

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRESIDENT AND TRUSTEES OF
BATES COLLEGE

Employer

and

Case 01-RC-284384

MAINE SERVICE EMPLOYEE ASSOCIATION
SEIU LOCAL 1989

Petitioner

AMICUS BRIEF OF
THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Submitted by:

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STATEMENT OF INTEREST

The American Association of University Professors (the “Association” or “AAUP”) is a non-profit organization representing the interests of more than 45,000 faculty, librarians, graduate students, and academic professionals employed at institutions of higher education across the United States. A significant number of the AAUP’s members work at private colleges and universities that fall within the jurisdiction of the National Labor Relations Board (the “Board” or “NLRB”).

Since its founding in 1915, the AAUP has been 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. To these ends, the AAUP has published numerous statements of policy and principle, including the 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, the 1940 *Statement of Principles on Academic Freedom and Tenure*, and the 1966 *Statement on Government of Colleges and Universities*. These and other AAUP statements are widely respected and followed in American colleges and universities. They have also been recognized by the Supreme Court of the United States, federal courts of appeals, state courts, and the NLRB, which have relied upon the AAUP’s interpretations of its policies and upon amicus briefs explicating AAUP policies and explaining prevailing practices in the profession.¹

¹ *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); *Columbia University*, 364 NLRB 1080, 1089 n.82, 1095 n.104 (2016).

The AAUP frequently submits amicus briefs to the NLRB in cases that implicate AAUP policies or that otherwise involve legal issues important to faculty members, academic workers, or the higher education community in general. *See, e.g., Columbia University*, 364 NLRB 1080, 1080 n.3 (2016); *Pacific Lutheran University*, 361 NLRB 1404 (2014); *Brown University*, 342 NLRB 483, 483 n.1 (2004); *New York University*, 332 NLRB 1205, 1205 n.3 (2000). The AAUP seeks to participate as amicus in the present matter for three principal reasons. First, the AAUP seeks to share with the Board its views on the question of whether bargaining units that include faculty and staff employed at colleges and universities are appropriate under the National Labor Relations Act (the “NLRA”). Second, the AAUP wishes to clarify how two of its most prominent and longstanding policy statements—the 1940 *Statement of Principles* and the 1966 *Statement on Government of Colleges and Universities*—should be applied to the case at hand. Third, the AAUP seeks to clarify that the exclusion of tenured and tenure-track faculty members from the petitioned-for unit in this matter does not imply that they are not employees entitled to the full protection of the NLRA.

SUMMARY OF THE ARGUMENT

The AAUP’s brief consists of three parts. Part I argues that faculty and staff employed at institutions of higher education have much in common and that, at certain institutions, they can share a “community of interest” sufficient to render their joint inclusion in a single bargaining unit appropriate under the NLRA—provided that faculty members are afforded a meaningful mechanism for registering their desires on the issue.² Faculty undoubtedly have a number of

² The Regional Director found the petitioned-for unit appropriate based “both on the presumption and on the existence of traditional community of interest factors.” Decision and Direction of Election, Case 01-RC-284384, at 9 (Dec. 16, 2021). The AAUP therefore addresses the community of interest factors, but views it as unnecessary for the Board to address any questions concerning

distinctive interests, and it is proper for the Board to provide a procedure—such as the *Sonotone* election procedure utilized in this case—that protects those interests. Part II explains that nothing in AAUP pronouncements on academic freedom and shared governance necessarily precludes faculty members from deciding to be included in a bargaining unit alongside staff. Part III urges the Board to make clear, in its written decision, that the exclusion of tenured and tenure-track faculty from the proposed unit in this case does not imply that tenure-line faculty—at Bates College or anywhere else—are not protected by the NLRA.

ARGUMENT

I. A bargaining unit that includes both faculty and staff can be appropriate under the NLRA, provided that the desires of faculty members are taken into account.

