

No. 23-15339

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ALICE WIELAND,

Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER
EDUCATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Nevada
No. 3:19-cv-00724-MMD-CLB
Hon. Miranda M. Du

**MOTION FOR LEAVE TO FILE BRIEF OF NEVADA FACULTY
ALLIANCE AND AMERICAN ASSOCIATION OF UNIVERSITY
PROFESSORS AS *AMICI CURIAE***

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Pursuant to Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rule 29(a) the Nevada Faculty Alliance and the American Association of University Professors move this honorable Court for leave to file the attached Brief of *Amici Curiae* attached in support of Plaintiff-Appellant and in favor of reversal. Plaintiff-Appellant consents to the filing of the attached *Amici* Brief. Defendant-Appellee was contacted but did not provide consent. In support of this Motion, *Amici* state as follows:

The Nevada Faculty Alliance (“NFA”) is the statewide association of faculty at the colleges and universities of the Nevada System of Higher Education (“NSHE”). NFA represents collective bargaining units at the College of Southern Nevada, Truckee Meadows Community College, and Western Nevada College. NFA maintains advocacy chapters at Great Basin College, Nevada State College, the University of Nevada, Las Vegas, and the University of Nevada, Reno (“UNR”). The NFA is affiliated with the American Association of University Professors and the American Federation of Teachers, which together represent over 300,000 higher education professional employees in North America. The organization advocates for academic freedom, shared governance, faculty rights, the common good, civils rights, and human rights.

The American Association of University Professors (“AAUP”) is a non-profit organization that represents more than 43,000 faculty, librarians, graduate

students, and academic professionals employed at institutions of higher education across the United States. Founded in 1915, the AAUP is committed to advancing academic freedom and shared governance, defining fundamental professional values and standards for higher education, promoting the economic security of faculty and other academic workers, and ensuring higher education's contribution to the common good. In furtherance of these ends, the AAUP has published numerous statements of principle and policy, which represent the collective experience and carefully considered judgment of the academic profession. These statements are widely respected and followed by American colleges and universities and have been recognized by the Supreme Court of the United States, as well as this and other courts. *E.g.*, *Bd. of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681–82 (1971); *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975); *McAdams v. Marquette University*, 914 N.W.2d 708, 730, 733 (Wis. 2018). In addition, the AAUP frequently submits amicus briefs to this and other courts in cases that implicate AAUP policies or that otherwise involve legal issues important to faculty members and the broader higher education community. *E.g.*, *Freyd v. Univ. of Oregon*, 990 F.3d 1211 (9th Cir. 2021); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

Proposed *amici* submit to this Court that they have a special interest in this matter and can provide valuable assistance given their unique insights into higher

education in the state of Nevada and across the United States. These insights support and enlarge upon the issues addressed in the parties' briefs and can be helpful to the Court's adjudication of this appeal. The brief specifically discusses how student evaluations should be used in assessing the quality of faculty teaching given the growing body of evidence that gender bias often plays a role in those evaluations. It also addresses the procedures for handling discrimination claims within higher education institutions and the way decisionmakers respond—or fail to respond—to concerns about the negative impact of gender bias on student evaluations of female instructors.

Proposed *amici* have a distinct viewpoint on the proper functioning of the tenure evaluation process and potential biases therein. This perspective can offer the Court valuable insights in evaluating the merits of the appeal.

Proposed *amici*'s interest also lies in making certain that processes and decisions made in higher education institutions are fair, transparent, and consistent with the values and standards that academic institutions should uphold and with the law.

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For these reasons, proposed *amici* respectfully request that this Court grant this Motion for Leave to File a Brief of *Amici Curiae* and accept the attached brief for filing.

Respectfully submitted,

/s/ Luke Busby

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DATED: August 20, 2023

CERTIFICATE OF COMPLIANCE WITH RULE 27(d)(2)(A)

IT IS HEREBY CERTIFIED:

1. That the foregoing Motion for Leave to File a Brief as *Amici Curiae* complies with the type-volume limitation of Rule 27(d)(2)(A), Federal Rules of Appellate Procedure, because this motion contains 975 words, excluding the parts of the brief exempted by Rule 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

/s/ Luke Busby
Luke Busby
Attorney for Amici Curiae

DATED: August 20, 2023

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Motion for Leave to File a Brief as *Amici Curiae*, was made, this 20th day of August 2023, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

DATED: August 20, 2023

/s/ Luke Busby
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No. 23-15339

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**BRIEF OF *AMICI CURIAE* NEVADA FACULTY ALLIANCE AND
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN
SUPPORT OF PLAINTIFF-APPELLANT AND IN FAVOR OF REVERSAL**

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Nevada Faculty Alliance and American Association of University Professors makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

NO.

