



FIRE

Foundation for Individual
Rights and Expression

September 21, 2022

Dr. Robert C. Robbins
Office of the President
Old Main, Room 200
1200 East University Boulevard
P.O. Box 210021
Tucson, Arizona 85721-0021

Sent via U.S. Mail and Electronic Mail (president@email.arizona.edu)

Dear President Robbins:

FIRE¹ appreciates that the University of Arizona is one of the few institutions in the country whose policies earn a “green light” rating from our organization. We additionally appreciate U of A’s continued willingness to work with FIRE to address our concerns. However, we are concerned with U of A’s subjective process of determining who may appear on the ballot to join the university’s Committee on Academic Freedom and Tenure (CAFT), an important committee for shared governance at the university. Particularly, we are concerned by U of A’s decision to prevent the nominating committee from reviewing professors Matthew Abraham, Wei Hua Lin, and Keith Maggert for ballot consideration because of administrators’ opinions of them.

By allowing a small number of staff and administrators to gate-keep which professors the Faculty Senate may select from to join CAFT, the university can ensure that only faculty who effectively agree with administrators serve on the panel. Such a rigged process raises serious questions about U of A’s commitment to truly shared governance and academic freedom. The university must ensure administrators do not unduly limit which eligible faculty candidates the general faculty may consider for election to CAFT.

I. U of A Excluded Faculty from CAFT Ballot Based on Previous Criticism of the University

CAFT is a faculty governance committee at U of A with jurisdiction to conduct hearings regarding matters relating to the “contractual employment relationship between the General Faculty member and the University/Board of Regents” and “grievances against or by any

¹ As you may recall from previous correspondence, the Foundation for Individual Rights and Expression is a nonpartisan nonprofit dedicated to defending freedom of speech, expression, and conscience, and other individual rights on campus.

member of the General Faculty.”² The committee is tasked with “consider[ing] the protection of academic freedom and tenure as a principal obligation.”³ CAFT additionally reviews faculty grievances “where no policies or procedures exist or existing policies or procedures have been misinterpreted, misapplied or violated by a University administrator.”⁴ The faculty senate votes on CAFT membership after a nominating committee selects candidates after “consultation with the Chair of the Faculty and the President.”⁵

On January 12, professors Abraham, Lin, and Maggert, who had each formally expressed interest in joining CAFT, were informed they were not selected to appear on the ballot for faculty to select members of the committee. A public records request submitted by Abraham revealed that Katharine Hunsdon Zeiders, a faculty member of CAFT, expressed concern about how some faculty were labeled ineligible to appear on the ballot, specifically Abraham, Lin, and Maggert.⁶ She said they were deemed ineligible by Jane Cherry, a university staff member, based on Cherry’s “personal experience with them, rumors of them being problematic and not good candidates for CAFT[.]”⁷ Each of these faculty members has filed grievances in the past and has criticized administrators’ actions previously.⁸

On January 24, Zeiders again expressed concern via email that Cherry labeled some faculty ineligible for the ballot because they are viewed as not “impartial faculty” and allegedly possessed “hidden agendas,” specifically because they have previously filed grievances.⁹ Zeiders responded that the nominating committee members decided they would review ineligible candidates because of the reputation-based reasoning for excluding some faculty.¹⁰ However, Cherry apparently *again* limited the list to bar “problem faculty” from appearing on the ballot.¹¹

² We present here our understanding of the pertinent facts, though we appreciate you may have additional information to offer and invite you to share it with us. To these ends, enclosed are executed privacy waivers authorizing you to share information about this matter. *Committee on Academic Freedom and Tenure*, UNIV. OF ARIZ., <https://facultygovernance.arizona.edu/other-committees/committee-academic-freedom-and-tenure> (last visited Sept. 14, 2022).

³ *Id.*

⁴ Faculty Bylaws Art VII.§5.b.iii.3.b (on file with author).

⁵ *Committee on Academic Freedom and Tenure*, UNIV. OF AZ., <https://facultygovernance.arizona.edu/other-committees/committee-academic-freedom-and-tenure> (last visited Sept. 16, 2022).

⁶ Email from Katharine Hunsdon Zeiders, Associate Professor, Univ. of Az., to Ping Situ, Associate Librarian, Univ. of Az. (Oct. 5, 2021, 1:16 PM) (on file with author).

⁷ *Id.*

⁸ Last year, Matthew Abraham filed an open records lawsuit against the institution, which is ongoing. Additionally, Abraham has filed multiple grievances alleging violations of his expressive rights. Keith Maggert has also filed a grievance with CAFT alleging an institutional violation of his academic freedom rights.

