COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-000820-D

THE BOARD OF REGENTS OF
NORTHERN KENTUCKY UNIVERSITY — APPELLANT

v.

On Discretionary Review From Kentucky Court of Appeals
Case No. 2011-CA-002111-MR and Campbell County Circuit Court
Case No. 2009-CI-0432

ANDREA WEICKGENANNT — APPELLEE

BRIEF FOR AMICI CURIAE, EASTERN KENTUCKY UNIVERSITY, KENTUCKY COMMUNITY AND TECHNICAL COLLEGE SYSTEM, KENTUCKY STATE UNIVERSITY, THE UNIVERSITY OF LOUISVILLE, MOREHEAD STATE UNIVERSITY, MURRAY STATE UNIVERSITY, AND WESTERN KENTUCKY UNIVERSITY IN SUPPORT OF APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that the original and ten copies of the foregoing was served upon the following named individual via Federal Express, on November 3, 2014: Hon. Susan Stokely Clary, Clerk of the Supreme Court, Room 209, 700 Capital Avenue, Frankfort, Kentucky, 40601; and one copy served via United States Mail this 3rd day of November 2014 upon: Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Fred A. Stine, Chief Circuit Judge, Campbell County Circuit Court, 330 York St., Newport, Kentucky 41071; Sheila M. Smith, Esquire, and Kelly Mulloy Myers, Esquire, FREKING & BETZ, LLC, 525 Vine Street, Sixth Floor, Cincinnati, Ohio 45202; Hon. Michael W. Hawkins, Esquire, and Kathleen A. Carnes, Esquire, DINSMORE & SHOHL, LLP, 1900 Chemed Center, 255 East Fifth Street, Cincinnati, OH 45202; and Drew B. Millar, Esquire, DINSMORE & SHOHL, LLP, 250 West Main Street, Suite 1400, Lexington, KY 40507.

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STATEMENT OF POINTS AND AUTHORITIES

I. STATEMENT OF PURPOSE AND PARTICULAR ISSUES

This case concerns a faculty member's challenge, through assertion of a Kentucky statutory discrimination claim for denial of tenure, to a university's constitutional autonomy to determine for itself who may teach at the university. As fellow universities in the Commonwealth, the *amici* file this brief to argue, as a matter of the United States Constitution and leading case law, universities are entitled to deference in their tenure decisions. Further, these universities propose a method by which that deference can be realized within the framework of the *McDonnell Douglas* burden shifting analysis.

II. INTRODUCTION

"'In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest.'" *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring). The special aims of universities – inquiry, pursuit of knowledge, growth, and experimentation – are unique in our society. As Justice Frankfurter acknowledged, unlike commercial settings and "normal" societal situations, knowledge in the university setting is not a tool to be wielded to obtain some other goal, knowledge, in and of itself, *is* the goal. "Objective, disinterested inquiry tested by the scientific method or subjected to peer review serves as a foundational principle of the modern university, fulfilling the call to benefit society and the public good."Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 Cath. U.L. Rev. 67, 81 (2006).

This unfettered pursuit of knowledge, and the prerogative to decide how differing academic interests and scholarly goals are best achieved – including the decision about

who can teach – is only possible if universities' autonomy is honored. Otherwise, the university, its resources, and goodwill as a purely academic enterprise, can be co-opted by government intervention for political purposes. The Constitution recognizes this autonomy as the "academic freedom" of universities. Any judicial refereeing of who should receive tenure and who should not is an invasion of the role and rights of the university. As a result, and for the reasons set forth below, Kentucky should recognize that universities are entitled to deference whenever they are subjected to a discrimination claim from a failed tenure candidate.

III. ARGUMENT

A. Universities' Academic Freedom to Determine "Who May Teach"

Because of the collective aims of universities in promoting knowledge for knowledge's sake, and the individual aims of each discrete university in deciding for itself how best to achieve that broadly stated goal, each university has a certain degree of autonomy in making academic decisions. The term representing that autonomy, "academic freedom," has been used, somewhat confusingly, in scholarship and case law to mean two related but ultimately different interests: "[i]t is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher (or in some versions – indeed in most cases – the student) to pursue his own ends without interference from the academy." *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985); *see also* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 257 (1989) (noting the tension between the two principles: "[t]he institutional right seems to give a university the authority to hire and fire without government interference

those very individuals apparently granted a personal right to write and teach without institutional hindrance").

