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Legal Update¹

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Introduction

This year has seen several significant changes affecting the rights of faculty members in both private and public sector institutions. Most importantly, in *Pacific Lutheran University* (*infra* at pg. 4 and 6) the NLRB 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.

In addition, the NLRB published a decision allowing the use of employers' email systems for union organizing (*Purple Communications*, *infra* at pg. 10). Finally, while the case addressing whether graduate student assistants are employees under the NLRA was resolved by the parties and therefore withdrawn (*NYU*, *infra* at pg. 6), this issue is under consideration in the Northwestern University football players' case. (*Northwestern University*, *infra* at pg. 8).

Meanwhile, the Supreme Court invalidated a number of NLRB decisions, finding that the recess appointments in question were not valid, while preserving the ability of the President to make recess appointments in certain circumstances. (*Noel Canning*, *infra* at pg. 2). While hundreds of NLRB decisions were invalidated, in many of the cases, the Board has issued decisions largely concordant with the prior Board rulings in the cases. (*Infra* at pg. 4).

¹This 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.

This year was also an active one for cases involving the First Amendment Rights of public sector faculty members. Most importantly, the Supreme Court ruled that a public employee's speech that may concern their job, but is not ordinarily within the scope of their duties, is subject to First Amendment protection. (*Lane, infra* at pg. 12). The U.S. Supreme Court also declined requests to radically alter agency fee law, but refused to allow the charging of agency fees to certain "partial-public" employees. (*Harris, infra* at pg. 11). Finally, the Court found constitutional amendments to the Michigan Constitution banning affirmative action. (*Schuetz, infra* at pg. 21.)

Similarly, issues of importance to faculty have been decided by the appellate courts. The federal appeals court for the Seventh Circuit dramatically expanded the scope of academic freedom and expression for adjuncts and part-time faculty as well as full-time senior professors. (*Mead, infra* at pg. 15). The Ninth Circuit explicitly recognized that speech related to scholarship or teaching was not subject to the *Garcetti* job duties test, and is entitled to First Amendment protection (*Demers, infra* at pg. 14). And the Second and Eleventh Circuits issued important copyright decisions. (*Authors Guild Inc., infra* at 24, *Cambridge University Press, infra* at 22). In the state courts, the Virginia Supreme Court ruled that academic research is protected from disclosure under the Virginia Freedom of Information Act (*ATI, infra* at pg. 18); and the Kentucky Supreme Court ruled that religious higher education institutions are not immune from suits to enforce university handbooks (*Kant, infra* at pg. 19).

I. Collective Bargaining Cases and Issues

A. NLRB Authority

1. Recess Appointments

Noel Canning v. NLRB, 189 L. Ed. 2d 538 (U.S. June 26, 2014)

On June 26, 2014, the U.S. Supreme Court unanimously invalidated three appointments to the NLRB because they did not meet the requirements of the Recess Appointments Clause.

The case arose when, in January 2012, President Obama filled three vacancies on the National Labor Relations Board (NLRB) through recess appointments, after a Senate minority had used the filibuster rule to block a Senate vote on the nominees. Under the Constitution's Recess Appointments Clause, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session." U.S. Const. art II, § 2, cl. 3. The three NLRB appointments preserved a quorum in the agency, allowing it to conduct business. During this period, from December 17, 2011 to and January 23, 2012, the Senate held *pro forma* sessions during which no business was conducted but the Senate was not adjourned for more than three days. The President asserted that the Senate was in recess despite these *pro forma* sessions, giving him authority to exercise his recess-appointment power during this period.

Following these recess appointments, the NLRB issued a ruling that Noel Canning, a Pepsi bottling firm in Washington State, illegally refused to enter a collective bargaining agreement with

the Teamsters. The company filed a Petition for Review in the United States Court of Appeals for the D.C. Circuit, challenging the validity of the “recess” appointments, and thus the Board’s quorum. A three-judge panel found that the recess appointments to the NLRB were unconstitutional, and therefore it “could not lawfully act, as it did not have a quorum.” While Noel Canning’s petition challenged the validity of using recess appointments during *pro forma* sessions of the Senate, the D.C. Circuit issued a more sweeping decision, ruling that the President can only exercise his recess appointment power during *intersession* recesses that occur between formal sessions of Congress, and not during *intrasession* recesses that occur within a session of Congress, despite long historical practice to the contrary. The Court further held that the President may only use recess appointments for vacancies that arose during the recess, and not for positions that became vacant while Congress was in session and remained vacant when a recess occurred. The National Labor Relations Board petitioned the U.S. Supreme Court for certiorari, and the Supreme Court agreed to take the case in June 2013.

The U.S Supreme Court unanimously invalidated three appointments to the NLRB because they did not meet the requirements of the Recess Appointments Clause. However, the Court divided by a vote of 5-4 on what types of recess appointments are permissible. The majority held in its controlling opinion that recess appointments can be made during any recess of at least ten days, regardless of whether the recess is an intersession recess or an intrasession recess and regardless of when the vacancies being filled arose.

Justice Breyer explained: “The Recess Appointments Clause responds to a structural difference between the Executive and Legislative Branches: The Executive Branch is perpetually in operation, while the Legislature only acts in intervals separated by recesses. The purpose of the Clause is to allow the Executive to continue operating while the Senate is unavailable. We believe that the Clause’s text, standing alone, is ambiguous. It does not resolve whether the President may make appointments during intra-session recesses, or whether he may fill pre-recess vacancies. But the broader reading better serves the Clause’s structural function. Moreover, that broader reading is reinforced by centuries of history, which we are hesitant to disturb. We thus hold that the Constitution empowers the President to fill any existing vacancy during any recess—*intra-session* or *inter-session*—of sufficient length.”

