

IN THE COURT OF APPEALS OF THE STATE OF OREGON

UNITED ACADEMICS OF
OREGON STATE UNIVERSITY,

Employment Relations Board
No. UP-02-118

Respondent,

CA A174198

v.

OREGON STATE UNIVERSITY,

Petitioner.

**BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS AND OREGON HIGHER EDUCATION
FACULTY ASSOCIATIONS
IN SUPPORT OF RESPONDENT**

On Judicial Review of the Rulings, Findings of Fact,
Conclusions of Law, and Order of the Employment Relations
Board of the State of Oregon dated May 4, 2020

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I. INTEREST OF AMICI CURIAE

Amici are the national American Association of University Professors, and eight membership organizations and unions representing the faculty at six public universities in Oregon.¹ The administrations of these public universities filed an amicus curiae brief with this Court in the instant case, addressing the issue of shared governance.² Amicus AAUP and the other amici on this brief are involved in shared governance either nationally, at the state level, or at their respective institutions. Amici are all interested in protecting shared governance and honoring its relationship with collective bargaining representatives.³

Amicus, the American Association of University Professors (“AAUP”), founded in 1915, is a non-profit organization of over 45,000 faculty members, librarians, graduate students, and academic professionals, a significant number of whom are public sector employees. The mission of the AAUP is to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all

¹ Amici do not include membership organizations or unions at Oregon State University, which is a party in the instant case.

² See, Joint Brief of *Amici Curiae* The Oregon Public Universities, *Oregon State University v. United Academics of Oregon State University*, filed in the Court of Appeals of the State of Oregon, January 5, 2021.

³ This amicus brief does not address the application of the specific governance policies at the public universities, other than Oregon State University, to the facts of this case.

those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good. As discussed in greater detail below, the AAUP has played a primary role in establishing shared governance as an essential aspect of higher education. The AAUP, both independently and in concert with other higher education organizations, issues statements and interpretations that have been recognized by the Supreme Court and are widely respected and followed in American colleges and universities. *See, e.g., Bd. of Regents v. Roth*, 408 US 564, 579 n 17 (1972); *Tilton v. Richardson*, 403 US 672, 681-82 (1971). In cases that implicate AAUP policies or otherwise raise legal issues important to higher education or faculty members, the AAUP frequently submits *amicus* briefs in the Supreme Court, the federal and state appellate courts, and the National Labor Relations Board. *See, e.g., Grutter v. Bollinger*, 539 US 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 US 214 (1985); *NLRB v. Yeshiva University*, 444 US 672 (1980); *Keyishian v. Bd. of Regents*, 385 US 589 (1967); *Demers v. Austin*, 746 F3d 402 (9th Cir. 2014); *Urofsky v. Gilmore*, 216 F3d 401 (4th Cir. 2000); *Pacific Lutheran University*, 361 NLRB 1404 (2014). Courts have relied upon the interpretations of AAUP policies issued by the AAUP, as well as *amicus* briefs explicating AAUP policies and explaining prevailing practices in the profession, *see, e.g. McAdams v. Marquette Univ.*, 2018 WI 88, 914 NW2d 708, 730, 733 (Wisc. 2018); *Columbia University*, 364 NLRB No. 90,

n 82, n 104 (August 23, 2016); *Del. State College v. Ricks*, 449 US 250, 266 n 3 (1980)(dissenting opinion); *Adamian v. Jacobsen*, 523 F2d 929, 934 (9th Cir. 1975).

Amicus, the Oregon Tech Chapter of the American Association of University Professors represents faculty at Oregon Institute of Technology.

Amicus, the Graduate Employees Union, AFT/AAUP Local 6666, AFL-CIO, represents graduate assistants at Portland State University.

Amicus, Portland State University-American Association of University Professors (PSU-AAUP) represents instructional faculty and academic professionals employed by Portland State University.

Amicus, United Academics of the University of Oregon, AFT/AAUP represents faculty at the University of Oregon.

Amicus, the Oregon State Conference of the American Association of University Professors represents faculty, graduate employees, and academic professionals across Oregon.

