Bennett Hartman
ATTORNEYS AT LAW, LLP

Robert A. Bennett (1931-2018)
Thomas K. Doyle WA §
Kate D. Flanagan
Nelson R. Hall
Gregory A. Hartman †
Dylan P. Jensen
Henry J. Kaplan †
Linda J. Larkin §
Derrick A. Louie
Aruna A. Masih WA
Michael J. Morris §
Richard B. Myers WA
Margaret S. Olney WA
Julie D. Reading

† retired
§ of counsel

Aruna Masih
direct: 503.546.9636
aruna@bennetthartman.com

MEMORANDUM

TO: Lane Community College Education Association
DATE: November 28, 2022
RE: Association Speech and Organizing Rights

We write to provide the Association guidance regarding its member speech and organizing rights to allow it to analyze the legality of policies being proposed by the Lane Community College. Of particular interest to the Association at this time is: (1) whether the college is constitutionally required to apply the same time, place, and manner policy restrictions to speech of the Association and students which it applies to the speech of external groups and (2) whether the college may lawfully enact policies restricting the speech and advocacy rights of the Association and its members protected by the Public Employee Collective Bargaining Act (PECBA), ORS 243.650-243.806. The answer to both questions is "no" as explained further below.

Time, Place, and Manner Regulation of Internal vs. External Groups

Both Article I, section 8 of the Oregon Constitution and the First Amendment of the United States Constitution provide protection for "private speech" occurring on government property.

For purposes of First Amendment analysis of "private speech," government property is generally divided into three categories: traditional public fora, designated or limited public fora, and non-public fora. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 US 37, 45-47, 103 S Ct 1951 (1983). The U.S. Supreme Court has long recognized that, "A university differs in significant respects from public forums such as streets or parks or even municipal theaters[,]" noting that "[w]e have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings. *Widmar v. Vincent*, 454 US 263, 268, 102 S Ct 269, 274, 70 L Ed 2d 440 (1981). In addition, in the *Perry* case, the Supreme Court explained that, under forum analysis, granting an exclusive bargaining representative greater access to non-public fora to exercise speech rights than another external group does not transform the property into a traditional public forum nor constitute prohibited viewpoint discrimination so long as there is no record of an intent to suppress other

viewpoints. According to the Supreme Court, the differential access provided an exclusive representative is reasonable because it is wholly consistent with the legitimate interest in preserving the property for the use to which it is lawfully dedicated and enables the organization representing employees to effectively perform its obligations as an exclusive representative. Differential access, however, must not be cover for viewpoint discrimination.

For purposes of Article I, section 8, the Oregon courts apply the three-part framework established in the *State v. Robertson*, 293 Or. 402, 412, 649 P.2d 569 (1982) case. The first category encompasses any law that is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." *Id*. at 412. Laws in this category are unconstitutional on their face, "unless the restriction is wholly confined within an historical exception." *Id*. A law within the second category also expressly regulates speech but is directed to forbidden effects of the proscribed speech and not to the substance of the communication itself. *Id.* at 415. Laws that fall within this category are analyzed for overbreadth. 293 Or at 410. The third category encompasses laws that do not expressly restrict speech but that may have the effect of prohibiting or limiting it. Laws in this category are not facially invalid but are subject to as-applied challenges. *State v. Babson*, 355 Or 383, 404, 326 P3d 559 (2014).

Applying this analysis, the Oregon Court of Appeals has permitted a school district to constitutionally exclude a street preacher from property which was otherwise accessible to and used by students and other school employees. *State v. Carr*, 215 Or App 306, 170 P3d 563 (2007). The court noted that, "the mere fact of public ownership does not authorize any person to go on public property for any expressive purpose at any time without regard to the use to which the public has put the property." Thus, even under Article I, section 8, the Association's, its members', and students' use of the property for expressive purpose may be entitled to greater protections as consistent with the use to which the public has put the property.