The NLRA empowers employees to organize themselves into “a unit” that is “appropriate” for the purposes of collective bargaining. 29 U.S.C. § 159(a)–(b); *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610–11 (1991). Because the NLRA “requires only that the unit be ‘appropriate,’” it need not be “the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit.” *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950) (emphasis in original), *enforced*, 190 F.2d 576 (7th Cir. 1951); *accord Marks Oxygen Co.*, 147 NLRB 228, 229–30 (1964) (“[I]t is not essential that a unit be the *most* appropriate unit.” (emphasis in original)). A unit is “appropriate” if the employees included in it share a “community of interest.” *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985); *P.J. Dick Contracting*, 290 NLRB 150, 151 (1988). The community of interest analysis “involves weighing such factors as whether the employees have comparable or divergent duties, qualifications, compensation, hours, supervision, and conditions of employment.” *International Bedding Co.*, 356 NLRB 1336, 1337 (2011) (citing *Overnite Transportation Co.*, 322 NLRB 723,

the “presumptive appropriateness” of a “wall-to-wall unit.” See NLRB Order dated Mar. 18, 2022 (granting Employer’s request for review in part).

724 (1996)). The purpose of requiring the existence of a community of interest is to ensure that the unit is minimally “cohesive”—that is, that it is “*relatively* free of conflicts of interest” so that effective collective bargaining can occur. *Action Auto.*, 469 U.S. at 494 (1985) (emphasis added) (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941)).

In keeping with their Section 7 right to self-organization, “the initiative in selecting an appropriate unit resides with the employees.” *Am. Hosp. Ass’n*, 499 U.S. at 610. The desires of the employees concerning the scope of the unit must therefore be taken into account as a relevant factor when assessing its appropriateness. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941) (“Naturally the wishes of employees are a factor in a Board conclusion upon [the appropriateness of] a unit.”); *Marks Oxygen Co.*, 147 NLRB at 230 (affirming that “a petitioner’s desires as to the unit is always a relevant consideration”).

Faculty and staff at colleges and universities generally have much in common. In certain instances, these similarities can support a finding that they share a community of interest. The facts of the present case are illustrative. As the Regional Director’s decision explains, the non-tenured and non-tenure-track faculty (i.e., contingent faculty) and staff at Bates College “enjoy similar benefits, are subject to many of the same policies, are functionally integrated, and have frequent contact with one another at their common worksite.” Decision and Direction of Election, Case 01-RC-284384, at 8 (Dec. 16, 2021) (hereinafter, “D&DE”). For example, “library staff work regularly with professors or with any member of the campus community requiring support with information technology or scholarly research”; faculty liaisons are “involve[d] with competitive sports teams,” and “the athletic facilities are available for the use of all members of the community”; and “facilities personnel may interact with any student or employee requiring their services.” *Id.* at 7. The Regional Director also found that some staff “have advanced degrees,

including PhDs” and that some “have also taught courses for credit in the First Year Seminar program.” *Id.* at 6 & n.8. At the same time, faculty and staff are different in various respects, which the Regional Director recognized in this case when she observed that “the petitioned-for employees have varied skills, training, and job functions, as is typical in a wall-to-wall unit.” *Id.* at 8. Taking an overall view of these similarities and differences, the Regional Director determined that the petitioned-for unit was appropriate, a conclusion she “[b]ased both on the presumption [of appropriateness afforded to wall-to-wall units] and on the existence of traditional community of interest factors.” *Id.* at 9 (emphasis added).

The Regional Director’s community of interest analysis is reasonable and well supported in fact. It is true that there are important differences between faculty and staff with respect to the nature of the work they perform, the particular terms and conditions under which that work occurs, and the pay and benefits they receive. But the community of interest test does not require that employees’ job duties, terms of employment, and benefits be identical in all respects. Rather, the critical question is whether the proposed unit has some minimal cohesiveness to it such that effective collective bargaining could reasonably take place. The evidence pointed to by the Regional Director in this matter indicates that such a basic commonality of interest does exist among the contingent faculty and staff at Bates College.