Amicus, the Associated Academic Professionals, AFT-OR Local 6200, represents teaching faculty and librarians at Eastern Oregon University.

Amicus, Association of Professors, Southern Oregon University, represents faculty at Southern Oregon University.

Amicus, Western Oregon University Federation of Teachers, Local 2278, AFT, AFL-CIO (WOUFT) represents faculty at Western Oregon University.

II. SUMMARY OF ARGUMENT

Since its founding in 1915, amicus AAUP has played a pivotal role in developing principles and standards of the academic profession in higher education, including those related to academic freedom and tenure of individual faculty members, and the role of the faculty in institutional governance, generally known as “shared governance.” The AAUP’s long and well-respected history of formulating the principles and practices of shared governance is of particular relevance to evaluating OSU’s conduct in the instant case.

Amicus AAUP seeks to assist this Court in evaluating the claim made in the briefs submitted to this Court by Appellant Oregon State University (OSU) and amicus curiae Oregon Public Universities (OPU) that the Employment Relations Board (ERB) decision⁴ would threaten the system of shared governance in universities. Specifically, OSU and OPU argue that the ERB decision that OSU’s “Frequently Asked Questions” (“FAQs”)⁵ violated ORS 243.670(2)(a) would chill the free and open exchange of information that is essential to the process of shared governance.⁶ As discussed more fully, below, based on its extensive expertise and

⁴ *United Academics of Oregon State University v. Oregon State University*, Oregon Employment Relations Board, Case No. UP-021-18, 2020 OR PER LEXIS 34 (May 4, 2020).

⁵ Consistent with the ERB opinion, “the various questions and responses are referred to collectively as the ‘FAQs,’ even where the question was drafted by OSU.” *United Academics v. OSU*, OR PER LEXIS 34, at 5.

⁶ Petitioner’s Opening Brief, *Oregon State University v. United Academics of Oregon State University*, filed in the Court of Appeals of the State of Oregon,

experience, the AAUP can state, with great confidence, that OSU's FAQs did not constitute shared governance, nor does the ERB's decision threaten the shared governance process in any way. Rather OSU's baseless argument is nothing more than a post-hoc attempt to use shared governance as a rationalization for its unlawful conduct under Oregon state law.

Section I of this amicus brief describes the widely recognized system of shared governance set forth in AAUP policies and standards. In particular, the AAUP's 1966 *Statement on Government of Colleges and Universities*⁷ describes the system of shared governance for institutional decision-making by the three "components" of governance: the governing board; the President (which also encompasses the administration); and the faculty, through their governance bodies or "agencies." Section II of this amicus brief demonstrates the contrast between a shared governance system and OSU's conduct in creating and disseminating its FAQs. OSU's FAQs were not an instance of the university administration consulting with faculty shared governance bodies about institutional decision-making. To the contrary, OSU directed its FAQs to individual faculty members through a top-down, highly orchestrated, and tightly controlled propaganda

December 28, 2020, at pp. 52-53; Joint Brief of *Amici Curiae* The Oregon Public Universities, Oregon State University, *supra* at pp. 6-7, 16-20.

⁷ AAUP, *1966 Statement on Government of Colleges and Universities*, AAUP Policy Documents and Reports 117-125 (11th ed. 2015) (<https://www.aaup.org/report/statement-government-colleges-and-universities>) (last visited March 16, 2021)

campaign to influence individual faculty views about unionization in violation of ORS 243.670.

III. ARGUMENT

A. THE AAUP'S 1966 *STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES* HAS WIDELY INFLUENCED THE SYSTEM OF SHARED GOVERNANCE FOR INSTITUTIONAL CONSULTATION AND DECISION-MAKING IN HIGHER EDUCATION.

