, 2012, following the expiration of a Board member's term the previous day, President Obama appointed three new Board members to the NLRB to ensure that the Board could reach this requisite quorum and, in effect, avoid a shutdown of the NLRB. The President appointed Board members Block, Griffin, and Flynn using the Recess Appointments Clause of the Constitution.

In this particular case, Noel Canning, a Pepsi-Cola bottler and distributor from Washington state, appealed an adverse NLRB decision, dated February 8, 2012, to the U.S. Court of Appeals for the District of Columbia Circuit. Arguing that President Obama's appointment of members Block, Griffin, and Flynn was unconstitutional, Noel Canning contended that the NLRB's decision in its case was invalid because the Board lacked the quorum required to render a decision. The circuit court agreed and ultimately ruled President Obama's recess appointments invalid, vacating the NLRB's decision. To reach this conclusion, the circuit court closely scrutinized the meaning of the phrase "the Recess" in the Recess Appointments Clause of the Constitution and relied heavily on "logic and language . . . [and] also constitutional history" to decipher the term. Concluding that "the Recess" refers only to recesses between sessions of the Senate—periods "when the Senate simply cannot provide advice and consent"—rather than mere intrasession breaks, the court ruled that President Obama impermissibly utilized the Recess Appointments Clause to appoint members Block, Griffin, and Flynn. Because it ruled President Obama's appointments invalid, the court vacated the NLRB's decision in this case.

In January 2013, the U.S. Court of Appeals for the District of Columbia Circuit found invalid three recess appointments that President Obama made to the National Labor Relations Board (NLRB) early the previous year. As the recess appointments were "invalid from their inception," the court found that the NLRB lacked the requisite quorum to issue a decision in this case and vacated the NLRB's decision. This decision threw all NLRB rulings issued after President Obama's January 2012 appointment of members Block, Griffin, and Flynn (over 200

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decision in total) into question. However, despite the circuit court's decision, the NLRB has continued business as usual.

In June of 2013, the U.S. Supreme Court granted cert to consider: (1) Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate; (2) Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess." *Petition for Writ of Certiorari, NLRB v. Noel Canning*, 2013 WL 1771081 (No. 12-1281). In granting the petition, the Supreme Court further directed that "in addition to the questions presented by the petition, the parties are directed to brief and argue the following question: Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions." Writ of certiorari granted NLRB v. Canning, 133 S. Ct. 2861, (U.S. 2013). Oral argument was heard on January 13, 2014 and a decision is expected in June of 2014.

Pacific Lutheran University v. Service Employees International Union, Local 925, N.L.R.B. Case No.: 19-RC-102521

The pending Board case of Pacific Lutheran University raised two issues. First, the appropriate standards under *Yeshiva* for determining whether faculty are managers and are therefore not employees covered by the Act. (This issue is discussed below.) Second, when self-identified religiously affiliated institutions are exempt from NLRB jurisdiction. *Pacific Lutheran University*, 2014 NLRB LEXIS 90 (Feb. 10, 2014).

The issue of whether, and when, religiously affiliated institutions should be subject to Board jurisdiction was addressed by the Supreme Court in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). As the Regional Director explained, in *Catholic Bishop*, the Supreme Court held that the Act must be construed to exclude church-operated schools, because to do otherwise "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Catholic Bishop*, 440 U.S. at 502. Such an inquiry by the Board would violate the First Amendment. *Id.* Although it invoked the doctrine of constitutional avoidance, the Court nevertheless posited that Board assertion of jurisdiction over church-operated schools would "'give rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.'" *Id. (quoting Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

There are two predominant tests for determining the application of *Catholic Bishops*, the test used by the Board and the test used by the D.C. Circuit Court of Appeals. The Board now applies a "substantial religious character" test on a case-by-case basis to assess whether, under *Catholic Bishop*, exercise of the Board's jurisdiction presents a significant risk of infringing the First Amendment, *Trustees of St. Joseph's College*, 282 NLRB 65, 68 (1986). The Board considers all relevant aspects of the school's organization and function, including "the purpose of

the employer's operations, the role of unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction." *Univ. of Great Falls*, 331 NLRB at 1664-65. Important factors include the organization's mission statement, whether and to what degree curriculum requirements emphasize the associated faith, requirements that faculty teach or endorse the faith's doctrine, significant funding by the religious organization, governance by a religious organization or religious doctrine, and requirements for (or preference given to) administrators, faculty, or students who are members of the faith associated with the institution. *Id*. at 1664-65*; Ecclesiastical Maintenance Services*, 325 NLRB 629 (1998).