However, the Court invalidated the NLRB appointments at issue in the case because the Senate had held “*pro forma*” sessions that broke a lengthy recess into smaller ones that were too short for the recess appointment power to apply.

The concurring justices would have only permitted recess appointments during intersession recesses and only when the vacancies arose during the same recess in which they would be filled. Justice Scalia stated: “To prevent the President’s recess-appointment power from nullifying the Senate’s role in the appointment process, the Constitution cabins that power in two significant ways. First, it may be exercised only in ‘the Recess of the Senate,’ that is, the intermission between two formal legislative sessions. Second, it may be used to fill only those vacancies that ‘happen during the Recess,’ that is, offices that become vacant during that intermission. Both conditions

are clear from the Constitution's text and structure, and both were well understood at the founding."

There were roughly 430 cases decided by the Board with the invalid appointments. Decisions of the Board during this period are technically invalid. However, many of these cases have been settled or finalized and are therefore not affected by the Court's decision. NLRB spokesman Tony Wagner said the board has identified roughly 100 decisions that are still pending and must be reviewed in the wake of the high court's ruling.

Generally, after the *Noel Canning* decision was issued, the Board issued an order in many of the pending cases setting aside the vacated Decision and Order, and retaining the case on its docket for further action as appropriate. The Board has subsequently been addressing these cases on an individual basis. In many of the cases, the Board has issued decisions largely concordant with the prior Board rulings in the cases, adopting the reasoning of the vacated decisions, with short summaries of the rationale in the original board decision.

For example in *Grand Canyon Education, Inc. d/b/a Grand Canyon University*, 28-CA-022938, et al.; 362 NLRB No. 13 (February 2, 2015), the Board explained:

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 164, which is incorporated herein by reference.

In addressing a specific finding, the Board highlighted the issue and adopted the reasoning of the prior decision. "We agree with the analysis in the vacated Decision and Order regarding Human Resources Business Partner Rhonda Pigati's questioning of employee Gloria Johnson, and we find that it violated Section 8(a)(1) of the Act for the reasons stated therein."

2. Religiously Affiliated Institutions

Pacific Lutheran University, 361 NLRB No. 157 (December 16, 2014)

On Saturday, December 20, 2014, the National Labor Relations Board published a significant decision involving the organizing rights of private-sector faculty members. In *Pacific Lutheran University*, 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*.

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

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

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

The Board also found that that faculty must be "held out as performing a *specific religious function*," such as integrating the institution's religious teachings into coursework or engaging in religious indoctrination (emphasis in original). This would not be satisfied by general statements that faculty are to support religious goals, or that they must adhere to an institution's commitment to diversity or academic freedom.

Applying this standard, the Board found that while Pacific Lutheran University held itself out as providing a religious educational environment, the petitioned-for faculty members were not performing a specific religious function. Therefore, the Board asserted jurisdiction and turned to the question of whether certain of the faculty members were managerial employees.

Following the issuance of the *Pacific Lutheran University* decision, the Board remanded a number of cases involving whether to exercise jurisdiction over faculty members at self-identified religious colleges and universities. In these cases, the Board generally explained:

the Board issued its decision in *Pacific Lutheran University*, 361 NLRB No. 157 (2014), which specifically addressed the standard the Board will apply for determining, in accordance with *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), when we should decline to exercise jurisdiction over faculty members

at self-identified religious colleges and universities. Accordingly, the Board remands this proceeding to the Regional Director for further appropriate action consistent with *Pacific Lutheran University*, including reopening the record, if necessary. . . . [Note 2]. Members Miscimarra and Johnson stated that they adhere to their dissenting view in *Pacific Lutheran University*, but nevertheless agree that a remand is appropriate in this case.

Saint Xavier University, Case No. 13-RC-22025 (February 3, 2015). See also *Islamic Saudi Academy*, Case No. 05-RC-080474 (February 26, 2015); *Seattle University*, Case No. 19-RC-122863 (February 3, 2015); *Manhattan College*, Case No. 02-RC-023543 (February 3, 2015); *Duquesne University of the Holy Spirit*, Case No. 06-RC-080933 (February 12, 2015).

The Regional Directors are issuing decisions based on these remands. For example, as the National Center reported, on March 3, 2015, Regional Director Ronald K. Hooks issued a supplemental decision and order in *Seattle University*, Case No. 19-RC-122863. In the decision, Regional Director Hooks reexamined the evidence in the existing record based on the revised standards and analysis in *Pacific Lutheran University*. The Regional Director concluded that while the university demonstrated that it holds itself out as a Jesuit Catholic educational institution, it failed to meet its burden of proving that it holds the petitioned-for contingent faculty members out as performing a religious function. In support of his conclusion, the Regional Director referenced the content of the faculty handbook, job postings, and faculty evaluation criteria. In addition, the Regional Director cited to the lack of evidence in the record showing that faculty members are required to serve as religious advisors, engage in religious training or conform with the institution's religious tenets.

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

1. Faculty as Managers

***Pacific Lutheran University*, 361 NLRB No. 157 (December 16, 2014)**

In *Pacific Lutheran University*, the Board also modified the standards used to determine whether certain faculty members are managers, who are excluded from protection of the Act. This 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 University*, 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.

Following the issuance of the *Pacific Lutheran University* decision, the Board remanded a number of cases involving whether faculty members are managers under *Yeshiva*. In these cases, the Board generally explained:

On December 16, 2014, the Board issued its decision in *Pacific Lutheran University*, 361 NLRB No. 157 (2014), which specifically addressed the standard the Board will apply for determining, in accordance with *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), when faculty members are managerial employees, whose rights to engage in collective bargaining are not protected by the Act.

