IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2501

EDWIN OTERO-BURGOS, et al.;

Plaintiffs-Appellants

v.

INTER-AMERICAN UNIVERSITY OF PUERTO RICO, et al.;

Defendants-Appellees

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS AMICUS CURIAE

This Brief Supports Appellants In Seeking Reversal
Of The District Court's Order

Seth A. Tucker
John E. Bies
M. Ryan Calo
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for Amicus Curiae American Association of University Professors

January 25, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2501

EDWIN OTERO-BURGOS, et al.;

Plaintiffs-Appellants

v.

INTER-AMERICAN UNIVERSITY OF PUERTO RICO, et al.;

Defendants-Appellees

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

As Amicus Curiae

STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

The American Association of University Professors (AAUP) is an unincorporated not-for-profit association whose mission is to advance the standards, ideals, and welfare of the American academic profession. The AAUP was founded in 1915 and currently has more than 44,000 members. The AAUP draws its membership from virtually every academic discipline represented at an

American college or university; its members include faculty at undergraduate, graduate, and professional schools.

One of the AAUP's central tasks is the formulation of statements intended to establish minimum standards of institutional practice in higher education. Paramount among these is the 1940 Statement of Principles on Academic Freedom and Tenure (hereinafter, the "1940 Statement"), drafted jointly with the Association of American Colleges and endorsed by more than 200 educational organizations and disciplinary societies. Among other things, the 1940 Statement articulates the consensus view of the concept of academic tenure and the protections that tenure affords.

The instant case addresses whether a particular statutory remedy — namely, limited salary relief — may substitute for the protections of academic tenure. This issue goes to the core of the AAUP's institutional purpose. Through this amicus curiae brief, the AAUP offers its knowledge regarding the history and role of academic tenure in the American higher-educational system. The values that the tenure system safeguards would be threatened if this Court were to affirm the district court's decision that Puerto Rico's Law 80 affords the exclusive remedy when a tenured faculty member is terminated, and tenure is revoked, in violation of the employing institution's policies and procedures. Because, in AAUP's view, this result is not required or even intended by the text or purpose of Law 80, and

because of the negative consequences that would follow from this result, the AAUP supports reversal of the district court's ruling.

The AAUP, in a motion filed pursuant to Federal Rule of Appellate Procedure 29, respectfully asks this Court for leave to file this brief.

SUMMARY OF ARGUMENT

The case before this Court has significant consequences for the meaning of academic tenure. The district court's holding that Law 80 sets forth a tenured professor's exclusive remedy under Puerto Rico law would eviscerate the important guarantees that accompany, underpin, and define tenure. Academic tenure is firmly rooted in a historical tradition; tenure as currently understood in the United States is the product of long deliberation and wide consensus among the interested parties. Academic tenure confers important benefits on professors, universities, and the public as a whole. It promotes the development of expertise; safeguards the free investigation and exchange of ideas; and permits universities to shape their missions and standards. As recognized by Appellee Inter-American University in its Faculty Handbook:

> Higher education institutions, such as Inter-American University of Puerto Rico, are conducted for the common good. This common good depends, to a large degree, upon the free search for truth and its free exposition. Tenure is one means of insuring such freedom to the faculty members of the Institution.

Inter-American University Faculty Handbook 5.8.2 (April 2001). These individual and common goods would be greatly hampered were universities effectively able to circumvent the protections of tenure through a modest financial payment.

AAUP believes that the district court's conclusion that Law 80 provides the exclusive remedy for a tenured professor dismissed in contravention of stated

university policy is deeply problematic in light of the historic protections afforded by tenure, and that it is wrong as a matter of Puerto Rico law. Law 80 applies to at-will employees — which tenured professors, by definition, are not. Indeed, the Supreme Court of Puerto Rico has held that "private-university tenure decisions [are] subject to an implicit contractual constraint." *Selosse v. Fundacion Educativa Ana G. Mendez*, 122 D.P.R. 534, 22 P.R. Offic. Trans. 498, 514 (1988) (cited in *Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49, 51 (1st Cir. 2000)). In *Selosse*, a denial-of-tenure case, the Supreme Court of Puerto Rico affirmatively ordered the university to perform a "new, objective evaluation . . . that follows the procedures established in the regulations" because the university had "violated the spirit of the contractual procedure." *Selosse*, 22 P.R. Offic. Trans. at 517.