DATED: August 20, 2023

Luke Busby, Esq.

/s/ Luke Busby
Luke Busby, Esq.

Attorney for Amici Curiae

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INTEREST OF *AMICI CURIAE*

The Nevada Faculty Alliance (“NFA”), founded in 1983, is the statewide association of faculty at the colleges and universities of the Nevada System of Higher Education (“NSHE”). NFA represents collective bargaining units at the College of Southern Nevada, Truckee Meadows Community College, and Western Nevada College. NFA maintains advocacy chapters at Great Basin College, Nevada State College, the University of Nevada, Las Vegas, and the University of Nevada, Reno (“UNR”). The NFA is affiliated with the American Association of University Professors and the American Federation of Teachers, which together represent over 300,000 higher education professional employees in North America. The organization advocates for academic freedom, shared governance, faculty rights, the common good, civil rights, and human rights.

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principle and policy, which represent the collective experience and carefully considered judgment of the academic profession. These statements are widely respected and followed by American colleges and universities and have been recognized by the Supreme Court of the United States, as well as this and other courts. *E.g.*, *Bd. of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681–82 (1971); *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975); *McAdams v. Marquette University*, 914 N.W.2d 708, 730, 733 (Wis. 2018). In addition, the AAUP frequently submits amicus briefs to this and other courts in cases that implicate AAUP policies or that otherwise involve legal issues important to faculty members and the broader higher education community. *E.g.*, *Freyd v. Univ. of Oregon*, 990 F.3d 1211 (9th Cir. 2021); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

NFA and the AAUP seek to participate as *amici curiae* in the present case for three principal reasons. First, they wish to bring to this Court’s attention the significant body of research demonstrating that gender bias tends to negatively affect student evaluations of female instructors at the university level. Second, amici seek to highlight AAUP policy statements that have long emphasized that standards of the profession demand cautious and limited use of student evaluations in assessing instructional quality due to well-documented problems with their reliability and accuracy, including the presence of gender bias. Third, amici seek to explain that, in

certain circumstances, the use of student evaluations in connection with a denial of tenure or other adverse employment action can constitute evidence supporting a claim of gender-based disparate treatment under Title VII.

SUMMARY OF THE ARGUMENT

I. A sizeable corpus of empirical research demonstrates that gender bias tends to affect student evaluations of teaching, often resulting in diminished assessments of female instructors at the university level. AAUP statements have long stressed the need for judicious use of student evaluations due to limitations on their reliability and accuracy as measures of instructional quality. Such limitations include the intrusion of extraneous considerations, including gender bias, into the assessments. Improper use of student evaluations runs contrary to professional standards, including the requirement that decisions concerning tenure and other matters not be based on gender bias or other forms of discrimination.

II. The AAUP has long opposed discrimination on the basis of sex and other protected characteristics. Courts charged with applying Title VII's prohibition on gender discrimination should take account of empirical evidence that student evaluations of teaching tend to reflect gender biases and should recognize that, in certain cases, the use of such evaluations by decisionmakers can be a factor supporting a claim of disparate treatment.

Amici urge this Court to reverse the district court's grant of summary

judgment against Dr. Wieland's Title VII claim.

ARGUMENT

I. Professional academic standards, as articulated in AAUP policy statements, call for careful and limited use of student evaluations of teaching, particularly in light of the growing body of evidence that gender bias often plays a role in those assessments.