Amicus AAUP is the nation's oldest and largest organization dedicated exclusively to advancing the standards, ideals, and welfare of the academic profession. The AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure* ("1940 Statement")⁸ is considered the seminal statement on academic freedom and other standards of the academic profession. The 1940 *Statement*, which was jointly formulated by the AAUP and the Association of Colleges and Universities, has been endorsed by more than 250 higher education organizations and scholarly societies. Courts have relied upon the interpretations of AAUP policies issued by the AAUP, as well as amicus briefs explicating AAUP policies and explaining prevailing practices in the profession. See, e.g., *Minnesota State Board for Community Colleges v. Knight*, 465 US 271, 288 (1984) (The Court

⁸ AAUP, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AAUP Policy Documents and Reports 13-16 (11th ed. 2015) (<https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>) (last visited March 16, 2021)

stated, “[T]here is a strong, if not universal or uniform, tradition of faculty participation in school governance, and there are numerous policy arguments to support such participation,” and cited the AAUP’s amicus brief); *McAdams v. Marquette Univ.*, 2018 WI 88, 914 NW2d at 730, 733 (Wisconsin Supreme Court relied on “the analytical structure described by the AAUP” in its policy interpretations and its amicus brief, and referred to the 1940 *Statement* “as necessary to understand the scope of the academic freedom doctrine.”); *Del. State College v. Ricks*, 449 US at 266 n 3 (1980) (dissenting opinion) (citing AAUP amicus brief that “indicated . . . the ‘prevailing academic employment practices’ of American higher education.”); *Gray v. Bd. of Higher Educ., City of New York*, 692 F2d 901, 907 (2d Cir. 1982) (“Certain AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies, . . . *Adamian v. Jacobsen*, 523 F2d at 934 (9th Cir. 1975)).

Further advancing the interests of faculty in higher education, the widely recognized AAUP 1966 *Statement on Government of Colleges and Universities* (“1966 *Statement on Government*”) describes the system of shared governance for institutional decision-making by the three “components” of governance: the governing board; the President (which also encompasses the administration); and the faculty, through their governance bodies or “agencies.”⁹ The 1966 *Statement*

⁹ AAUP, 1966 *Statement on Government of Colleges and Universities*, AAUP Policy Documents and Reports, 117, 121 (11th ed. 2015).

on Government was jointly formulated by the AAUP, the American Council on Education (ACE), and the Association of Governing Boards of Universities and Colleges (AGB).¹⁰ The joint formulation of the 1966 *Statement on Government* by these three organizations, representing the interests of the different components of the university, demonstrates their mutual understanding that a system of shared governance is carried out through consultation and decision-making by the university's institutional governance bodies.¹¹ The widespread influence of the 1966 *Statement on Government* is reflected in the many colleges and universities, including some statewide systems, which are guided by the 1966 *Statement on Government* in their institutional shared governance policies.¹² Indeed, OSU's "Shared Governance Document"¹³ describes a system of shared governance consistent with the 1966 *Statement on Government*. Further, OPU's amicus brief acknowledges that the 1966 *Statement on Government* "has greatly influenced the

¹⁰ *Id.* at 117-18.

¹¹ See, Larry G. Gerber, *College and University Governance: How the AAUP Has Established Widely Accepted Norms of Shared Governance*, *Academe*, Vol. 101:1, 31, 33 (Jan.-Feb. 2015).

¹² *Id.* at 34 ("the governing boards of statewide systems in both California and Illinois formally recognized the statement as a guide for governance at their systems' institutions").

¹³ Oregon State University, "Shared Governance Document" (2020) (https://senate.oregonstate.edu/sites/senate.oregonstate.edu/files/sgtf_doc_0.pdf) (last visited March 16, 2021)

shared governance models of American higher education institutions, including Oregon's public institutions of higher education.”¹⁴

The AAUP's 1973 *Statement on Collective Bargaining*¹⁵ endorses the formation of faculty unions as an appropriate mechanism for preserving academic freedom and promoting sound academic government. Thus, amicus AAUP's principles and standards support both shared governance and collective bargaining as structures that “ensur[e] the faculty role in institutional decision making.”¹⁶