Accordingly, the Board remands this proceeding to the Regional Director for further appropriate action consistent with *Pacific Lutheran University*, including reopening the record, if necessary. . . . [Note 2] Members Miscimarra and Johnson adhere to their separate opinions in *Pacific Lutheran University*. Nevertheless, they agree with their colleagues that a remand is appropriate.

Point Park University, Case No. 06-RC-01226 (February 25, 2015).² See also *Seattle University*, Case No. 19-RC-122863 (February 3, 2015).

The Regional Directors are issuing decisions based on these remands. For example, as the National Center reported, on March 3, 2015, Regional Director Ronald K. Hooks issued a supplemental decision and order in *Seattle University*. In the decision, Regional Director Hooks reexamined the evidence in the existing record based on the revised standards and analysis in *Pacific Lutheran University*. The Regional Director rejected the university's claim that the contingent faculty were managerial, finding that they lack authority, or effective control concerning the primary and secondary areas of decision making identified in *Pacific Lutheran University*.

2. Graduate Assistants Right to Organize

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

AAUP filed an amicus brief with the National Labor Relations Board arguing that graduate assistants at private sector institutions should be considered employees with collective bargaining rights. The Board invited amicus briefs in the Northwestern University football players case to address several important issues, including whether the Board should modify or overrule its 2004 decision in *Brown University*, which found that graduate assistants were not employees and therefore were not eligible for unionization. 342 NLRB 483 (2004). In the *amicus* brief the AAUP argued that the Board should overrule the test of employee status applied in *Brown* to graduate assistants, but did not take a position as to whether or not the unionization of college football players was appropriate.

² The Board in *Point Park* 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. *Point Park University*, 2012 NLRB LEXIS 292 (May 22, 2012)(Invitation to file amicus briefs). 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.” This issue was instead addressed in *Pacific Lutheran University* and therefore the Board remanded Point Park for further proceedings in light of the *Pacific Lutheran* decision. *Point Park University*, Case No. 06-RC-01226 (February 25, 2015).

This case arose when football players at Northwestern University sought to unionize. The University argued that the football players were not “employees” under the National Labor Relations Act (NLRA) and therefore were not allowed to choose whether to be represented by a union. The Regional Director for the Board had to determine whether players were “employees” as defined by the NLRA. The Board normally 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 Regional Director found that under this common law test, the football players were employees under the NLRA.

However, the University also argued that the football players were not employees under the Board’s decision in *Brown*, in which the Board found that graduate assistants were not employees and therefore had no right to unionize. The Regional Director responded that *Brown* 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.” Regional Director Decision at 18 citing *Brown University*, 342 NLRB 483 (2004). The Regional Director further found that even applying the test articulated in *Brown*, the football players would be considered employees. Accordingly, the Regional Director held that the scholarship football players are “employees” and therefore are entitled to choose whether or not to be represented by a union for the purposes of collective-bargaining.

The University appealed to the National Labor Relations Board, and on April 24, 2014, the Board granted the University’s request for review. On May 12, 2014 the Board issued a Notice and Invitation to File Briefs inviting *amici* parties to address one or more of six questions. One of the questions involved whether the *Brown* test, which impacts the bargaining rights of graduate assistants and other student-employees, should be modified or overruled: “Insofar as the Board’s decision in *Brown University*, 342 NLRB 483 (2004), maybe applicable to this case, should the Board adhere to, modify, or overrule the test of employee status applied in that case, and if so, on what basis?” Thus, while the Northwestern case involved football players, a Board decision to modify or overrule *Brown* would significantly impact the rights of graduate assistants and other similar student-employees.

AAUP had previously filed *amicus* briefs before the Board arguing that graduate assistants should be granted collective bargaining rights. Since the issue was raised by the Board in the Northwestern University case, AAUP filed an *amicus* brief arguing that the general rule established in *Brown*, that the deprived graduate assistants of collective bargaining rights, should be overruled. The brief explained

The policy reasons cited by the *Brown University* majority do not justify implying a special “graduate student assistant” exception to the statutory definition of “employee.” Therefore, the Board should overrule *Brown University* and return to its understanding that, where “the fulfillment of the duties of a graduate assistant requires performance of work, controlled by the Employer, and in exchange for consideration,” “the graduate assistants

are statutory employees, notwithstanding that they simultaneously are enrolled as students.” *New York University*, 332 NLRB 1205, 1207, 1209 (2000).

The *amicus* brief took particular issue with the argument that academic freedom justified depriving graduate assistants of the right to unionize. As the brief argued,

At its core, the *Brown University* test of employee status is based on an erroneous understanding of the relationship between academic freedom and collective bargaining. . . . Indeed, interim developments provide further support for the notion that collective bargaining is compatible with academic freedom. These include the NYU administration’s decision to voluntarily recognize its graduate assistant union and a new research study that is the first to provide a cross-campus comparison of how faculty-student relationships and academic freedom fare at unionized *and* non-unionized campuses.

Therefore, the brief concluded that “the Board should overrule the test of employee status applied in *Brown University* and return to its well-reasoned *NYU* decision, which found collective bargaining by graduate assistants compatible with academic freedom.”

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

These cases addressed the question of whether are employees who have collective bargaining rights, but were rendered moot and withdrawn as the parties settled based on an agreement to allow a vote by the graduate assistants on whether to organize with the UAW.

C. Employee Rights to Use Email

***Purple Communications*, 361 NLRB No. 126 (N.L.R.B. Dec. 11, 2014)**

The National Labor Relations Board recently issued a decision significantly expanding the right of employees to use their employers' e-mail systems for union organizing and other activities protected by Section 7 of the National Labor Relations Act.