⁹ Email from Zeiders to Jane Cherry, Sr. Program Coordinator, Univ. of Az., et al. (Jan. 24, 2022, 3:19 PM) (on file with author).

¹⁰ *Id.*

¹¹ *Id.*

After viewing these emails, Abraham, Lin, and Maggert wrote Chair of the Faculty Leila Hudson, expressing concern over this “arbitrary” and “prejudicial” selection process.¹² Amelia Kraehe, nominating committee chair, responded with ways the nominating committee would move forward to ensure an equitable process, stating in part:¹³

Eligibility of faculty for Shared Governance Committees

Issue: One issue that emerged in the functioning of the Nominating Committee last year (2021-2022) was decisions and discussions of potential candidates’ eligibility. In the start of the year, unsubstantiated information about candidates was presented at meetings by a non-elected support staff.

Corrective action: Multiple members expressed concern with this information being shared (publicly and privately) and driving eligibility decisions and thus, the Nominating Committee consulted the Faculty Bylaws for guidance on eligibility. All members and decisions about eligibility were only based on the specific criteria stated in the Faculty Bylaws.

Moving forward: The Nominating Committee will continue to follow the Faculty Bylaws for all eligibility on committees.

Process by which Nominating Committee advances CAFT names to the ballot

Issue: The Faculty bylaws state that “After consultation with the Chair of the Faculty and the President, the [Nominating] committee will reduce the list to a slate of twice the number to be elected, giving due consideration to diversity.” This process was not followed, however, as the Nominating Committee was not involved in reducing the list to a final slate of candidates as it should have been.

Moving forward: As outlined by the Faculty Bylaws, the responsibility to reduce the list of names to a slate of candidates does not belong to the Chair of Faculty and the President. Rather, these two parties provide consultation to the Nominating Committee, and it is the duty of the Nominating Committee to then make the final determination. In 2022-23, the process has been amended to include an additional nominating committee meeting in the fall semester to allow enough time for the committee to receive input on its list from the Chair of Faculty and

¹² Letter from Abraham, Lin, and Maggert to Hudson (July 28, 2022) (on file with author).

¹³ Email from Kraehe to Abraham, et al. (Aug. 31, 2022) (on file with author).

the President before committee members determine the final slate of CAFT candidates.

Kraehe also said the committee would make recommendations on bylaw changes as it “see[s] necessary.”¹⁴

II. U of A’s Limitation of CAFT Members to University-Approved Faculty Violates Core Tenants of Shared Governance and Academic Freedom

It has long been settled law that the First Amendment binds public universities like U of A,¹⁵ such that their decisions and actions must comply with the First Amendment. And academic freedom is of “special concern to the First Amendment.”¹⁶ As the Supreme Court has recognized, “vigilant protection of constitutional freedoms is nowhere more vital” than in institutions of higher education, as the “classroom is peculiarly the ‘marketplace of ideas[.]’”¹⁷ In this connection, the American Association of University Professors in 1994 highlighted the importance of shared governance—the joint responsibility of faculty, administrations, and governing boards to govern colleges and universities¹⁸—to faculty academic freedom, stating:¹⁹

[A] sound system of institutional governance is a necessary condition for the protection of faculty rights and thereby for the most productive exercise of essential faculty freedoms. Correspondingly, the protection of the academic freedom of faculty members in addressing issues of institutional governance is a prerequisite for the practice of governance unhampered by fear of retribution.

Limiting faculty participation in shared governance based on their expression violates all faculty members’ academic freedom rights. Additionally, faculty’s decisions should be authoritative and “given the highest weight” on issues of academic freedom, as faculty have primary responsibility for teaching and research at the institution²⁰ Likewise, faculty have the right to file grievances against public institutions—effectively, petitioning the government for

¹⁴ *Id.*

¹⁵ *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

¹⁶ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

¹⁷ *Id.* (quoting, in part, *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

¹⁸ *FAQs on Shared Governance*, AM. ASS’N OF UNIV. PROFESSORS, <https://www.aaup.org/programs/shared-governance/faqs-shared-governance> (last visited Sept. 20, 2022).

¹⁹ *On the Relationship of Faculty Governance to Academic Freedom*, AM. ASS’N OF UNIV. PROFESSORS (1994), <https://www.aaup.org/report/relationship-faculty-governance-academic-freedom>.