While both concepts are implicated by tenure denials, the focus should be on the constitutional deference afforded to universities in making those decisions. Any individual academic freedom is significant only insofar as the grant of tenure represents a large portion of what makes the tenure decision so important.[1] But, in any event and from a practical perspective, by granting tenure, the university cedes to the individual professor a degree of control to determine who may teach what and how they do so.[2]

Institutional academic freedom, as a legal concern, is grounded in the First Amendment and was first recognized by Justice Frankfurter is his concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Justice Frankfurter endorsed the concept that universities are designed to promote learning and exploration, and that permitting them to achieve those goals necessarily requires that university atmospheres be free of interference: "[i]t is an atmosphere in which there prevail 'the four essential freedoms' of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263 (Frankfurter, J., concurring). One of those "four essential freedoms," the right to determine "who may teach" is challenged every time a court sits in judgment of a university's tenure decision.

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[1] To be clear, whatever the source and scope of individual academic freedom is, constitutional academic freedom is a right of the university, not individual faculty members. *See See Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593 (6th Cir. 2005) ("[T]o the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors.").

[2] The cessation is not absolute of course. As addressed, *infra*, the grant of tenure simply conditions the university's right to terminate a professor without due process. The university still maintains ultimate control over certain activities associated with the classroom. *See Johnson-Kurek*, 423 F.3d at 593 (noting that the "'essential freedoms' of a university encompass the right to determine how classes are taught, and grades assigned").

The institutional right of universities to academic freedom and the "four essential freedoms" which it includes has repeatedly been acknowledged by the Supreme Court of the United States and its members. In 1978, in a case concerning a medical school's inclusion of race as a factor in making student admission decisions, Justice Powell noted in his opinion, "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.). Justice Powell relied on the institutional constitutional right of the university to decide who may be taught when he and the Court held[3] that attainment of a diverse student body was a compelling interest justifying race conscious admissions decisions. *See id* at 312-14; *see also Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (noting that "Justice Powell grounded his analysis in the academic freedom that 'long has been viewed as a special concern of the First Amendment'").

Less than a decade later, but in the different context of substantive due process, the Court again recognized universities' rights to make academic decisions and that courts should only intervene in the academic sphere in a very narrow set of circumstances. "When judges are asked to review the substance of a genuinely academic decision . . ., they should show great respect for the faculty's professional judgment." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985). The Court held that deference is required: courts "may not override [the faculty's professional judgment]

[3] The *Bakke* case led to a notably fractured Court where six different opinions were issued. As a result, many lower courts were uncertain as to whether this portion of Justice Powell's analysis was binding precedent. *See Grutter*, 539 U.S. at 325 (noting that courts had struggled with whether they were bound by Justice Powell's holding and rationale). Nonetheless, his opinion "served as the touchstone of constitutional analysis" for admissions practices and was later explicitly endorsed by the Court. *Id.* at 323, 325.

unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* In making its holding, the Court noted that academic freedom included protecting "autonomous decisionmaking by the university itself" because of "'the four essential freedoms' of a university." *Id.* at 226. n.12.

In 2003, the Court was again faced with a challenge to a race conscious admissions policy, this time at the University of Michigan Law School. In ultimately holding that the university's program did not offend applicants' equal protection rights, the Court observed that the academic institution was entitled to a degree of deference in how it chose its student body, in part, because of educational autonomy. The Court characterized this autonomy as having "a constitutional dimension, grounded in the First Amendment." *Grutter*, 539 U.S. at 329. The Court acknowledged that universities enjoy a long standing special status under the Constitution whereby they are entitled to deference in their academic decisions: "[w]e 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.*" *Id.* (emphasis added).

This special niche – a constitutional concern at least if not a constitutional right – guarantees universities the right to teach and pursue scholarship how they see fit without undue intervention from other government sections and outside influences. *See id.* at 328 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."). Kentucky

should acknowledge and give force to that deference in the context of tenure decisions, which, even within the world of the four essential freedoms, are of a unique character.