The Board should reject the Employer’s invitation to create a new, categorical rule barring faculty from being included in a unit with staff. At the same time, however, respect for the important differences that often exist between faculty and staff favors providing a mechanism for faculty to register their desire to be included (or not) in a unit with staff.³ In the present case, a

³ In addition to the *Sonotone* procedure used in this case, the Board has created other procedures for the conduct of self-determination elections among employees in appropriate circumstances. For instance, under the Board’s *Armour-Globe* doctrine, employees sharing a community of

statutorily-mandated self-determination election procedure has already been employed. Because the proposed unit includes both professional and non-professional employees, the Regional Director directed that the professional employees (which include both contingent faculty and professional staff) be given a two-part *Sonotone* ballot.⁴ D&DE at 1, 12–13; *see Sonotone Corp.*, 90 NLRB 1236 (1950); *Pratt & Whitney*, 327 NLRB 1213, 1217–18 (1999) (reaffirming the appropriateness of the *Sonotone* procedure). Although the group of professional employees in this case is not comprised entirely of faculty members, the Regional Director’s decision notes that faculty are a majority of the professionals who were provided with a *Sonotone* ballot. D&DE at 5–6 (stating that the unit includes “between 75–95 contingent faculty” and “approximately 50” professional staff employed as “data analysts, athletic trainers, project managers, technology consultants, nurse practitioners, psychologists, nurses, and librarians”). In these circumstances, the AAUP believes that the *Sonotone* election mechanism provides sufficient protection for faculty’s distinctive interests vis-à-vis staff (both professional and non-professional), ensures that faculty members’ desires are adequately accounted for in determining the appropriate scope of the bargaining unit, and minimizes any risk that faculty’s unique interests will frustrate, or be frustrated by, the collective bargaining process.

interest with an already represented unit of employees may vote on whether they wish to be included in the existing bargaining unit. *See Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937). Similarly, when an incumbent union seeks to add a group of previously unrepresented employees to an existing unit and no other labor organization is involved, the Board conducts a self-determination election, provided that the employees to be added constitute an identifiable, distinct segment and share a community of interest with unit employees. *See, e.g., Warner-Lambert Co.*, 298 NLRB 993, 995 (1990); *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972).

⁴ The *Sonotone* ballot implements Section 9(b)(1)’s directive that “the Board shall not . . . decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.”

II. AAUP statements on academic freedom and shared governance do not support categorically barring faculty from being included in bargaining units with staff.

The Employer incorrectly asserts that AAUP statements on academic freedom and shared governance support its claim that faculty and staff cannot be included in the same unit.

A. Academic freedom and the 1940 *Statement of Principles*

The 1940 *Statement of Principles on Academic Freedom and Tenure*, authored jointly by the AAUP and the Association of American Colleges (now the Association of American Colleges and Universities), has been endorsed by more than 250 professional organizations and learned societies and has been incorporated into hundreds of college and university faculty handbooks. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AAUP POLICY DOCUMENTS & REPORTS 13–19 (11th ed. 2015) (hereinafter, the “1940 *Statement*”). The 1940 *Statement* defines the concept of academic freedom and prescribes certain basic procedural guidelines for the protection of that freedom. With the gloss of meaning that comes from over eighty years of interpretation and application by the AAUP, the 1940 *Statement* has become the standard for practices concerning academic freedom in higher education, and adherence to those standards has become a crucial indicator of an institution’s membership in the broader higher education community. *See, e.g.*, Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, in FREEDOM AND TENURE IN THE ACADEMY 3, 4 (William W. Van Alstyne ed., 1993); *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975); *McAdams v. Marquette University*, 914 N.W.2d 708, 730, 733 (Wis. 2018).

The Employer contends that the 1940 *Statement* “is one of the most significant points of differentiation with staff” because “it protects the freedom of faculty—and only faculty—to pursue their teaching, scholarship and research without undue restrictions and administrative intrusion.” Employer’s Brief on Review, at 20. The Employer’s characterization of the 1940 *Statement* is