In *Purple Communications* the board explained that “the use of email as a common form of workplace communication has expanded dramatically in recent years.” Therefore the board ruled that “employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.” While the case addressed communications supporting the union during an organizing drive, given the board's expansion of protected activity, this also includes

communications critical of the employer's employment-related policies, practices and management decisions.

Therefore, employees who are given access to their employer's e-mail system for business purposes now will be able to use that system on non-working time to engage in a wide range of protected communications, including union support and comments critical of the employer's employment-related policies and management decisions. While the board did not directly address other types of electronic equipment and communications, such as instant messaging or texting from employer-owned smartphones and other devices, the board noted that a similar analysis would potentially apply.

However, there are limitations to the decision. First, since the decision was issued by the NLRB, under the statute protecting private-sector employees, it only applies to private-sector employees. Second, the board only addressed employee use of work e-mail, and did not extend the protection to cover use by non-employees. Third, the protected use was limited to non-work time, and absent discrimination against the union it does not give the employees right to use the work e-mail during work time. Fourth, the employer may in certain limited circumstances prohibit or limit the use of work e-mail on non-work time. Finally, this ruling will likely be appealed and could be overturned by the courts.

Nonetheless, this is a major step forward for the rights of faculty members in private institutions. E-mail is one of the primary ways in which faculty speak to each other in the modern world. The ability to use email to communicate is essential to faculty, particularly contingent faculty, who are often dispersed and may not be able to speak directly to each other regularly. This decision recognizes this reality and provides private-sector faculty members' use of work email to communicate with each other about union matters will be protected.

D. Agency Fee

***Harris v. Quinn*, 189 L. Ed. 2d 620 (U.S. 2014)**

On June 30, 2014, the Supreme Court issued its much awaited decision in the *Harris* case in which the plaintiffs requested that the Court rule unconstitutional the charging of agency fees in the public sector. The Court rejected these attempts to alter the agency fee jurisprudence as it has existed in the public sector for over 35 years since the Court issued its seminal decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Here, in a 5 to 4 opinion issued by Justice Alito, the Court questioned the foundation of *Abood*, but specifically stated that it was unnecessary for the Court to reach the argument that *Abood* should be overruled. Instead, the Court ruled that agency fees could not be imposed on certain "partial-public" employees, a category that likely has little applicability to faculty members at public institutions.

In its decision the Court focused on the unique employment status of the individuals in question, who were personal assistants providing homecare services to Medicaid recipients. While the state compensated the individuals, the majority noted that the employer was normally considered the person receiving the care and that the government had little role in the individuals'

employment. It also noted that the state classified the individuals as state employees “solely for the purpose” of being covered by the state labor law but did not consider them state employees “for any other purpose.” Accordingly, the Court held that these individuals were not “full-fledged public employees” but were instead “partial-public or quasi-public employees.” The majority then held that the authorization to charge agency fees under *Abood* did not extend to such employees and the imposition of agency fees could not be justified under other First Amendment principles. However, as the dissent explained, “[s]ave for an unfortunate hiving off of ostensibly ‘partial-public’ employees, *Abood* remains the law.” Because the ruling applied only to “partial-public employees,” it is unlikely to have a significant impact on agency fee jurisprudence applicable to faculty members at public institutions.

However, there are some disturbing undercurrents in the decision. First, the five justice majority clearly questions the rationale supporting *Abood*, and it did not reaffirm *Abood* and Justice Alito has all but invited further challenges to *Abood* in general. Second, the Court created a new category of “partial-public employees.” This category, while not well defined, would seem to have limited application to current faculty members, whether on full-time, part-time or on contingent appointments. However, there could be attempts to create such “partial-public” employees as a result of this decision. Third, the Court raised the issue of the scope of bargaining as supporting agency fee under *Abood*. This could lead to some confusion regarding *Abood* in situations where bargaining rights are limited. Fourth, the case illustrates the danger in creating special classes of “employees,” whether the classes are created in the interests of unions or by employers seeking to avoid the application of certain laws.

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

Lane v. Franks, 189 L. Ed. 2d 312 (U.S. 2014)

In this Supreme Court case the Court held unanimously that a public employee’s speech that may concern their job, but is not ordinarily within the scope of their duties, is subject to First Amendment protection. The Court reversed the Eleventh Circuit’s holding that Lane did not speak as a citizen when he was subpoena’d to testify in a criminal case, finding that Eleventh Circuit relied on too broad a reading of *Garcetti*. *Garcetti* does not transform citizen speech into employee speech simply because the speech involves subject matter acquired in the course of employment. The crucial component of *Garcetti* then, is, whether the speech “is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”

Edward Lane was the director of Community Intensive Training for Youth (CITY), a program operated by Central Alabama Community College (CACC). Lane in the course of his duties as director conducted an audit of the program’s expenses and discovered that Suzanne Schmitz, an Alabama State Representative who was on CITY’s payroll, had not been reporting for work. As a result Lane terminated Schmitz’ employment. Federal authorities soon indicted Schmitz on charges of mail fraud and theft. Lane was subpoenaed and testified regarding the events

that led to the termination of Schmitz at CITY. Schmitz was later convicted. Steve Franks, then CACC's president, terminated Lane along with 28 other employees under the auspices of financial difficulties. Soon afterward, however, "Franks rescinded all but 2 of the 29 terminations—those of Lane and one other employee". Lane sued alleging that Franks had violated the First Amendment by firing him in retaliation for testifying against Schmitz.