B. The Role of Tenure in the University's Right to Decide "Who May Teach"

Against this backdrop of nearly complete university control over "who may teach," one must analyze the curious phenomena of tenure. The tenure system, at base, is an acknowledgement by the university that conditioning its right to terminate qualified professors better serves the university's higher goal of true unburdened scholarship. "Tenure decisions and other promotional 'decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally.'" *Benison v. Ross*, No. 13-2554, 2014 U.S. App. LEXIS 16978, at *19 (6th Cir. Sept. 3, 2014). In Kentucky, most employment relationships are at-will, meaning that both the employee and the employer are free to terminate the relationship at any time. *Benningfield v. Pettit Envtl., Inc.,* 183 S.W.3d 567, 570 (Ky. App. 2005). The grant of university tenure forever changes that dynamic. "'Tenure,' as . . . understood in the teaching profession, embraces the concept of permanent security in the academic position one holds." *Board of Regents of Ky. State Univ. v. Gale*, 898 S.W.2d 517, 521 (Ky. App. 1995).

Tenure is unique not only because of the significant right that accompanies it – the right to be free from termination without cause (including financial exigency or other administrative concerns) – but also the interests the right is designed to protect. Tenure "protects faculty members from retribution for the results of their research, for what they say and teach in class, for their actions in fulfilling their duties in university governance, and for their extramural utte[r]ances." Mark L. Adams, *The Quest for Tenure: Job*

Security and Academic Freedom, 56 Cath. U.L. Rev. 67, 70 (2006). Tenure is a university tool designed to insulate faculty from outside forces, including the university itself, from anything which would improperly inhibit free academic exploration.

It stands to reason, then, that before a university grants any individual this enormous privilege, its administrators and faculty scrutinize the individual's record and abilities very closely. Because the stakes are so high, no one is incentivized more than the university to make a pure merit-based decision in granting or denying tenure. *See id.* at 78 ("When it is remembered that a decision to award tenure involves a commitment of several million dollars in salary and benefits over a thirty-to fifty-year period, the level of scrutiny should dramatically increase."). If the university gets the decision wrong on the merits, then it is either burdened for decades with a sub-par faculty member, or it must watch as a talented but rejected scholar makes important discoveries while employed at some other university.[4]

The theoretical reasons as to why a university would closely scrutinize a tenure candidate are borne out in practice. The form of that scrutiny, tenure review, is similar across institutions. Universities typically evaluate candidates based on three areas: 1) teaching, 2) scholarship, and 3) service. *See, e.g., Kovacevich v. Kent State Univ.*, 224 F.3d 806, 812-13 (6th Cir. 2000); *Adelman-Reyes v. St. Xavier Univ.*, 500 F.3d 662, 664 (7th Cir. 2007); *Jiminez v. Mary Washington College*, 57 F.3d 369, 373 (4th Cir. 1995);

[4] This is a heightened example of the potential costs of "taste discrimination," an economic theory that posits that labor market discrimination is inefficient and costly because it does not use available labor resources in the best possible way. *See* Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. Rev. 1251, 1279 - 89 (1995) (discussing taste discrimination). Under this theory, an employer who discriminates must pay for his discriminatory "taste" by incurring the cost of not having the best available employees at the best possible jobs. This cost is heightened in the tenure context because, unlike the normal employment relationship where an employer could decide that the cost for his discriminatory "taste" is too high down the road and simply end the costly employment relationship, the tenure decision is, more or less, a permanent one.

Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 Cath. U.L. Rev. 67, 81 (2006) (all identifying teaching, scholarship and service as main factors controlling tenure decision). Indeed, in the case currently before the Court, Northern Kentucky University reviewed Ms. Weickgenannt's credentials based on the same three criteria of teaching, scholarship, and service. *See Weickgenannt v. Bd. of Regents of N. Ky. Univ.*, No. 2011-CA-2111-MR, 2013 Ky. App. Unpub. LEXIS 919, at *5 (Ky. App. Nov. 22, 2013).