misleading for two reasons. The first is the Employer’s faulty assumption that it is only faculty members who have any interest *at all* in academic freedom. In fact, given that academic freedom is “indispensable to the success of an institution in fulfilling its obligations to its students and to society,” 1940 *Statement* at 14, *all* employees at institutions of higher education—faculty and staff alike—have an interest in preserving and advancing academic freedom. The 1940 *Statement* makes clear that academic freedom “applies to . . . teaching and research,” but nothing in it suggests that staff have no interest in ensuring that their institutions respect that freedom, which, after all, is the mainstay of the common enterprise in which all of the institution’s employees are engaged. See Cynthia Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 949 (1992) (“[E]mployees do have a genuine interest as employees in the quality of what they collectively produce. First, and most obviously, employees have a direct economic interest in the ongoing success of the enterprise on which their livelihoods depend.”). Furthermore, as the AAUP has expressly recognized, some staff—such as librarians and other academic professionals—have a particularly palpable interest in academic freedom approaching that held by faculty members themselves. E.g., AAUP, *Joint Statement on Faculty Status of College and University Librarians*, AAUP POLICY DOCUMENTS & REPORTS 210–11 (11th ed. 2015) (recognizing that “[c]ollege and university librarians share the professional concerns of faculty members” and that “[a]cademic freedom is indispensable to librarians in their roles as teachers and researchers”); AAUP, *College and University Academic and Professional Appointments*, AAUP POLICY DOCUMENTS & REPORTS 212–15 (11th ed. 2015) (hereinafter, “*College and University Appointments*”) (recognizing that professional staff “with significant academic responsibilities should have academic freedom in the

discharge of those responsibilities and in their civic lives” and that “colleges and universities should recognize the free-expression rights of all of their employees”).

The second erroneous notion which underlies the Employer’s characterization of the 1940 *Statement* is that faculty members’ particular interest in academic freedom inherently and inexorably conflicts with the interests of staff. Nothing in the 1940 *Statement* suggests an active opposition between the employment-related interests of staff and faculty’s interest in academic freedom. Cf. Estlund, *What Do Workers Want?*, 140 U. PA. L. REV. at 951–52 (“Highly trained professionals are not, however, the only employees who transcend parochial pocketbook concerns. Abundant anecdotal evidence demonstrates the interest of nonprofessional employees in the quality and safety of the product or service they produce.”). Nor do AAUP statements concerning collective bargaining suggest that academic freedom will be undermined if bargaining takes place in a unit containing both faculty and staff. On the contrary, AAUP statements recognize that faculty and staff often have significant common interests and suggest that those interests can be advanced through collective bargaining. E.g., *College and University Appointments*, at 212 (explaining that the AAUP has afforded membership eligibility to “professional appointees who are not members of the faculty” in collective bargaining chapters since 1972 and that this membership has been accorded “on the basis of a ‘community-of-interest’ determination”); *id.* at 213 (stating that “[f]aculty members and other professional appointees in the academy share similar and overlapping commitments and frequently work with each other on academic and administrative responsibilities” and that “[t]hese overlapping responsibilities create a community of interest” that extends to “collective bargaining”); AAUP, *Academic Unionism Statement* (2005), available at <https://www.aaup.org/academic-unionism-statement> (recognizing that “[u]nions have proven effective in struggles to defend tenure [and] protect academic freedom” and that “[u]nions enable

faculty and other members of the academic community, who would be powerless alone, to safeguard their teaching and working conditions by pooling their strengths”).

Some staff whose job duties are far removed from teaching and research may not have as obvious or tangible an interest in academic freedom as faculty and professional academic staff do, but this does not mean that a combined faculty-and-staff unit could not deal productively with issues related to academic freedom that might arise during collective bargaining. Accordingly, faculty members could plausibly conclude that their overall interests would be best served if they were part of a larger unit possessed of greater bargaining power with which to meet the employer during negotiations or in the event of economic action. In any event, the text and policies of the NLRA militate in favor of leaving this judgment to the employees themselves—as occurred in this case.

B. Shared governance and the AAUP’s *Statement on Government of Colleges and Universities*

The AAUP has long advocated for shared governance as a means for faculty to participate in college and university policymaking that affects their interests. Formulated in 1966 by the AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges, the *Statement on Government of Colleges and Universities* recognizes the primacy of the faculty role in such fundamental areas as “curriculum, subject matter and methods of instruction, . . . and those aspects of student life which relate to the educational process.” AAUP, *Statement on Government of Colleges and Universities*, AAUP POLICY DOCUMENTS & REPORTS 117–22 (11th ed. 2015).