On the other hand, the D.C. Circuit applies a three part bright line rule. In particular, the D.C. Circuit's *University of Great Falls* sets forth three-part test as a bright-line rule for determining whether the Board has jurisdiction "without delving into matters of religious doctrine or motive." *University of Great Falls v. NLRB*, 278 F.3d 1335, 1344-45 (D.C. Cir. 2002); *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009). Under this test, a school is exempt from the Board's jurisdiction if it:

> (1) holds itself out to students, faculty and the 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.

Univ. of Great Falls, 278 F.3d at 1344-1345.

In Pacific Lutheran, the Regional Director found that under either test the University was subject to Board jurisdiction. The University requested review which was granted by the Board. Moreover, the Board requested the submission of amicus briefs on the religious exemption issue, and posed two questions related to religiously affiliated educational institutions.

> 1. What is the test the Board should apply under Catholic Bishop to determine whether self-identified "religiously affiliated educational institutions" are exempt from the Board's jurisdiction?
>
> 2. What factors should the Board consider in determining the appropriate standard for evaluating jurisdiction under Catholic Bishop?

Thus, the Board may be considering issuing a substantial decision involving religiously affiliated colleges and universities. Amicus briefs in Pacific Lutheran are due no later than March 28, 2014.

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B. Faculty, Graduate Assistants and Players Coverage as Employees Entitled to Collective Bargaining Representation

Point Park University v. Newspaper Guild of Pittsburgh/Communication Workers of America Local 38061, AFL-CIO, CLC, N.L.R.B. Case No.: 06-RC-012276 (Private Institute Faculty Organizing)

Pacific Lutheran University v. Service Employees International Union, Local 925, N.L.R.B. Case No.: 19-RC-102521

In two different cases, *Point Park* and *Pacific Lutheran,* the Board 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. The two invitations for briefs in the two cases raised similar questions regarding the managerial exclusion. *Compare Pacific Lutheran University*, 2014 NLRB LEXIS 90 (Feb. 10, 2014) and *Point Park University*, 2012 NLRB LEXIS 292 (May 22, 2012). The amicus briefs in *Point Park* were filed in July 2012 and the briefs in *Pacific Lutheran* are due no later than March 28,204. In both cases, faculty members petitioned for an election and voted in favor of representation by a union, and 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.

In *Point Park,* AAUP submitted an amicus brief in July 2012, urging the NLRB to develop a legal definition of employee status "in a manner that accurately reflects employment relationships in universities and colleges and that respects the rights of college and university employees to exercise their rights to organize and engage in collective bargaining."[2] AAUP's brief stressed the extent to which the erosion of faculty power that union advocates at Point Park have cited reflects broad trends. "The application of a corporate model of management has resulted in significant changes in university institutional structure and distribution of authority. There has been a major expansion of the administrative hierarchy, which exercises greater unilateral authority over academic affairs," the brief states. AAUP also points out that:

"This organizational structure stands in stark contrast to the *Yeshiva* majority's description of the university as a collegial institution primarily driven by the internal decision-making authority of its faculty. Further, university administrators increasingly are making decisions in response to external market concerns, rather than consulting with, relying on, or following faculty recommendations. Thus, university decision-making is increasingly made unilaterally by high-level administrators who are driven by external market factors in setting and

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[2] *Point Park University v. Newspaper Guild of Pittsburgh/ Communication Workers of America Local 38061, AFL-CIO, CLC*, NLRB Case No.: 06-RC-012276, Amicus Curiae Brief of American Association of University Professors http://www.aaup.org/NR/rdonlyres/CFE2A35C-44AC-4F87-975D-E405CF5D5209/0/PointParkamicus.pdf (last accessed 7/23/2012)

implementing policy on such issues as program development or discontinuance, student admissions, tuition hikes, and university-industry relationships. As a result, the faculty have experienced a continually shrinking scope of influence over academic matters."