The District Court granted Franks' motion for summary judgment, on the grounds that the individual-capacity claims were barred by qualified immunity and the official-capacity claims were barred by the Eleventh Amendment. The Eleventh Circuit subsequently affirmed, holding that Lane spoke as an employee, not a citizen, because he acted in accordance to his official duties when he investigated and terminated Schmitz' employment.

The Supreme Court granted certiorari to resolve the disagreement among the Courts of Appeals as to "whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities".

The Court held that Lane's speech was entitled to First Amendment protection. The Court explained that under *Garcetti*, the initial inquiry was into whether the case involved speech as a citizen, which may trigger First Amendment protection, or speech as an employee, which would not trigger such protection. In *Lane* the Court provided a more detailed explanation of employee versus citizen speech, and expanded the range of speech that is protected. The Court explained that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee--rather than citizen--speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." And the Court found that "Lane's sworn testimony is speech as a citizen."

The Court further determined that Lane's speech was protected under the First Amendment. First, Lane's speech about the corruption of a public program is "obviously" a matter of public concern and further that testimony within a judicial proceeding is a "quintessential example" of citizen speech. Second, the employer could not demonstrate any interest in limiting this speech to promote the efficiency of the public services it performs through its employees or "that Lane unnecessarily disclosed sensitive, confidential, or privileged information".

The Court held that Franks could not be sued in his individual capacity on the basis of qualified immunity. Under that doctrine, courts should not award damages against a government official in their personal capacity unless "the official violated a statutory or constitutional right," and "the right was 'clearly established' at the time of the challenged conduct." Because of the ambiguity of Eleventh Circuit precedent at the time of the conduct, the right was not "clearly established" and thus the test unsatisfied to defeat qualified immunity. Lane's speech is entitled to First Amendment protection, but Franks is entitled to qualified immunity. As a result of this case the right is clearly established and is now the standard.

***Demers v. Austin*, 746 F.3d 402 (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.)(First Amendment protection for faculty speech critical of the employer)**

In this important decision, the U.S. Court of Appeals for the Ninth Circuit reinforced the First Amendment protections for academic speech by faculty members. Adopting an approach advanced in AAUP's amicus brief, the court emphasized the seminal importance of academic speech. Accordingly, the court concluded that the *Garcetti* analysis did not apply to "speech related to scholarship or teaching," and therefore the First Amendment could protect this speech even when undertaken "pursuant to the official duties" of a teacher and professor.

Professor Demers became a faculty member at Washington State University (WSU) 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 on the ground 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, the district court found 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 balancing test established in *Pickering v. Board of Education*, 391 US 563 (1968). In two opinions, the Ninth Circuit agreed and issued a ruling that vigorously affirmed that the First Amendment protects the academic speech of faculty members.

In an initial opinion issued on September 4, 2013, the Ninth Circuit held that *Garcetti* did not apply to "teaching and writing on academic matters by teachers employed by the state," even when undertaken "pursuant to the official duties" of a teacher or professor. *Demers v. Austin*, 729 F.3d 1011 (September 4, 2013). Instead, as argued in the *amicus* brief, the court held that academic employee speech on such matters was protected under the *Pickering* balancing test. The court

found that the pamphlet prepared by Demers was protected as it addressed a matter of public concern but remanded the case for further proceedings. The University filed a petition for panel rehearing and a petition for rehearing *en banc*.

On January 29, 2014, the U.S. Court of Appeals for the Ninth Circuit issued an opinion denying the petition for panel rehearing and the petition for rehearing *en banc* and withdrawing and modifying its previous opinion. 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 Ninth Circuit expanded that ruling to hold that *Garcetti* does not apply to "speech related to scholarship or teaching" and reaffirmed that "*Garcetti* does not – indeed, consistent with the First Amendment, cannot – apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor.”

The Ninth Circuit held specifically that the 7-Step plan was “related to scholarship or teaching” within the meaning of *Garcetti* because “it was a proposal to implement a change at the Murrow School that, if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it.” The court thus considered whether the Demers pamphlet was protected under the *Pickering* balancing test. Academic employee speech is protected under the First Amendment by the *Pickering* analysis if it is a (1) matter of public concern, and (2) outweighs the interest of the state in promoting efficiency of service. The court held that the pamphlet addressed a matter of “public concern” within the meaning of *Pickering* because it was broadly distributed and “contained serious suggestions about the future course of an important department of WSU.” The case was remanded to the district court, however, to determine (1) whether WSU had a “sufficient interest in controlling” the circulation of the plan, (2) whether the circulation was a “substantial motivating factor in any adverse employment action, and (3) whether the University would have taken the action in the absence of protected speech.

***Meade v. Moraine Valley Cmty. College*, 770 F.3d 680 (7th Cir. Ill. 2014)**

The U.S. Court of Appeals for the Seventh Circuit (based in Chicago) dramatically expanded the scope of academic freedom and expression for adjuncts and part-time faculty as well as full-time senior professors. This quite unexpected (and unanimous) ruling greatly enhanced recently established constitutional protection for outspoken critics of public college and university administrators. It reinforced and enhanced recent and congenial decisions in two other federal circuits in cases from Washington (*Demers*) and North Carolina (*Adams*). The court specifically relied on a sympathetic view of the Supreme Court’s judgment in the *Garcetti* case, expressly invoking the justices’ “reservation” of free speech and press protections for academic speakers and writers. The three-judge panel unanimously declared that an Illinois community college could not summarily dismiss an adjunct teacher for criticizing the

administration, at least as long as the issues she had raised publicly and visibly constituted “matters of public concern.”