This conclusion is supported further by the express will of the legislature included in the PECBA, discussed further below, and the repeated recognition by the federal courts before and after *Garcetti v. Ceballos,* 547 US 410, 425, 126 S Ct 1951 (2006) that expression related to academic scholarship and classroom instruction in the higher education setting is entitled to greater constitutional protections. *See e.g. Demers v. Austin*, 746 F3d 402, 411 (9th Cir 2014)("We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed "pursuant to the official duties" of a teacher and professor) *citing Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) and *Adams v. Trs. of the Univ. of N.C.–Wilmington*, 640 F.3d 550, 562 (4th Cir.2011); *Rodriguez v. Maricopa County Community College Dist*., 605 F 3d 703 (2010).

PECBA Speech and Organizing Rights

Pursuant to ORS 243.662, "Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and

collective bargaining with their public employer on matters concerning employment relations." In ORS 243.656, the Legislative Assembly has expressly recognized, in relevant part, that:

> "(1) The people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees;
>
> (2) Recognition by public employers of the right of public employees to organize and full acceptance of the principle and procedure of collective negotiation between public employers and public employee organizations can alleviate various forms of strife and unrest. Experience in the private and public sectors of our economy has proved that unresolved disputes in the public service are injurious to the public, the governmental agencies, and public employees;
>
> (3) Experience in private and public employment has also proved that protection by law of the right of employees to organize and negotiate collectively safeguards employees and the public from injury, impairment and interruptions of necessary services, and removes certain recognized sources of strife and unrest, by encouraging practices fundamental to the peaceful adjustment of disputes arising out of differences as to wages, hours, terms and other working conditions, and by establishing greater equality of bargaining power between public employers and public employees;
>
> (5) It is in the public interest to ensure that exclusive representatives of public employees are able to effectively carry out their statutory duties by having direct access to represented employees, including communicating with the employees at the workplace or otherwise; and
>
> (7) Ensuring meaningful communication between labor organizations and employees increases the effectiveness of public employees' work performance.

In ORS 243.688, the Legislative Assembly has expressly provided further that:

> (a) It is the policy of this state that public funds may not be used to subsidize interference with an employee's choice to join or to be represented by a labor union.
>
> (b) Some public employers use public funds to aid or subsidize efforts to deter union organizing.
>
> (c) Use of public funds to deter union organizing is contrary to the purposes for which the funds were appropriated and is wasteful of scarce public resources.

ORS 243.670 then incorporates the restrictions on use of public funds to engage in such interference, but expressly exempts, in relevant part, the following:

> (4) This section does not apply to an activity performed, or to an expense incurred, in connection with:
>
> (a) Addressing a grievance or negotiating or administering a collective bargaining agreement.
>
> (b) Allowing a labor organization or its representatives access to the public employer's facilities or property.
>
> (c) Performing an activity required by federal or state law or by a collective bargaining agreement.
>
> (d) Negotiating, entering into or carrying out an agreement with a labor organization.
>
> (e) Paying wages to a represented employee while the employee is performing duties if the payment is permitted under a collective bargaining agreement.

Finally, in ORS 243.796 to 243.806, the Legislative Assembly has expressly granted designated representatives rights of access to employees and release time to fulfill their obligations as the designated representatives, including the ability to hold meetings. ORS 243.804(2) provides that "a public employer shall permit an exclusive representative to use the public employer's facilities or property, whether owned or leased by the employer, for purposes of conducting meetings with the represented employees in the bargaining unit."

The Oregon Employment Relations Board has also long recognized that, academic freedom proposals are mandatory subjects of bargaining under the PECBA. *Springfield*, 1 PECBR at 364 and that an employer's interference in union organizing speech can constitute an unfair labor practice. *See e.g. Laborers' International Union of North America Local 483 v. Metro*, 2016 WL 1391620 (Case No. UP-030-14)(2016)(finding that Metro's ban of certain union buttons constituted an unfair labor practice). Similarly, the Ninth Circuit has found unconstitutional attempts by a public employer to enact overbroad policies to suppress union speech. *See Eagle Point Education Association/SOBC/OEA v. Jackson...*, 880 F.3d 1097 (2018).

In short, while granting the Association, its members, and students greater access than other groups comports with constitutional and statutory protections afforded exclusive representatives, adopting broad policies in an effort to suppress union speech would not.