Law 80 was designed to set a floor of protection, and not a ceiling, for a category of employees who lack job security. In the absence of any indication that it was intended to scale back the protections of tenure, and especially in the face of Puerto Rico and First Circuit precedent suggesting the contrary, this Court should not hold Law 80 to be the exclusive remedy for professors who are terminated in spite of their tenured positions. As this Court has said about Law 80 in another context, "[i]t would be perverse indeed to allow [an employer] to invoke a statute enacted for the protection of workers as a justification for its unlawful labor practices." *McGaw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 10 (1st Cir. 1997).

For all these reasons, the AAUP urges this Court to consider the wider ramifications of the district court's opinion and to reverse the lower court's holding that Law 80 is the sole remedy under Puerto Rico law for tenured professors terminated in contravention of university policy.[1]

ARGUMENT

I. The District Court's Conclusion That Law 80 Precludes Professor Otero's Breach-Of-Contract Claim Would Eviscerate Tenure And Its Social Benefits.

The 1940 Statement of Principles on Academic Freedom and Tenure has been endorsed by organizations, universities, and courts as a definitive articulation of the concepts of academic freedom and tenure. *See, e.g.*, *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003); *Browzin v. Catholic University of America*, 527 F.2d 843, 848 n.8 (D.C. Cir. 1975) (noting that the 1940 Statement of Principles

[1] Amicus AAUP is also troubled by Inter-American University's intrusion into Professor Otero's autonomy over his course and his grading methods, in light of the AAUP's statements on faculty authority in matters of instruction, including grading. *See* AAUP, *Statement on Government of Colleges and Universities, in Policy Documents and Reports* 139 (10th ed., 2006) ("The faculty has primary responsibility for such fundamental areas as curriculum, [and] subject matter and methods of instruction . . . ."); AAUP, The Assignment of Course Grades and Student Appeals, *id.* at 127-128, 127 ("The assessment of student academic performance . . . including the assignment of particular grades, is a faculty responsibility. . . . Under no circumstances should administrative officers on their own authority substitute their judgment for that of the faculty concerning the assignment of a grade. The review of a student complaint over a grade should be by faculty, under procedures adopted by faculty, and any resulting change in a grade should be by faculty authorization."). However, the AAUP respectfully submits that the district court's opinion must be overturned on other grounds as described herein, and that this Court may reverse the district court's opinion without addressing this issue.

"represents widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent college administrators and governing boards"). It embodies a consensus reached between the AAUP and what is now the Association of American Colleges and Universities (AACU). The landmark statement has subsequently been endorsed by more than two hundred additional educational associations and learned societies.

According to the 1940 Statement:

> Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. **Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.**

1940 Statement of Principles on Academic Freedom and Tenure: *AAUP Policy Documents and Reports* 3 (10th ed., 2006) (emphasis added). The 1940 Statement goes on to describe tenure as "permanent or continuous" employment following "the expiration of a probationary period." *Id.*; *see also* Inter-American University Faculty Handbook 5.3.5 ("A tenured appointment is normally for the rest of appointee's working years or until retirement…."). Once tenured, a professor should not be terminated absent "adequate cause," defined as some specified misconduct or the failure to adhere to a published university norm, and then only upon an acceptable level of process. 1940 Statement; William Van Alstyne,

"Tenure: A Summary, Explanation, and 'Defense'," *Academe: The Bulletin of the American Association of University Professors* 57 (Autumn 1971). Any termination process should be in writing, should include notice and the opportunity to be heard, and should involve some level of peer review. 1940 Statement.

> As tenure expert William Van Alstyne has explained:
>
> > The conferral of tenure means that the institution, after utilizing a probation period of as long as six years in which it has had ample opportunity to determine the professional competence and responsibility of its appointees, has rendered a favorable judgment establishing rebuttable presumption of the individual's professional excellence.