The method by which those credentials are assessed in different universities share many common threads as well. The representative tenure decision is marked by review from both faculty and administration.[5] Because the decision as to whether a professor is qualified for tenure is based largely on his/her acumen as a scholar, university administrators and faculty are positioned best to judge the quality of a candidate's scholarship. Faculty review is a mainstay of the tenure process because faculty members have an important perspective on the quality of a candidate's scholarship.

Administrative review of the faculty recommendation also serves an important purpose. Administrators are most capable of assessing the aims of the university or college as a whole and whether the candidate's qualifications fit those aims. "While peer review is the primary duty of the faculty, university administrators and university counsel play an important role in ensuring consistency between departments and schools, and also in serving as the final guardians of the gate." Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 Cath. U.L. Rev. 67, 78 (2006).

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[5] Both forms of review, at multiple levels, were present in this case. *See Weickgenannt*, 2013 Ky. App. Unpub. LEXIS, at *6-7. A characteristic example of the specific levels of review typically found is set forth in *Kovacevich v. Kent State Univ.*: "1) Faculty Advisory Committee (FAC)[;] 2) Department Chairperson[;] 3) College Advisory Committee (CAC)[;] 4) Dean of the College[;] 5) University Advisory Board (UAB)[;] 6) University Provost [; and] 7) University President." 224 F.3d at 812.

Reviewers at both levels must also be cognizant of the "deadwood problem." Because of the rights that accompany tenure – a seemingly permanent right to employment – some academics severely curtail their scholarship once they receive tenure, becoming "deadwood" to the university and its aims of continued scholarship. To combat this potential issue, "[b]oth faculty and administrators must carefully examine . . . the likelihood the individual will continue to grow and be an effective contributor to the academic community." *Id.* at 78. Thus, reviewers must make a trajectory determination on each candidate. Has this candidate peaked, in terms of substantive contributions, or is (s)he on his/her way up? Will this candidate be a service to the department in the coming decades or is (s)he terribly difficult and selfish? Does this candidate show teaching skill and an ability to adapt so that (s)he will still be effective with changes in technology and circumstances? A reviewer must, at least implicitly, answer each of these questions with respect to each candidate.

A university's tenure decision is unique not only because of what rights accompany it, but also because of the setting in which it is made. In making tenure decisions, universities must assess whether a candidate is a good fit for his/her current job as well as whether (s)he is qualified to continue in his/her position indefinitely. In doing so, they must make decisions as to academic credentials and skill which no one but the university itself is able to determine. Because of that, tenure decisions are made delicately and at multiple levels within universities. These factors make tenure decisions unique in the world of employment law. *See Benison*, 2014 U.S. App. LEXIS 16978, at *19 (noting that "[t]enure decisions . . . 'involve a combination of factors which tend to set them apart from employment decisions generally.'").

C. Universities are Entitled to Deference in Making Tenure Decisions

In recognition of universities' constitutional interest in deciding "who may teach" and the practical implications that are associated with tenure appointments, courts across the United States have held that universities' tenure decisions are entitled to deference when challenged via a disappointed tenure candidate's discrimination claim. Two of the leading early cases on academic deference come from the Second Circuit Court of Appeals. In *Lieberman v. Gant*, a gender discrimination case, Judge Friendly, writing for the court, held[6] that "[w]hen a decision to hire, promote, or grant tenure to one person rather than another is reasonably attributable to an honest even though partially subjective evaluation of their qualifications, *no inference of discrimination can be drawn*." 630 F.2d 60, 67 (2d Cir. 1980) (emphasis added). To do otherwise, "is to risk a serious infringement of first amendment values. A university's prerogative 'to determine for itself on academic grounds who may teach' is an important part of our long tradition of academic freedom." *Id.* The court then held that the university was entitled to summary judgment and noted that the district court "did not err in declining plaintiff's invitation to engage in a tired-eye scrutiny of the files of successful male candidates for tenure in an effort to second-guess" the defendant university's tenure decision. *Id.* at 67-68, 70.