The AAUP agrees with OSU and OPU that “shared governance is essential to the maintenance of academic freedom and the free exchange of ideas and knowledge that lie at the heart of higher education.” OPU amicus brief, at 7. The AAUP has described “sound governance practice” as being “inextricably linked”¹⁷ to the exercise of faculty academic freedom, as “a sound system of institutional governance is a necessary condition for the protection of faculty rights.”¹⁸ For this reason, the 1966 *Statement on Government* describes the primary governance responsibilities of the faculty in matters of educational policy, including curriculum and faculty status, with shared responsibilities and consultation with

¹⁴ Joint Brief of *Amici Curiae* The Oregon Public Universities, *supra*, at pp. 15-16.

¹⁵ AAUP, *Statement on Collective Bargaining*, AAUP Policy Documents and Reports, 323 (11th ed. 2015).

¹⁶ AAUP, *Statement on Academic Government for Institutions Engaged in Collective Bargaining*, AAUP Policy Documents and Reports, 325 (11th ed. 2015).

¹⁷ AAUP, *On the Relationship of Faculty Governance to Academic Freedom*, AAUP Policy Documents and Reports, 123, 125 (11th ed. 2015).

¹⁸ *Id.* at 123.

the university administration and governing board on matters such as long range planning and budgets.

The 1966 *Statement on Government* describes three components of governance in the university: the governing board, the president (which also encompasses the administration), and the faculty. The system of shared governance refers to the deliberations and decision-making carried out by institutional components of the university, not by individuals.¹⁹ Thus, “the faculty” generally refers to the faculty as an institutional group, not to individual faculty members.²⁰ Faculty governance bodies are “[a]gencies for faculty participation in the government of the college or university [which] should be established at each level where faculty responsibility is present,” such as faculty-elected senates.²¹ In commending the 1966 *Statement on Government* to their institutional members, the ACE and AGB reiterated the structural nature of the governance system, with each “recogniz[ing] the [1966] [S]tatement as a

¹⁹ As the AAUP has explained, “An institution’s system of governance is the structure according to which authority and responsibilities are allocated to the various offices and divisions within the institution.” *Id.*

²⁰ For example, the following provisions in 1966 *Statement of Government* refer to the faculty as an institutional component, not as individuals: “The allocation of resources among competing demands is central in the formal responsibility of the governing board, in the administrative authority of the president, and in the educational function of the faculty”; “The selection of a chief administrative officer should follow upon a cooperative search by the governing board and the faculty”; “Faculty representatives should be selected by the faculty according to procedures determined by the faculty.”

²¹ 1966 *Statement on Government*, *supra*, at 121.

significant step forward in the clarification of the respective roles of governing boards, faculties, and administrations.”²²

As the 1966 *Statement on Government* stresses, the system of shared governance functions through the exchange of information among the governance bodies, including memoranda and reports circulated by board committees, the administration, and faculty committees, as well as the creation of joint ad hoc committees and faculty membership on administrative bodies. “The relationship calls for adequate communication among these components and full opportunity for appropriate joint planning and effort.... Effective planning demands that the broadest possible exchange of information and opinion should be the rule for communication among the components of a college or university.”²³ As the 1966 *Statement on Government* notes, “Whatever the channels of communication, they should be clearly understood and observed.”²⁴ Thus, full and open communications among shared governance bodies are an integral part of creating clearly structured and meaningful shared governance.

²² *Id.* at 117-18.

²³ *Id.* at 118-19.

²⁴ *Id.* at 121.

B. OSU’S ARGUMENT IS A POST-HOC ATTEMPT TO USE SHARED GOVERNANCE AS A RATIONALIZATION FOR ITS UNLAWFUL CONDUCT IN CREATING AND DISSEMINATING ITS FAQs TO OSU FACULTY MEMBERS.