The federal appeals court also noted that even a contingent or part-time teacher had a reasonable expectation of continuing employment at the institution. The appellate court for the Seventh Circuit ruled in a sympathetic opinion that Robin Meade, the outspoken critic and active union officer, was “not alone in expressing concern about the treatment of adjuncts.” The panel added that “colleges and universities across the country are targets of increasing coverage and criticism regarding their use of adjunct faculty.” In this regard, the court broke important new ground not only with regard to academic freedom and professorial free expression, but even more strikingly in its novel embrace of the needs and interests of adjuncts and part-timers.

***Benison v. Ross*, 765 F.3d 649 (6th Cir. Mich. 2014)**

The U.S. Court of Appeals for the Sixth Circuit ruled that retaliation against a faculty member as a result of her husband’s activity could be protected under the First Amendment. Kathleen Benison was a tenured professor of geology at Central Michigan University (“CMU”). In 2011, Kathleen's husband Christopher Benison, an under-graduate student at CMU, sponsored a vote of no confidence in the president and provost of the university. Subsequently, the Geology Department refused a salary supplement to Kathleen, a tenured professor of geology at the University who had previously been approved to take a 2012 spring semester sabbatical. Kathleen then resigned from her position and refused to repay the compensation and benefits that she had received during the sabbatical, which included her husband's tuition. The University filed suit against her, claiming that Kathleen had breached her commitment to return to the University after her sabbatical. The Benisons filed suit alleging that the president of CMU, and the provost and dean, retaliated against them because of Christopher's sponsorship of the no-confidence resolution. The Sixth Circuit found sufficient evidence to create a genuine dispute of material fact regarding whether CMU filed a lawsuit against Kathleen Benison and placed a hold on Christopher Benison's transcript in retaliation for Christopher's exercise of his First Amendment rights.

***Frieder v. Morehead State Univ.*, 770 F.3d 428 (6th Cir. Ky. 2014)**

The U.S. Court of Appeals for the Sixth Circuit affirmed a ruling in favor of defendant, Morehead State University. Frieder was a tenure-track professor at the University who was evaluated for tenure based on three factors: teaching, professional achievement, and service to the university. His evaluations for professional achievement and service to the university were excellent but reviews of his teaching abilities were “abysmal.” After being denied tenure, Frieder sued claiming that the University retaliated against his exercise of free speech. Frieder argued that his evaluators retaliated against his “idiosyncratic teaching methods,” which allegedly involved “context appropriate uses of the middle finger.” The court concluded that Frieder's First Amendment claim failed because he did not show any connection between the tenure decision and

his exercise of free speech. The court explained, “Even if we assume for the sake of argument and against our better judgment that the Constitution protects Frieder's one-finger salute in this instance, a free speech retaliation claim still requires retaliation--a showing that his gesture motivated the university's tenure decision.”

A. 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 related union related.

***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.

***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 [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.

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, 756 S.E.2d 435 (Va. 2014)

In this case the Virginia Supreme Court unanimously ruled that a professor's climate research records were exempt from disclosure under the Virginia Freedom of Information Act as academic research records. The Court explained that the exclusion of University research records from disclosure was intended to prevent "harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression." While the decision was limited to a Virginia statute, it provided a strong rationale for the defense of academic records from disclosure.

The case began in 2011, when the American Tradition Institute served a FOI request on the University of Virginia regarding Professor Michael Mann's climate research. This request mirrored the subpoena previously served on the University by Attorney General Cuccinelli. 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 release. AAUP submitted a letter to the trial court, 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 with the Circuit Court. On April 2, 2013 the Circuit Court held 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.

The Virginia Supreme Court granted a petition for review and the AAUP, in partnership with the Union of Concerned Scientists, 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. The brief 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."

In April 2014, the Virginia Supreme Court issued a unanimous decision upholding the trial court's decision that none of the requested records were subject to disclosure. The primary issue was whether the research records were "proprietary" under the statute. The Court found that the legislature wanted to ensure that public universities were not at a competitive disadvantage in relation to private universities. The Court noted that this applied not only to financial injury, but also to "undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression." The Court also cited the numerous affidavits attesting to the harmful nature of the disclosures, quoting extensively from one that discussed the threats to possible collaborations with faculty at public institutions. Therefore, the Court found that the term proprietary was intended to have a broad definition that resulted in the exclusion from disclosure of the requested research material.

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

A. **Tenure – Breach of Contract**

Kant v. Lexington Theological Seminary, 426 S.W.3d 587 (Ky. 2014); and *Kirby v. Lexington Theol. Seminary*, 426 S.W.3d 597 (Ky. 2014)

The Kentucky Supreme Court recently issued two decisions strongly affirming the rights of tenured faculty members at religious institutions and echoing arguments made by AAUP in an *amicus* brief filed with the court. In two companion cases the Kentucky Supreme Court ruled that religious institutions are generally bound by tenure contracts, including faculty handbooks, and that faculty members may sue if these contracts are breached, even in some instances in which the faculty member is a minister.

One of the two cases involved Laurence Kant, a tenured Professor of Religious Studies at Lexington Theological Seminary, which employed him to teach courses on several religious and historical subjects. In 2009, the Seminary terminated Kant's employment in violation of the terms of the Faculty Handbook. Kant challenged his termination by filing suit for breach of contract and breach of implied covenants of good faith and fair dealing. Similarly, the Seminary terminated Professor Jimmy Kirby, who filed suit for breach of contract, breach of good faith and fair dealing, and for race discrimination in violation of Kentucky law. Two trial courts summarily dismissed Kant's and Kirby's claims, holding that the contract claims were barred by the "ministerial exception"—a judicially created "principle whereby the secular courts have no competence to review the employment-related claims of ministers against their employing faith communities[.]" *Kirby* at * 11. The lower courts also held that they had no jurisdiction to interpret the contract under the "ecclesiastical abstention doctrine," under which "the secular courts have no jurisdiction over ecclesiastical controversies and . . . will not interfere with religious judicature or with any decision of a church tribunal relating to its internal affairs, as in matters of discipline or excision, or of purely ecclesiastical cognizance." *Kirby* at * 53. The Kentucky Court of Appeals affirmed the decisions below and both professors filed separate appeals with the Kentucky Supreme Court.