Citing this statement, the Employer claims that “by tradition and practice, faculty members . . . are involved in the governance of the institution” and that this involvement renders them “generally unlike all staff employees.” Employer’s Brief on Review, at 22. Contrary to the

Employer's contention, faculty's interest in shared governance should not be understood to support a rule that categorically denies the ability of faculty to be included in a bargaining unit with staff. To the extent the Employer means to suggest that collective bargaining inherently conflicts with or undermines shared governance, it ignores the basic fact that collective bargaining is, in crucial respects, a form of shared governance and a means of obtaining guarantees that can safeguard institutions of shared governance. *See Academic Unionism Statement* ("Collective bargaining agreements have proven to be effective in protecting the faculty's independence in governance—for example, by incorporating senate regulations."). As the AAUP has stated, "[t]enure-line and non-tenure-line faculty, graduate employees, and academic professionals at both public and private institutions are entitled to choose to engage in collective bargaining in order to ensure an effective role in the governance of the institution." AAUP, *Statement on Collective Bargaining*, available at <https://www.aaup.org/report/statement-collective-bargaining>. Indeed, in "affirm[ing] that collective bargaining ensures that all academic professionals have an effective role in the governance of institutions," *id.*, the AAUP has made clear that shared governance is of interest to more than just faculty.

There is no merit to the suggestion that collective bargaining—regardless of whether it takes place in a unit combining faculty and staff, or in a unit comprised of faculty alone—necessarily conflicts with traditional institutions of shared governance. As the AAUP has explained, "[t]he presence of institutions of faculty governance does not preclude the need for or usefulness of collective bargaining." *Id.* "On the contrary, collective bargaining can be used to increase the effectiveness of those institutions by extending their areas of competence, defining their authority, and strengthening their voice in areas of shared authority and responsibility." *Id.* As with academic freedom, there is no inherent, insurmountable conflict between the interests of

faculty and staff when it comes to shared governance. Consequently, so long as faculty members are given a means by which to express their distinctive interests and desires—as they were in this case by means of the *Sonotone* election ballot—they should not be prevented from joining in a single unit with staff.

C. The Board’s decision should make clear that the exclusion of tenured and tenure-track faculty from the unit in this case does not carry any implication about their rights under the NLRA.

In its written decision in this case, the Board should clarify that the exclusion of tenure-line faculty from the unit does not imply that those faculty members are not employees entitled to full rights under the NLRA. Generally speaking, if a petitioner’s proposed unit is found to be appropriate, that is the end of the matter. *See P.J. Dick Contracting*, 290 NLRB at 151 (explaining that “[t]he inquiry first considers the petitioning union’s proposals,” and only “[i]f the union’s proposed unit is [found] inappropriate” does the Board engage in further scrutiny). In this case, the petitioning union did not seek to include tenure-line faculty in the unit, and there has never been any reason to examine their status as employees under the NLRA.⁵ In order to avoid the possibility that parties in future cases will draw unwarranted inferences about the status of tenure-line faculty from the scope of the unit in this case, it would be appropriate for the Board to reaffirm that tenured and tenure-track faculty are not necessarily “managerial employees” excluded from the NLRA’s protections by *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). In *Yeshiva*, the Supreme Court explained that, regardless of tenure or tenure-eligibility, “professors may not be

⁵ In general, a petitioner’s choice to exclude certain job categories from a proposed unit—even from a wall-to-wall unit—does not require justification and does not require the Board to examine the propriety of the exclusion. Furthermore, the exclusion of a job category from a unit does not necessarily mean that the workers so excluded are not “employees” under the NLRA. For example, although clerical employees are protected by the NLRA, plant clerical and office clerical employees are generally not joined in a single unit due to policy reasons. *See Kroger Co.*, 204 NLRB 1055, 1055 (1973) (excluding office clerical employees from the unit).

excluded [from a unit as ‘managerial’ employees] merely because they determine the content of their own courses, evaluate their own students, and supervise their own research,” and that faculty can be “entirely or predominantly nonmanagerial” and “properly . . . included in a bargaining unit.” *Id.* at 690 n.31.

CONCLUSION

The AAUP urges the Board to consider the aforementioned points when it renders a decision in this case.

Respectfully submitted,

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