In addition to AAUP's brief, amicus briefs were filed by Matthew Finkin, Joel Cutcher-Gershenfeld, and Thomas A. Kochan (as impartial employment and labor relations scholars); Dr. Michael Hoerger, PhD, social scientist; Higher Education Council of the Employment Law Alliance; National Education Association; Newspaper Guild of Pittsburgh, CWA, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations; American Council on Education, National Association of Independent Colleges and Universities, Council of Independent Colleges, Association of Independent Colleges and Universities of Pennsylvania, College and University Professional Association for Human Resources, and Association of American Universities; The Center for the Analysis of Small Business Labor Policy, Inc.; Louis Benedict, MBA, J.D., Ph.D. (Higher Education Administrator); and National Right to Work Legal Defense and Education Foundation, Inc.[3] Similar amicus briefs will likely be filed in *Pacific Lutheran*.

New York University v. GSOC/UAW, N.L.R.B. Case No.: 02-RC-023481; Polytechnic Institute of New York University v. International Union, United Automobile Aerospace, and Agricultural Implement Workers of America (UAW), N.L.R.B. Case No.: 29-RC-012054

In June 2012, the Board invited briefs from interested parties on the question of whether graduate student assistants may be statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. The Board specifically invited parties to address whether the Board should modify or overrule its decision in *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants are not statutory employees because they "have a primarily educational, not economic, relationship with their university," and whether, if the Board finds that graduate student assistants *may* be statutory employees, should the Board continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, in part because they do not perform a service for the university? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974).

AAUP co-signed with the AFL-CIO, AFT, and NEA, on an amicus brief which was filed on July 23, 2012, and argued that the Board should overrule *Brown University* and return to its prior determination that graduate student assistants, who "'must perform work, controlled by the Employer, and in exchange for consideration,'" are statutory employees, "'notwithstanding that they are simultaneously enrolled as students.'" However, the union and NYU resolved their disputes and the union requested to withdraw the election petition. Accordingly, on December 5,

[3] *Point Park University v. Newspaper Guild of Pittsburgh/ Communication Workers of America Local 38061, AFL-CIO, CLC*, NLRB Case No.: 06-RC-012276 http://www.nlrb.gov/case/06-RC-012276 (last accessed 7/23/2012)

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2013, the Board held that the requests for review were moot and would not be ruled on by the Board. Therefore, the issue of whether graduate student assistants are employees covered by the NLRA will need to wait for another day.

Northwestern University and College Athletes Players Association (CAPA), Case No. 13-RC-121359 (March 26, 2014)

This important Regional Director decision addressed whether football players at Northwestern University were employees subject to the NLRA and therefore were entitled to choose whether to be represented by a union for collective bargaining purposes. The primary question was whether players were "employees" as defined by the law. The Board applies the common law definition under which a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment, is an employee.

The first question was whether the payers were receiving "payment" from the University. The Regional Director noted that the scholarships received by the players had a monetary value of as much $76,000 per year. He explained, "While it is true that the players do not receive a paycheck in the traditional sense, they nevertheless receive a substantial economic benefit for playing football. And those players who elect to live off campus receive part of their scholarship in the form of a monthly stipend well over $1,000 that can be used to pay their living expenses." Slip Op. at. 14.

Of course, other students receiving scholarships also receive something of monetary value. However, the Regional Director found that the players received this monetary value "in exchange for the athletic services being performed." He noted that the University recruited and granted scholarships to players because of their athletic prowess. Moreover, while Northwestern did not utilize one year renewable scholarships, the players could still lose their scholarships if they withdrew from the team or violated team rules. Finally, the provision of athletic services significantly benefited the University, generating revenue of approximately $235 million from 2003 through 2012. Thus the purpose of the football scholarship was to secure athletic services for the benefit of the University. (By contrast the Regional Director found that walk-ons, who did not receive an athletic scholarship, were not employees "for the fundamental reason that they do not receive compensation for the athletic services that they perform.")

Another important factor was that the Regional Director found that the players had an employment contract with the University: "the type of compensation that is provided to the players is set forth in a 'tender' that they are required to sign before the beginning of each period of the scholarship. This 'tender' serves as an employment contract and also gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them." The Regional Director also found that the players who received scholarships were under strict and exacting control by the University throughout the entire year.

Therefore, the Regional Director held that players receiving athletic scholarships were employees under the general common law definition of employee.