1. OSU was not engaged in shared governance when it created and disseminated its FAQs to individual faculty members.

As discussed in Section I, *supra*, AAUP, OSU, and OPU agree on the importance of shared governance in colleges and universities. However, AAUP strongly objects to OSU’s attempt to characterize its FAQs as part of the shared governance system. Applying the standards and principles of the 1966 *Statement on Government* reveals the sharp contrast between OSU’s conduct and the shared governance process. As discussed, *supra*, the system of shared governance refers to deliberations and decision-making by university’s institutional components, consisting of the governing board, administration and the faculty, not by individuals. The “faculty” refers to the faculty as a collective entity, not as individual faculty members. The governing bodies of the faculty include faculty-elected senates that represent the university faculty as whole. Further, the 1966 *Statement on Government* emphasizes that shared governance calls for a well understood and clear structure for exchanging information among the governance components, through communications such as memoranda and reports circulated by board committees, the administration, the faculty senate, and faculty committees. This process promotes full, open, and honest communication among

the institutional governance bodies to support well-informed deliberation and consultation.

OSU's conduct in creating and disseminating the FAQs departs from any semblance of shared governance. OSU's FAQs were not part of the shared governance system of deliberation and consultation among and within governance bodies of the three components (faculty, administration and governing board). Rather, OSU unilaterally created the FAQs and disseminated them directly to individual faculty members and even to some non-faculty employees through a top-down process that was highly orchestrated and tightly controlled by the administration. Further, OSU's FAQs were not open and honest communications, an element that is essential to creating clearly structured and meaningful shared governance. To the contrary, OSU created the FAQs without disclosing that the OSU administration controlled both the questions and the answers. As the ERB's factual findings establish, "OSU's conduct...included soliciting questions from employees and changing some of those questions, answering some questions with non-factual information including advice, [and] using the FAQ webpage to respond to a newspaper article, and publishing such questions and answers from March to July 2018 on its FAQ webpage..." *United Academics v. OSU*, OR PER LEXIS 34, at 52.

No matter how hard OSU and OPU may try to shoehorn OSU's FAQs into shared governance, they simply do not fit. OSU and OPU seek to elide the

distinction between those communications that are part of shared governance and those that are not. OSU's FAQs did not constitute a free exchange of information and ideas in the system of shared governance by institutional governance bodies. Rather, as discussed further in Section II.B, *infra*, OSU directed its FAQs directly to individual faculty members in an effort to influence individual faculty views about unionization. Not only was this not shared governance, but as the ERB held, OSU's FAQs violated ORS 243.670(2)(a).

2. OSU is seeking to use shared governance as a cover for its unlawful conduct of creating and disseminating the FAQs in an effort to influence individual faculty members' views about unionization.

The way in which the OSU administration created and manipulated the FAQs demonstrates the real nature and purpose of OSU's communications. The ERB's factual findings describe OSU's conduct of writing many of the questions, including the initial set of 27 questions and some subsequent questions, while presenting them as faculty-initiated questions; soliciting faculty questions; and making substantive edits in questions that the OSU administration received from faculty, but failing to disclose that the administration had made such changes. Further, the ERB's findings reveal that the OSU administration's manipulation of the questions and responses advanced a position against unionization. As the ERB explained, "OSU's responses were not merely factual, but included various opinion statements, predictions about the future, and legal positions. OSU also

advised employees how to take certain actions, such as retracting a signed authorization card or using campus activism to oppose the organizing drive.”

United Academics v. OSU, OR PER LEXIS 34, at 52.

Thus, OSU used the FAQs as a means of communicating the administration’s opposition to unionization in an effort to influence individual faculty members’ votes, in violation of ORS 243.670(2)(a). OSU’s attempt to cloak their conduct in the mantle of shared governance does not make the FAQs either shared governance or protected speech under state law. Indeed, it is OSU that threatens the integrity of shared governance with its baseless claim that its FAQs are an example of the free exchange of information that is essential to institutional governance of the university.

IV. CONCLUSION

For the foregoing reasons, and those in the answering brief of the Respondent United Academics of Oregon State University, Amici respectfully request that this Court affirm the ERB's decision.

DATED this 16th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b), and the word-count of this brief is 3,380.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED this 16th day of March, 2021.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Appellate Court Administrator through the electronic filing portal.

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