Van Alstyne, "Tenure: A Summary, Explanation, and 'Defense,'" at 329. The grant of tenure means that, absent a very small number of narrowly specified developments, the professor can reasonably expect to remain at his university for the remainder of his academic career. Any effort to discharge a tenured professor should be undertaken only in accordance with an adequate process, and in that process the burden of proof is on the university to establish that the professor has operated outside of the bounds of proper conduct (or, alternatively, that the university is experiencing a financial exigency). *See* Recommended Institutional Regulations on Academic Freedom & Tenure: *AAUP Policy Documents and Reports* 27 (§ 5(c)(8)) (10th ed., 2006) ("The burden of proof that adequate cause exists rests with the institution and will be satisfied only by clear and convincing evidence in the record considered as a whole."). *See also Browzin*, 527 F.2d at

846-47 ("[T]hose seeking dismissal [of tenured faculty] bear the burden of proof…."). This is not to say that tenure "insulate[s] the professor from any and all form of later evaluation." Matthew Finkin, *The Tenure System*, in THE ACADEMIC HANDBOOK 146 (A. Leigh DeNeef & Craufurd Goodwin eds., Duke University Press 1995). But at a minimum, tenure suggests a formal assurance that the economic security and intellectual freedom of the individual who obtains it will not be jeopardized except for specific, predetermined reasons and following full academic due process.

Why confer tenure? As the 1940 Statement provides, tenure is a "means to certain ends." Arguably of greatest importance, tenure protects professors whose ideas prove initially (or even eventually) unpopular. In the absence of tenure, professors would hesitate to investigate or share hypotheses that are in tension with other faculty, their university, or society at large. *See Browzin*, 527 F.2d at 846 (noting that the tenure system is "designed to eliminate the chilling effect which the threat of discretionary dismissal casts over academic pursuits"); *see also id. at* 848 (describing academic freedom as the "overarching purpose" of tenure). The result would be fewer and less bold ideas. As Kingman Brewster, Jr., former President of Yale University, has written: "Progress in the world of thought depends on people having enough freedom and serenity to take the risk of being

wrong." Kingman Brewster, Jr., *On Tenure*, President's Report (Yale University Winter 1972).

Tenure further benefits society by encouraging talented individuals to gain expertise through rigorous training over many years. An intellectually ambitious and able individual would be hard-pressed to pursue, at relatively low pay, many years of higher education and rigorous peer review if her employer could then terminate her at any time in contravention of its stated policies. Tenure affords those who pursue it successfully the time and safety to develop their ideas with a strong measure of security, to our collective benefit. For the same reasons, tenure also benefits society by helping world-class universities attract and retain individuals of high academic promise, who might otherwise choose to enter the private sector.

Indeed, Inter-American University has explicitly recognized this principle, stating in its Faculty Handbook:

> To serve the common good effectively, the role of faculty member at the University must be sufficiently attractive to appeal to men and women of ability and learning. This, in part, is achieved through the economic security and the professional satisfaction felt by the faculty member who is offered tenure.
>
> Thus, tenure contributes effectively to the success of the University in fulfilling its obligations to its students and to the society that it serves. In addition, it protects faculty members against undue pressures, from both inside and outside the academic community, [and] it safeguards academic freedom, which is essential to the institution.

Inter-American University Faculty Handbook 5.8.2. In addition, the tenure process provides the university with a means to set norms and standards for itself or its departments. Through the granting or denial of tenure, a university is able to shape and maintain its academic standards. *See* J. Stephen Ferris & Michael McKee, *Matching Candidates with Academic Teams: A Case for Academic Tenure*, 25 INT'L REV. L. & ECON. 290, 309 (2005).

These and other important benefits to academics, educational institutions, and society would be lost if the safeguards afforded tenured faculty were reduced to those set forth in Law 80. Law 80 provides that "[e]very employee in commerce, industry, or any other business or work place . . . in which he/she works for compensation of any kind, contracted without a fixed term, who is discharged from his/her employment without just cause," shall be paid additional compensation corresponding to some percentage of his or her salary. 29 L.P.R.A. § 185a (2005). Under the statute, the amount owed to a given employee — no matter how unjust her termination or how insufficient the process she was afforded — is calculated based on how long the individual was employed. Where it applies, Law 80 has been held to provide the "exclusive remedy," unless another law specifically applies by its terms. *See Vargas v. Royal Bank of Canada*, 604 F. Supp. 1036, 1040 (D.P.R. 1985).