AAUP filed an *amicus* brief in support of Kant's appeal to the Kentucky Supreme Court, arguing that the Seminary could not use the ministerial exception to avoid its voluntarily negotiated tenure contract obligations. Specifically, AAUP argued that the issue at the heart of the case—whether the contract permitted the Seminary to eliminate tenure and terminate Kant due to financial exigency—could be decided based on “neutral principles of law” that would not require the Court to interfere with the Seminary's constitutional right to select its own ministers or otherwise to intrude on matters of church doctrine. While the Court did not formally join the Kant and Kirby cases, it heard arguments on the same day and relied upon the arguments in AAUP's *amicus* brief in reaching its decision in both Kirby and Kant.

On April 17, 2014, the Kentucky Supreme Court issued unanimous decisions in both cases. Although the Court adopted the ministerial exception doctrine as outlined by the U.S. Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), it flatly rejected the reasoning of the Kentucky courts below and permitted both professors to proceed with their cases. The Court viewed the ministerial exception as narrow, contrary to the expansive interpretation offered by Seminary. In particular, the Court stated “We reject a categorical application of the ministerial exception that would treat all seminary professors as ministers under the law.” *Kant* at *2-3. Instead, the Court emphasized that the “primary focus under the law is on the nature of the particular employee's work for the religious institution.” *Kant* at *22. Accordingly, the court found that Kant was not a minister, because he taught history of religion, a primarily secular field. The court concluded that “When an employee operates in a non-ministerial capacity . . . the employee should be entitled to full legal redress. As a result, the ministerial exception does not bar Kant's contractual claims.” *Kant* at *23.

The court explicitly stated that neither the ministerial exception nor the related ecclesiastical abstention doctrine would preclude claims where employees, and even ministers (like Kirby), sought to enforce contractual rights not involving an interpretation of church doctrine. In language echoing AAUP's *amicus* brief, the court explained:

"[W]hen the case merely involves a church, or even a minister, but does not require the interpretation of actual church doctrine, courts need not invoke the ecclesiastical abstention doctrine." Indeed, if "neutral principles of law" or "objective, well-established concepts . . . familiar to lawyers and judges" may be applied, the case—on its face—presents no constitutional infirmity. Of course, neutral principles of law can be applied to the breach of contract claim presented in the instant case; but, more importantly, Kant's claim involves no consideration of or entanglement in church doctrine. We reiterate that the intent of ecclesiastical abstention is not to render "civil and property rights . . . unenforceable in the civil court simply because the parties involved might be the church and members, officers, or the ministry of the church."

Kant at *24-25.

V. Discrimination and Affirmative Action
A. Affirmative Action in Admissions

***Schuette v. Coalition to Defend Affirmative Action*, 188 L. Ed. 2d 613 (2014)**

In this case the U.S. Supreme Court overturned a lower court ruling that had found unconstitutional provisions of an amendment to the Michigan Constitution banning affirmative action affecting Michigan's public higher education institutions. The issue was whether the Michigan amendment distorts the political process against racial and ethnic minority voters in Michigan, thereby violating the Fourteenth Amendment to the United States Constitution. The Court noted that the question was ". . . not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions." The Court held that because there was no specific injury, voters had the right to determine whether race-based preferences should be permitted by state entities and therefore the amendment banning affirmative action was constitutional. The Court made clear, however, that this ruling does not change the principle outlined in *Fisher v. University of Texas* that, "the consideration of race in admissions is permissible, provided that certain conditions are met."

The AAUP joined a coalition brief, authored by American Council on Education and joined by 47 other higher education related organizations, which was submitted on August 30, 2013. The brief argued that while Schuette and his supporting amici raise policy questions about the educational benefits of racially diverse student enrollments and offer commentary on the methods they believe colleges and universities should employ to attain diversity, the constitutionality of the pursuit of racial diversity in higher education is not at issue in this case.

The brief explained that the constraints Schuette and his amici supporters propose on the lawful tools by which colleges and universities may attain diversity are at odds with the Supreme Court's decisions in *Fisher v. Texas* and *Grutter v. Bollinger* and the "longstanding . . . tradition of governmental forbearance in higher education." Further, that "whether and how, within the bounds of the Equal Protection Clause, to pursue the educational benefits of a diverse student body are questions of academic policy and practice properly assigned to the judgment of colleges and universities." The brief reiterated the Supreme Court's decision in *Grutter*, in which it endorsed "deference to institutional judgment that student diversity is a compelling interest, reasoning that those responsible for higher education are best qualified to evaluate the cumulative information – related, for instance, to campus dynamics, cognitive processes, nurturance of moral reasoning, and pursuit of the institution's particular educational mission – necessary to make that judgment." The brief admonished that courts and States should "resist substitut[ing] their own notions of sound educational policy for those of the school authorities which they review," and concludes that "overrid[ing] those academic judgments by State constitutional amendment would truncate educators' traditional authority, an authority that educators have exercised to the immense benefit of this nation from the nation's beginnings to the present day."

On April 22, 2014, the Supreme Court issued a decision overturning the appellate court decision and finding the ban on affirmative action constitutional. The Court took pains to note that it was not ruling on the constitutionality of affirmative action itself. The Court explained. “Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. The consideration of race in admissions presents complex questions, in part addressed last Term in *Fisher v. University of Texas at Austin*, 570 U. S. ---, 133 S. Ct. 2411, 186 L. Ed. 2d 474 (2013). In *Fisher*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met. In this case, as in *Fisher*, that principle is not challenged. The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.”