The Regional Director further determined that the test applied to find that graduate assistants were not employees was inapplicable "because the players' football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements." Slip Op. at 18 *citing Brown University, 342 NLRB 483 (2004).*

Nonetheless, the Regional Director noted that even applying the four factors used in *Brown* would not change the outcome of the case. First and perhaps most importantly he found that players were not "primarily students." Slip Op. at 18. "The players spend 50 to 60 hours per week on their football duties during a one-month training camp prior to the start of the academic year and an additional 40 to 50 hours per week on those duties during the three or four month football season. Not only is this more hours than many undisputed full-time employees work at their jobs, it is also many more hours than the players spend on their studies." *Id.*

Second, he found that unlike with graduate assistants teaching and research duties, the players athletic duties do not constitute a core element of their educational degree. A third important factor was the lack of relationship between the athletes and any academic faculty as the players were supervised by non-academic coaches, rather than by academic faculty as with graduate assistances. Finally, the Regional Director found that the player scholarships were not financial aid as they were provided in exchange for athletic services.

Accordingly, the Regional Director found that the scholarship football players were "employees" within the meaning of the Act and therefore are entitled to choose whether or not to be represented by a union for the purposes of collective-bargaining. The parties have until April 9, 2014 to file with the Board a Request for Review of the Decision.

B. Agency Fee

Knox v. SEIU Local 1000, 132 S. Ct. 2277 (2012)

In June 2012, the Supreme Court held that public-sector unions, seeking to collect either a mid-year fee increase or a special assessment, are required to issue a fresh "*Hudson* notice" to nonmembers at the time of the fee request; further, the Court held that after such notice is given, unions can only collect funds from those nonmembers who affirmatively choose to pay the requested fees. This decision reversed an earlier decision of the U.S. Court of Appeals for the Ninth Circuit and may have implications for all public-sector unions operating under "agency shop" arrangements, which permit a union to represent all employees (union members and nonmembers alike) in a unionized workplace and collect annual agency fees from the nonmembers to cover the cost of the union's services.

At issue in this case was whether the Service Employees International Union Local 1000 (SEIU Local 1000), the bargaining agent for California state employees, was required to provide

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a separate *Hudson* notice after it imposed a temporary, mid-year fee increase to be used for political purposes. More specifically, SEIU Local 1000 levied a special assessment to mount campaigns to defeat two measures on a November 2005 ballot, but did not issue a second agency fee notice for the year. Agency fee payers challenged the special assessment, arguing that it violated their First Amendment rights under the U.S. Constitution because it seized their money for non-chargeable political expenses. The district court denied the plaintiffs' motion for a preliminary injunction against the union, but ruled that the union must give the agency fee payers a chance to ask for a refund on the special dues. SEIU Local 1000 appealed the district court's decision, and the Ninth Circuit overturned the lower court's decision, holding that the union's notice complied with the procedural requirements for agency fee notices set out in the seminal case *Chicago Teachers Union v. Hudson.*

The Supreme Court ultimately overturned the Ninth Circuit's ruling, however, and held that, "when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent." Contrasting the lower court's holding, the Supreme Court found that the *Hudson* precedent is not dispositive in the current case, explaining that the *Hudson* requirements only concern a union's "regular annual fees," while the plaintiffs in the current case were objecting to "a special assessment or dues increase . . . levied to meet expenses that were not disclosed when the amount of the regular assessment was set." Because SEIU Local 1000's special assessment was requested after the union established its annual fee, the union was obligated to send a new *Hudson* notice with the special assessment to ensure that nonmembers could make "informed choice[s]" about paying the additional fees. Further, to "respect the limits of the First Amendment," the Court stated that the fresh *Hudson* notice would only allow SEIU Local 1000 to collect the special assessment if the nonmembers "opt into the special fee."

In dicta, Justice Alito indicated that the Court's former decisions (such as *Hudson*), which authorize agency shops to collect union fees from nonmembers, may in fact violate nonmembers' First Amendment rights by compelling nonmembers to fund speech with which they may disagree. Noting that the Court's earlier cases have "tolerated" this potential impingement upon First Amendment rights, however, Justice Alito declined to render a decision on the overall constitutionality of agency shops. Commentators, however, have reported that this language could signal "[C]ourt approval of a . . . union-weakening, so-called 'right to work' law."