A well-established body of research demonstrates that women and other marginalized groups face significant biases in student evaluations of teaching (SETs) in higher education. For example, a prominent 2021 metastudy of more than 100 articles on bias in SETs found that student evaluations are impacted by characteristics unrelated to actual instructor quality and that factors including the instructor's gender, race, sexual orientation, and disability status affect student ratings. Kreitzer, Rebecca J. & Sweet-Cushman, Jennie, *Evaluating Student Evaluations of Teaching: A Review of Measurement and Equity Bias in SETs and Recommendations for Ethical Reform*, *Journal of Academic Ethics* 20 (1):73-84 (2021). That study also noted that, compared with women, male instructors are perceived as more accurate in their teaching, more educated, less sexist, more enthusiastic, more competent, more organized, easier to understand, more prompt in providing feedback, and that they are less penalized for being tough graders. In addition, studies show that students expect women and men to conform to prescribed gender roles, with students preferring professors with masculine traits while penalizing women instructors who do not conform to feminine stereotypes. Other

research reveals similar dynamics. *E.g.*, Whitney Buser, Cassondra L. Batz-Barbarich & Jill Kearns Hayter, *Evaluation of Women in Economics: Evidence of Gender Bias Following Behavior Role Violations*, 86 *Sex Roles* 695–710 (2022) (finding “strong evidence for bias against female faculty after the first exam grade” when compared to male faculty); Jennifer Chatman, Daron Sharps, Sonya Mishra, Laura J. Kray & Michael S. North, *Agentic but not warm: Age-gender interactions and the consequences of stereotype incongruity perceptions for middle-aged professional women*, 173 *Organizational Behavior and Human Decision Processes* (2022) (finding that older women are subjected to lower student evaluations when compared to men). And while such bias is a pervasive problem, empirical evidence demonstrates that it is especially pronounced in certain academic contexts such as business schools, where women are underrepresented. *See AACSB, 2021 Business School Data Guide*, 32–36, 60 (October 2021); Janaki Gooty, et al., *Stronger Together: A Call for Gender-Inclusive Leadership in Business Schools*, *Journal of Management* 1–10 (2023); Linda Scott, *Let’s Be Honest About Gender Discrimination at Business Schools*, *Bloomberg*, July 14, 2014, available at <https://www.bloomberg.com/news/articles/2014-07-28/most-business-schools-discriminate-against-female-faculty#xj4y7vzkg>.

The AAUP has long recognized that the misuse of SETs by colleges and universities—including improper reliance on evaluations that are infected with

gender bias—can run afoul of professional standards. Beginning with the 1975 *Statement on Teaching Evaluation*, the AAUP has emphasized that “responsible evaluation of teaching” and “arriving at fair judgments of a faculty member’s teaching” requires that any metric purporting to reflect teaching quality be used with caution and with adequate recognition of their limitations and deficiencies. AAUP POLICY DOCUMENTS AND REPORTS 219–22 (11th ed. 2015) (recognizing the “practical usefulness” of “carefully applied performance measures” and emphasizing that the evaluation of teaching performance presents “difficulties in measurement” that must be accounted for). The touchstone for assessing the utility of such metrics is their reliability as accurate measures of teaching performance. *Id.* (emphasizing that evaluations of teaching effectiveness must be based upon “accurate” data points).

The 1975 *Statement* noted that measures of student perceptions can provide useful insights into some important aspects of a faculty member’s teaching performance, provided that they are considered alongside multiple other sources. *Id.* But as with other measures of teaching, reliability and accuracy is fundamental to proper use of measures of student perceptions. *Id.* at 219–20 (stressing the importance of “teaching performance data that can be relied upon”).

In 2005, the AAUP revisited these issues in *Observations on the Association’s 1975 Statement on Teaching Evaluation*, AAUP POLICY DOCUMENTS AND REPORTS

223–26. That statement recognized that significant changes within higher education had occurred since the 1975 *Statement*, noting in particular that “student evaluations of teaching are increasingly relied upon in decisions about renewal, tenure, promotion, post-tenure review, and salary increases.” *Id.* at 223. In keeping with the concerns of the 1975 *Statement*, the 2005 statement focused on an issue that “continue[s] . . . to trouble the evaluation of teaching: how best to ensure that evaluations of teaching provide accurate information about the effectiveness of teaching.” *Id.* Among these concerns, the 2005 statement cited the growing body of evidence that student evaluations do not “exclusively measur[e] teaching effectiveness” but “tend also to measure” the instructor’s gender and other “matters extraneous to the quality of teaching,” and acknowledged the need to eliminate such influences. *Id.* at 224. Since the publication of the 2005 statement, that body of evidence has continued to grow.