The remedy afforded by Law 80 is entirely inadequate to address the concerns and promises of tenure — and, as described below, it could not reasonably have been intended to apply to tenured faculty members. Consistent with the protections afforded under the statute, a professor employed for 15 years, eight of which were tenured, could be fired in direct contravention of university policy and *absent any process* if the university were willing to pay out half a year's salary. This "quite limited" remedy of a "salary allowance calculated on the basis of the years of service rendered by the unjustly discharged employee" cannot constitute the exclusive remedy for a tenured professor dismissed in violation of his university's policies. Yet this is what the district court held. *Edwin Otero-Burgos et al. v. Inter-American University et al.*, Civil No. 04-1301(SEC) at 9 (D.P.R. Dec. 6, 2006). Such a holding, if not reversed, would subvert the time-honored consensus as to the nature of tenure, undoing a careful balance between the respective interests of professors and universities. It would effectively convert tenured professors into at-will employees, removing their incentives to develop special expertise and chilling their academic pursuits – to the detriment of society and, indeed, of institutions of higher education.

Moreover, this "quite limited" remedy cannot be what Appellee Inter-American University envisioned, nor what it promised, when it referred in its Faculty Handbook to "the economic security and the professional satisfaction felt

by the faculty member who is offered tenure." Tenured professors terminated in contravention of contractual language and the widely-embraced guarantees of tenure should have the full set of remedies otherwise available under law, including reinstatement. *See, e.g.*, *Trimble v. West Va. Bd. of Dirs., Southern W. Va. Cmty. & Tech. Coll.*, 549 S.E. 2d 294 (Ct. App. W. Va. 2001) (holding that a tenured assistant professor terminated on grounds of alleged insubordination and not afforded appropriate due process should be reinstated with back pay and benefits from date of termination); *cf. Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980) (reinstating, and awarding tenure and back pay to, a female college instructor denied tenure on the basis of sex).

II. Law 80 Is Not Applicable To Tenured Professors As A Matter Of Puerto Rico law.

A. Law 80 sets the floor, not the ceiling, of worker protection from unjust termination.

The district court's determination that Law 80 affords tenured professors such as Professor Otero an exclusive remedy in the event of unjust termination would eviscerate the concept of tenure. Far from compelling this result, Puerto Rico law sensibly forbids it.

Law 80 was enacted to protect an otherwise unprotected category of worker: at-will employees, who by definition may be fired at any time at the will of their employer. *Negron v. Caleb Brett U.S.A., Inc.*, 212 F.3d 666, 669 (1st Cir. 2000)

("The legislature of Puerto Rico enacted Law 80 to alter the employment-at-will doctrine by providing a statutory remedy for employees terminated without just cause."). The statute, unique when enacted, is intended to protect workers' rights, affording wage-earners in Puerto Rico a floor of protection that is still available almost nowhere else in the United States. *See Weatherly v. International Paper Co.*, 648 F. Supp. 872, 878 (D.P.R. 1986) ("[As of 1986], [i]n no American jurisdiction, other than Puerto Rico, are employees protected from unjust dismissal by a general statute regulating the employment relationship.").[2]

Tenured professors are not at-will employees — very far from it. As discussed above, tenure is a promise of job *permanency*, absent the determination, upon process, of "adequate cause" or "extraordinary circumstances [based on] financial exigencies." 1940 Statement. Indeed, Inter-American University itself made this guarantee relevant, and foreclosed application of Law 80, by promising tenure: the university's faculty handbook states that "[a] tenured appointment is normally for the rest of appointee's working years or until resignation," and Professor Otero's June 1994 employment letter from the Board of Trustees indicated that he had been "granted … permanency." Appellant's Appendix at

[2] Since 1987, the state of Montana has provided similar protection. *See* Mont. Code Ann. §§ 39-2-901, *et seq*. (2005) (enacted 1987).

673. *See also* 1940 Statement (describing tenure as "permanent or continuous"); Van Alstyne, *Tenure: A Summary, Explanation, and "Defense"* at 4-5.