Commentators have argued that this language "all but begs" opponents of organized labor to use the Court's emerging First Amendment jurisprudence to challenge the validity of agency shops altogether.

Harris v. Quinn, cert granted, Case No. 11-681 (U.S. Oct.1, 2013)

The question in this case is whether the Supreme Court will take up the challenge and radically alter the agency fee jurisprudence as it has existed for over 35 years.

The case has a number of unique facts that would appear to make it an unlikely candidate for a significant change in constitutional law. The case involves personal care workers reimbursed by Medicaid (via the State of Illinois), who claimed that the "fair share" provision of their collective bargaining agreement that requires them to pay a portion of union dues, which are not allocated for political purposes, violated the First Amendment. By compelling payment (whether a part of the union or not) to support collective bargaining, they argued that their speech was compelled through the union. The district court dismissed the plaintiffs' claims.

On appeal, the Seventh Circuit unanimously held, according to longstanding collective bargaining jurisprudence, that "[b]ecause the personal assistants are employees of the State of Illinois, at least in those respects relevant to collective bargaining, the union's collection and use of fair share fees is permitted by the Supreme Court's mandatory union fee jurisprudence." This agency fee jurisprudence has existed largely undisturbed since the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, the Supreme Court held that a law compelling non-union public employees to pay union fees to an exclusive representative was constitutional. The Court reasoned that compelling employees to pay such fees would facilitate "labor peace" by avoiding workplace disruptions caused by employee support for rival unions and prevent employees from free-riding.

However, this case may develop into a major test of the continuing validity of the *Abood* precedent. The home-care workers, and a number of their supporters, have sought to turn the case into a vehicle for overruling that decision outright. While they suggested that the Court could find that the *Abood* decision does not control this case, they left little doubt that their primary goal was to scuttle that ruling.

The federal government, participated in the case and argued that the *Abood* ruling was correct, adding that overruling it "would require the Court not only to discard sixty years of precedent on the specific issue of agency fees, but also to distort and destabilize the established framework for evaluating claims that a condition of public employment violates the First Amendment." In short, the government contended, the home-care providers have offered nothing to justify "so radically reshaping First Amendment law."

Illinois officials similarly defended the 1977 ruling, and accused the home-care providers and their attorneys of seeking "to remove collective bargaining from the options available to the government employer — not only in the present circumstances but in all others — by asking this Court to overrule one of its cases and implicitly suggesting that it overrule others."

Oral argument was held on January 21, 2014. The argument was lively and precipitated a range of reactions, from those who felt it portended little change in the law to those who saw the groundwork for a major sea change.

There are a number of potential outcomes, from the relatively innocuous to an extreme reworking of the rights of unions in the public sector. On the innocuous side, the Court could obviously affirm the ruling of the seventh circuit and confirm the vitality of *Abood*, leaving the law much as it currently exists. The Court could also issue a narrow ruling limited to the unique circumstances of the parties, for example by finding that these workers are really not employees

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of the state, but of the patients who hire them, so the state would have no authority to try to draw them into unions, nor would there be a state interest in labor peace as was the case in *Abood*.

On the other hand, the Court could decide to overrule or severely limit *Abood*. If *Abood* was overruled, the Court could hold that any agency fees are unconstitutional. Alternatively, the Court could hold, as Harris suggested, that *Abood* should be limited to situations where the government demonstrates that exclusive union representation is necessary and is the least restrictive means to prevent a workplace disruption, which would severely limit the instances in which agency fee could be applied. There is also a potential argument that some aspects of collective bargaining in the public sector themselves are unconstitutional impositions on the freedom of association, which could eviscerate public sector bargaining.

Another potential ruling is more technical and foreshadowed in *Knox*. Namely, the Court could hold that the current method for determining agency fees paid is unconstitutional. For example, in *Knox* Justice Alito was extremely critical of the system in which the union charges non-members a fee equal to dues unless the non-member objects (opting out.) Some have sought to continue this line of argument and claim that the individual should only be compelled to pay the agency fee percentage unless they affirmatively join the union (opting in).

Thus this case has the potential to radically rework well established constitutional law, as happened in *Citizens United*, but it could end up simply reaffirming the Court's long held views, as happened in *Fisher*.