²⁰ *Id.* (The weight of the faculty’s voice on particular issues should depend on the “degree to which the faculty’s voice should be authoritative on the issue—from the relative directness with which the issue bears on the faculty’s exercise of its various institutional responsibilities.”)

a redress of grievances—which it is the very purpose of CAFT to facilitate. Additionally, the United States Court of Appeals for the Ninth Circuit, whose decisions bind U of A, has consistently held that First Amendment retaliation need not be as severe as termination.²¹ Instead, an adverse employment action includes denying a faculty member the opportunity to participate in a shared governance activity because of their past grievances against the institution. This is clear retaliation based on their First Amendment-protected expression.

CAFT is a faculty-run shared governance committee, which makes authoritative decisions on academic freedom issues. It thus seriously compromises U of A's commitments to shared governance and academic freedom when its administrators seize control of the committee selection process to exclude faculty they dislike. How are faculty to trust that CAFT hears and decides grievances in an unbiased manner if U of A administrators pre-approve committee members but exclude those who may have filed grievances or criticized the institution in the past?

The AAUP makes clear that “faculty’s voice should be authoritative across the entire range of decision making that bears ... on its responsibilities”²²; however, that is not possible if all members of the committee are administration-approved. This is especially so given that administrators excluded the professors from the ballot by continuously subverting the nominating committee. Although support staff and administrators may use neutral procedural criteria for selecting CAFT nominees, when administrative staff exclude faculty because of their views or past criticism of the institution, that violates academic freedom.

III. Conclusion

These professors’ decisions to file grievances against the institution cannot preclude them from participating in shared governance at the institution, given that similarly situated faculty are able to participate. FIRE is glad U of A has responded to the professors’ letter concerning the issues with how faculty were selected for the ballot; however, we remain concerned by the nominating committee’s stance that it will “continue to follow the Faculty Bylaws for all eligibility on committees.”²³ It is clear that the nominating committee did not follow the bylaws

²¹ See *Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir.2003) (“To constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind. Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden.”); *id.* at 976–77 (“[S]ome, perhaps all, of the following acts, considered individually, were adverse employment actions for purposes of plaintiffs’ First Amendment retaliation suit: the transfer to new duties; an unwarranted disciplinary investigation; an unwarranted assignment of blame; a reprimand containing a false accusation; a criminal investigation; repeated and ongoing verbal harassment and humiliation; the circulation of a petition at the encouragement of management; a ten-day suspension from work; a threat of disciplinary action; an unpleasant work assignment; a withholding of customary public recognition; an unwarranted disciplinary action; and two consecutive ninety-day ‘special’ reviews of work quality.”) (court’s enumeration of adverse actions omitted); see also *D’Andrea v. Univ. of Hawaii*, 686 F. Supp. 2d 1079, 1088 (D. Haw. 2010), *aff’d sub nom. D’Andrea v. Hawaii*, 453 F. App’x 749 (9th Cir. 2011). (“Threats sufficient to deter an employee from engaging in protected activity may include threats to terminate employment, reduce compensation, or impose administrative leave.”).

²² *On the Relationship of Faculty Governance to Academic Freedom*, *supra* note 18.

²³ Email from Kraehe, *supra* note 13.

here, as faculty were deemed ineligible because they were critical of the institution, rather than for procedural reasons.

To rectify the situation, U of A must make clear it will not exclude faculty, including Professors Abraham, Lin, and Maggert, from the CAFT ballot because of their expression. We request a substantive response to this letter no later than the close of business on Wednesday, October 5, 2022.

Sincerely,



Sabrina Conza
Program Officer, Campus Rights Advocacy

Cc: Amelia M. Kraehe, Chair, Nominating Committee, Faculty Senate
Art M. Lee, Vice President & Deputy General Counsel
Leila Hudson, Chair, Faculty Senate
Andrea Romero, Associate Vice Provost for Faculty Affairs

Encl.

Authorization and Waiver for Release of Personal Information

I, MATTHEW ABRAHAM, do hereby authorize University of Arizona (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

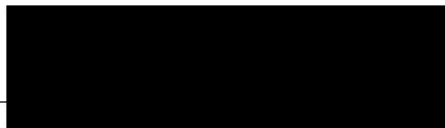
This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights and Expression, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights and Expression, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

Signature



Date

9/20/2022

Authorization and Waiver for Release of Personal Information

I, Wei Hua Lin, do hereby authorize University of Arizona (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

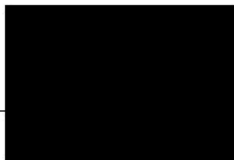
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I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

Signature



Date

9/21/2022

Authorization and Waiver for Release of Personal Information

I, Keith Maggert, do hereby authorize University of Arizona (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

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Date