Far from rejecting the values of tenure, Puerto Rico sees "employment stability and [job] tenure [as] matters of great public interest in Puerto Rico," so much so that it has extended some measure of this stability through Law 80 to employees who could otherwise be fired at the whim of their employers. 1991 PR LAWS 45. The AAUP urges this Court not to construe Law 80 as providing the *only* remedy to terminated tenured faculty members, as the district court did, where contract and history guarantee them greater protections. As this Court has recognized in a related context, in the absence of a clear indication that Puerto Rico intended to establish a ceiling on the protections that workers enjoy, a court should not interpret a law clearly protective of workers' economic security to eviscerate the protections already afforded to another category of employees. *See McGaw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 10 (1st Cir. 1997) ("It would be perverse indeed to allow [an employer] to invoke a statute enacted for the protection of workers [i.e., Rule 80] as a justification for its unlawful labor practices.").

B. The Supreme Court of Puerto Rico has afforded university professors redress beyond Law 80 for adverse employment decisions that are not consistent with the university's policies and procedures.

The Supreme Court of Puerto Rico has also specifically addressed the question of whether a professor may pursue a breach-of-contract claim against his

or her university employer. In *Selosse v. Fundacion Educativa Ana G. Mendez*, a non-tenured faculty member alleged breach of contract and other causes of action against a private university that had denied her tenure. The Supreme Court found that "the rules and regulations governing the rights and obligations of faculty members are part of the contract between [a university and its professors]." *Selosse v. Fundacion Educativa Ana G. Mendez*, 122 D.P.R. 534, 22 P.R. Offic. Trans. 498, 514 (1988). The First Circuit subsequently recognized and ratified this decision, observing: "Puerto Rico law apparently regards private-university tenure decisions as subject to an implicit contractual constraint that the university will follow its own regulations. This is the holding of *Selosse v. Fundacion Educativa Ana G. Mendez*." *Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49, 51 (1st Cir. 2000).

The *Selosse* court never invoked Law 80, which by then had been in place for a decade, nor did it opine that the plaintiff's recovery was limited to some percentage of her salary. Rather, the court determined that the university had "violated the spirit of the contractual procedure," and it ordered the university to perform a "new, objective evaluation . . . that follows the procedures established in the regulations." *Selosse*, 22 P.R. Offic. Trans. at 517. In addition, the court declined to overturn the lower court's decision ordering the university to reinstate the dismissed faculty member. *Id*. at 518.

The district court in the case presently on appeal distinguished *Selosse* on the ground that the *Selosse* plaintiff was not discharged unjustly from a tenured position, but was instead denied tenure, and therefore could be reinstated and receive money damages. *Edwin Otero-Burgos et al. v. Inter-American University et al.*, Civil No. 04-1301(SEC) at 9 (D.P.R. Dec. 6, 2006). Distinguishing *Selosse* on this ground, and thereby denying Professor Otero a remedy granted to the plaintiff in *Selosse*, would imply against all logic that the Puerto Rico legislature intended to divest tenured faculty of their legal protections from outright termination, and minimize the remedy available to them, even as Puerto Rico law specifically protects their colleagues who are terminated from positions that do not afford the protections of tenure.

In sum, not only would the district court's Law 80 decision seriously undermine the important purposes of academic tenure, it would do so on the basis of a law purporting to protect workers, and in contravention of Supreme Court of Puerto Rico precedent. This Court should not strain to interpret the law in a way that eviscerates the important and longstanding protections of tenure.

CONCLUSION

For the foregoing reasons, the American Association of University Professors respectfully urges this Court to reverse the district court's holding that Law 80 provides the exclusive remedy for the termination of a tenured professor.

Respectfully Submitted,

_____

Seth A. Tucker
John E. Bies
M. Ryan Calo
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for Amicus Curiae American Association of University Professors

January 25, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2008, I caused to be sent by Federal Express ten (10) copies of the foregoing Brief to the following:

United States Court of Appeals
United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

I hereby certify that on this 25th day of January, 2008, I caused to be sent by first-class mail postage pre-paid two (2) copies the foregoing Brief to the following:

Charles S. Hey-Maestre
1060 Calle Borinquena
Condominio Santa Rita, Ofic. C-8
Rio Piedras, Puerto Rico 00925

Counsel for Appellants

Amancio Arias-Guardiola, Esq.
Arias Cestero & Arias Guiardiola
PO Box 13727
Santurce Station
San Juan, Puerto Rico 00908

Lorraine Jaurabe-Santos, Esq.
Inter-American University
PO Box 363255
San Juan, Puerto Rico 00936

Counsel for Appellees

_____

M. Ryan Calo