The Court proceeded to find that the amendment to the Michigan Constitution was itself constitutional. In doing so the Court found that because there was no specific injury, voters had the right to determine whether race-based preferences should be permitted by state entities and therefore the amendment banning affirmative action was constitutional. The opinion of the Court concluded, “This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.”

VI. Intellectual Property

A. Patent and Copyright Cases

Cambridge University Press v. Patton, 769 F.3d 1232 (11th Cir. Ga. 2014)

The Eleventh Circuit Court of Appeals issued a decision analyzing the copyright fair use doctrine and the fair use four prong test. This case concerns the use at Georgia State University (GSU) of electronic course reserves and electronic course sites to make excerpts from academic books available online to students enrolled in particular courses. The named plaintiffs in the case are three academic publishers (Oxford University Press, Cambridge University Press, and Sage) who argued that the unlicensed posting of digital excerpts for student access almost always exceeded fair use and should require a license. The lower court determined that the vast majority of the alleged infringements (or excerpts)—all but five—constituted fair use. The district court applied the four factor fair use test (purpose and character of the use, nature of the work, amount and substantiality of the portion used and effect on the potential market) using an arithmetic approach, essentially weighing each factor equally and concluding that if three of the factors favored the user, then the use was fair.

For the appeal to the circuit court, AAUP submitted an *amicus* brief urging the circuit court to affirm the district court's ruling and to also clarify that district courts assessing fair use claims may conduct a "transformative use" analysis to determine whether use of a copyrighted work is fair. A "transformative use" analysis compares the purpose for which faculty use copyrighted material in their teaching with the original purpose for which the work was intended. AAUP argued that by making transformative use of a copyrighted work, faculty "employ the original work in a new way in order to express new ideas, add meaning, and convey new messages," thereby "add[ing] to our collective knowledge and understanding." AAUP contended that an alternative transformative use analysis "would not primarily focus on the act of posting copyrighted works, the format in which the works were posted, or how much was used; but, rather, on how the works were used in teaching." By "looking at the intended purpose of the use" courts can determine "whether the use supplants the original work or whether, in the case of transformative use, it creates new meanings and expresses new messages that copyright owners have no right to monetize or prevent." AAUP concluded that by protecting transformative uses as non-infringing, the fair use doctrine ensures that copyright can coexist with the First Amendment's protection of free speech.

The circuit court did not directly address the argument put forth in the AAUP *amicus* brief, however, this issue may be addressed in future cases. The circuit court reversed and remanded the district court's finding and determined that the district court had not properly applied the four prong test to determine "fair use" (purpose of the new use, the nature of the original work, the amount of the work being used, and the impact on the new use on the market for the original work). The appellate court agreed with much of the district court's fair use analysis, but not with how it applied that analysis: "The District Court did err by giving each of the four fair use factors equal weight, and by treating the four factors mechanistically. The District Court should have undertaken a holistic analysis which carefully balanced the four factors. . ."

While agreeing that the nonprofit educational purpose of GSU's copying supported fair use, the appellate court expressed concern that the use was not "transformative" (*e.g.*, a parody) in that it achieved the same educational purpose as the original work. Because of this, the first factor carries less weight in the overall fair use decision. The appellate court also rejected the district court's 10 percent or one chapter bright-line rule, and wrote "the District Court should have performed this analysis on a work-by-work basis, taking into account whether the amount taken - - qualitatively and quantitatively -- was reasonable in light of the pedagogical purpose of the use and the threat of market substitution."

The circuit court's "dueling" analysis of the fair use doctrine directly impacts the professoriate. On the one hand the appellate court espouses, "To further the purpose of copyright, we must provide for some fair use taking of copyrighted material. But if we set this transaction cost too high by allowing too much taking, we run the risk of eliminating the economic incentive for the creation of original works that is at the core of copyright and -- by driving creators out of the market -- killing the proverbial goose that laid the golden egg." Yet, the appellate court is also persuaded by the copyright law's fair use protections for colleges and universities. "Congress

devoted extensive effort to ensure that fair use would allow for educational copying under the proper circumstances. . .” Without the presence of clear standards and ascertainable rules, faculty, who are not experts in copyright law, will either use without deliberation of the fair use analysis or self-censor, diminishing the value of the fair use doctrine.

***Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. N.Y. 2014)**

In this case the Second Circuit recently 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, as the doctrine of “fair use” allowed them to create a full-text searchable database of copyrighted works and to provide those works in formats accessible to those with disabilities.

HathiTrust, a collection of over sixty universities worldwide 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 disagreed with this assertion. 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 found in regard to the first factor that the creation of a full-text searchable database as a “quintessentially transformative use” because it created new uses for the books rather than merely replicating or repackaging the books. Regarding the second and third factors, the court found that despite the fact HDL creates and maintains copies of the works at four different locations, these copies are reasonably necessary in order to facilitate the HDL’s

legitimate, transformative uses. As to the fourth factor, the court found that the full-text search function does not serve as substitute for the books that are being searched. The HathiTrust does not display to the user any text at all from the original work. Instead, it displays only the page number on which the search term is found and the number of times the term appears in the work. The Authors Guild was unable to identify any non-speculative harm to its members' potential market. It rejected the Authors Guild's argument that the HathiTrust's project could impair the potential market for digitally licensing books for search, which could potentially develop in the future, holding that lost licensing revenue from such a market did not count because the full-text search did not serve as a substitute for the original books.

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.