In an earlier case, the Second Circuit also noted, when considering a gender discrimination tenure denial claim, "[o]f all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision." *Faro v. New York Univ.*, 502

[6] *Lieberman*, like all federal cases cited in this section, analyzed a Title VII discrimination claim. 630 F.2d 60, 67 (2d Cir. 1980). Because Kentucky courts analyze Kentucky statutory discrimination claims in the same way that Title VII claims are assessed, *Am. Gen. Life & Accident Ins. Co. v. Hall*, 74 S.W.3d 688, 691 (Ky. 2002), and because universities' constitutional rights are the same regardless of the statute by which they are being challenged, the cases cited in this section are directly on point.

F.2d 1229, 1231-32 (2d Cir. 1974). The court upheld the district court's denial of an injunction where the plaintiff sought appointment to a tenure track position. It did so because there was no evidence of discrimination and because doing otherwise "would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates," an unwieldy result. *Id.* at 1232.

The deference acknowledged in *Lieberman* and *Faro* has been cited again and again, as courts do not deem it appropriate for them to sit as "super-tenure committees" weighing the relative worth of one academic against that of another. *See Stein v. Kent State*, No. 98-3278, 1999 U.S. App. LEXIS 9152, at **21-22 (6th Cir. May 11, 1999) (the court "acknowledge[d] and adhere[d] to the significant body of case law that emphasizes courts are not to sit as ''super-tenure' committees' and substitute judgment for that of the university in the absence of a strong showing of discrimination"); *Villanueva v. Wellesley Coll.*, 930 F.2d 124, 129 (1st Cir. 1991) ("[I]t is not the function of the courts to sit as 'super-tenure' committees.'"); *Jimenz v. Mary Washington College*, 57 F.3d 369, 376 (4th Cir. 1995) ("We must be ever vigilant in observing that we do not 'sit as a 'super personnel council' to review tenure decisions.'"). This deference is rooted in the Constitution and Kentucky should join these other courts in recognizing deference as a legitimate constitutional concern in claims challenging tenure review decisions.

D. Method by Which Deference is Given Effect

While many courts have acknowledged that deference should be given to universities' tenure decisions when adjudicating discrimination claims, very few of them have articulated how it should be recognized in practice. Taking deference out of the

realm of the theoretical and into the sphere of application is important. The appropriate way to achieve this outcome and give proper respect to the constitutional interests implicated is by making slight modifications to the *McDonnell Douglas* test.

The *McDonnell Douglas* test is an evidentiary burden shifting test used when analyzing discrimination claims based on circumstantial evidence. Kentucky statutory claims for discrimination, such as the one currently before the Court, are evaluated using this same analytical framework, originally articulated in the context of federal Title VII discrimination claims. *See Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005) (noting that Kentucky "interpret[s] the civil rights provisions of KRS Chapter 344 with the applicable federal anti-discrimination law"). The test is inapplicable when there is direct evidence of discrimination, and the *amici* do not suggest that universities should be afforded deference when there is direct evidence of discrimination.

Instead, when a court is confronted with a circumstantial case, deference should be actualized at the pretext stage of the *McDonnell Douglas* test. The test is well-known and involves three separate stages:

> (1) a *prima facie* stage, where the plaintiff bears the burden of producing evidence that she was (a) a member of a protected class, (b) who was subjected to an adverse employment action, (c) who was qualified for the opportunity, and (d) that someone outside the class was afforded the opportunity denied to her;
>
> (2) a legitimate non-discriminatory reason stage, where the defendant bears the burden of producing a legitimate non-discriminatory reason for the adverse action; and
>
> (3) a pretext stage, where the employee must "'produce sufficient evidence from which the jury could reasonably reject the employer's explanation.'"

See Williams, 184 S.W.3d at 496-97.

The final stage, the pretext stage, is the appropriate analytical place to afford

deference and create a rule that could be applied across different factual circumstances. In the characteristic tenure denial case, after a plaintiff has made out a *prima facie* case, the university will offer its academic decision on the merits of the individual scholarship, teaching, and service of the candidate as the reason for the denial. At that point, the burden shifts back to the plaintiff to produce sufficient proof of pretext to survive a summary judgment attack. This Court has endorsed three methods by which the typical plaintiff can establish pretext: "(1) the proffered reasons are false; (2) the proffered reasons did not actually motivate the decision; and (3) the plaintiff could show that the reasons given were insufficient to motivate the decision." *Id.* at 497.