Professional standards require that university decisionmakers take measures to avoid these deficiencies in SETs, as “[i]t is the responsibility of the institution” to maintain “policies and procedures that ensure a sound basis for individual judgments fairly applied to all.” 1975 *Statement* at 221. When that does not occur—when “[c]asual procedures [and] a paucity of data” are permitted to dictate important matters such as who receives tenure and who does not—the basic standards of the profession are violated. *Id.* at 220. In addition, when decisions on such important

matters turn on metrics that are not only unreliable but that also reflect gender or other unacceptable biases, they result in impermissible discrimination and run afoul of fundamental professional standards.

II. In certain circumstances, the use of student evaluations in connection with adverse employment actions can constitute evidence supporting a claim of gender-based disparate treatment under Title VII.

The AAUP has long opposed discrimination on the basis of gender and other protected characteristics. *On Discrimination*, available at <https://www.aaup.org/discrimination> (declaring the AAUP’s opposition to “colleges and universities practicing illegal or unconstitutional discrimination, or discrimination on a basis not demonstrably related to the job function involved, including, but not limited to, age, sex, disability, race, religion, national origin, marital status, or sexual orientation”); *On Processing Complaints of Discrimination*, AAUP POLICY DOCUMENTS AND REPORTS 355 (“The Association has, through its statement *On Discrimination*, declared its opposition to improper discrimination in colleges and universities and has resolved to work toward correcting inequities[.]”); *see also Recommended Institutional Regulations on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS AND REPORTS 85 (“All members of the faculty, whether tenured or not, are entitled to protection against illegal or unconstitutional discrimination by the institution, or discrimination on a basis not demonstrably related to the faculty member’s professional performance, including but not limited

to race, sex, religion, national origin, age, disability, marital status, or sexual orientation.”).

In assessing claims of gender-based discrimination under Title VII, courts should take into account the empirical evidence that gender bias often plays a role in student evaluations of teaching. In certain circumstances, the use of such evaluations can support a disparate treatment claim.

In particular, the manner in which decisionmakers respond—or fail to respond—to concerns about the negative impact of gender bias on student evaluations of female instructors can support a disparate treatment claim. If decisionmakers dismiss a faculty member’s concerns about potential gender bias in student evaluations out of hand or give dubious justifications for continuing to rely on them, such actions can be probative of “[a] disdain for women’s issues, . . . [which] is evidence of a discriminatory attitude towards women,” *Lynn v. Regents of Univ. of California*, 656 F.2d 1337, 1343 (9th Cir. 1981), and can support a Title VII disparate treatment claim.

Here, Dr. Wieland was a high-achieving faculty member who stood out for her excellent performance. From the time she joined UNR in July of 2012 until she was denied tenure in the latter part of 2017, Dr. Wieland received an impressive array of awards for her research, teaching, and service—the three categories upon which tenure review at UNR is based. Appellant’s Opening Br. at 5–7. Yet Dr.

Weiland was denied promotion allegedly based on the student evaluations of her teaching. *See* Dist. Ct. Dec. at 13 – 14. This denial occurred notwithstanding that she raised the issue of the gender bias in student evaluations to the tenure review committee in her request for reconsideration. The reliance on these evaluations, and the committee’s knowledge of alleged bias in the evaluations, is relevant evidence, as it tends to show that the committee may have continued to place heavy emphasis on the student evaluations without adequately considering whether they were reliable indicators of instructional quality and without adequately considering other relevant evidence of teaching performance. *See* Appellant’s Opening Br. at 27–28.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to reverse the district court’s judgment as to Dr. Wieland’s Title VII claim.

DATED: August 20, 2023

Respectfully submitted,

/s/ Luke Busby
LUKE BUSBY

Attorney of Record for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that: This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3030 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in Times New Roman 14-point font.

DATED: August 20, 2023

/s/ Luke Busby

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Attorney for Amici Curiae

CERTIFICATE OF AUTHORSHIP

The undersigned counsel affirms that no counsel for any party authored this brief in whole or in part; no party or party's counsel contributed money to fund preparation or submission of the brief; and no one but Nevada Faculty Alliance and the American Association of University Professors contributed money to fund the preparation or submission of this brief. In the interest of full disclosure, the AAUP states that it may seek grant funding from the AAUP Foundation, a Delaware non-profit corporation, for costs associated with preparing and filing this brief. See Fed. R. App. P. 29(a)(4)(E).

DATED: August 20, 2023

/s/ Luke Busby

LUKE BUSBY

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

DATED: August 20, 2023

/s/ Luke Busby
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