In tenure denial cases, only one of these methods should be viable, and only then in limited circumstances. Both the first and third reasons are, inherently, challenges to a university's academic judgment and should be categorically barred as methods by which a plaintiff could prove pretext. One could not show that a tenure decision was "false," under the first method, or "insufficient," under the third, without necessarily requiring a court (or fact-finder) to weigh scholarship, teaching, and service of the applicant. Any plaintiff attempting to prove pretext with these methods would be asking the court to sit as a "super tenure committee" adjudicating whether one article published in one journal was better reasoned and more valuable than a separate article published elsewhere.

This is the exact type of inquiry the Constitution and leading case law prohibits. *See, e.g., Villanueva v. Wellesley Coll.*, 930 F.2d 124, 129 (1st Cir. 1991) ("[I]t is not the function of the courts to sit as 'super-tenure' committees.'"). As the Sixth Circuit recently noted, "[t]o the extent that . . . a plaintiff's pretext argument would require courts to perform a substantive evaluation of his or her academic record, the courts face a

significant challenge." *Thrash v. Miami Univ.*, 549 Fed. Appx. 511, 521 (6th Cir. Mar. 10, 2014). Rather than engage in this analysis, courts should defer to the academic decision of the university so long as that decision was reached via customary tenure processes where both faculty and administrators reviewed the candidate's record. In this way, universities will be afforded the deference to which they are entitled under the Constitution to decide "who may teach."

Universities should also be given deference, though not in the form of an absolute bar, when a plaintiff attempts to prove pretext through the second of the three methods, showing that the proffered non-discriminatory reason did not motivate the denial. In doing so, however, plaintiffs should have to come forward with pretext evidence that is significantly stronger than what is required of a typical plaintiff. The Seventh Circuit acknowledged the merit of requiring such a showing: "'in *the absence of clear discrimination*,' we are generally 'reluctant to review the merits of tenure decisions,' recognizing that 'scholars are in the best position to make the highly subjective judgments related to the review of scholarship and science.'" *Adelman-Reyes v. St. Xavier Univ.*, 500 F.3d 662, 667 (7th Cir. 2007) (emphasis added).

This heightened burden is analogous to "pretext plus" type evidence, the effect of which was articulated by the Third Circuit: "[u]nless the plaintiff introduces counter-affidavits and argumentation that demonstrate that there is a reason to disbelieve th[e] particular explanation [of defendant], there is no genuine issue of material fact." *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1215-16 (3rd Cir. 1988) (overruled). The "pretext plus" requirement, while not appropriate in the typical non tenure case, is particularly apt in tenure denial cases because it strikes the balance between universities' constitutional

right to decide who may teach and the individual's statutory rights to be free from discrimination. The Eighth Circuit acknowledged the soundness of the suggested balance: "in the tenure context, for example, the plaintiff's evidence of pretext must be of such strength and quality as to permit a reasonable finding that the denial of tenure was obviously unsupported." *Kobrin v. University of Minnesota*, 121 F.3d 408, 414 (8th Cir. 1997). To be clear, this heightened requirement would not bar *all* discrimination claims. Any employee who can proffer sufficiently convincing proof that the academic reasons offered by the university did not actually motivate the decision would be able to move forward with his claim. But, making this modification to the pretext showing in motivation pretext cases is in keeping with the broad judicial acknowledgement that the sphere of tenure decisions is not something courts should invade without good reason.

IV. CONCLUSION

Judicial acknowledgment of universities' constitutional interest in deciding "who may teach" is widespread. To recognize and give meaningful purpose to that interest requires announcement of a specific test which lower courts can apply in practice. Thus, this Court should hold that, in discrimination cases concerning tenure denial, the *McDonnell Douglas* test is modified to bar certain possibilities for pretext showings and that the "motivation" method is modified to require "pretext plus" evidence.

Respectfully submitted,

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