



# FIRE

Foundation for Individual  
Rights and Expression

September 27, 2022

President C. Scott Green  
University of Idaho  
Office of the President  
875 Perimeter Drive  
MS 3151  
Moscow, Idaho 83844-3151

**URGENT**

*Sent via U.S. Mail and Electronic Mail (president@uidaho.edu)*

Dear President Green:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,<sup>1</sup> is deeply concerned about the University of Idaho's (U of I's) implementation of a policy requiring faculty to "not promote or advocate in favor of abortion" except when doing so with "instructor neutrality."<sup>2</sup> This mandate imposes a viewpoint-discriminatory limitation on academic speech and instruction incompatible with U of I's legal obligations under the First Amendment and must be withdrawn.

In a September 23 faculty memo titled "Guidance on Abortion Laws," U of I's Office of the General Counsel summarizes and interprets Idaho's "No Public Funds for Abortion Act," Idaho Code §§ 18-8701, *et seq.*, for the ostensible purpose of "assist[ing] university employees with complying with restrictions" about abortion and contraception.<sup>3</sup> The memo claims the law applies "to the activities of university employees while 'on the job' even outside the context of counselling students," and restricts the ability of faculty to engage in "classroom discussions on topics related to abortion or contraception" by requiring that faculty members practice "instructor neutrality."<sup>4</sup> The university also warns that employees "who wish to counsel,

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<sup>1</sup> For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at [thefire.org](http://thefire.org).

<sup>2</sup> Memo from General Counsel to University of Idaho Employees (Sept. 23, 2022), as reported by Rachel Cohen, *U of I warns employees to stay neutral on abortion or risk prosecution*, BOISE STATE PUB. RADIO (Sept. 26, 2022), <https://www.boisestatepublicradio.org/news/2022-09-26/u-of-i-warns-employees-to-stay-neutral-on-abortion-or-risk-prosecution>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

promote or advocate in favor of abortion must do so outside the performance of their job duties[.]”<sup>5</sup>

The memo’s guidance notwithstanding, the First Amendment binds public universities,<sup>6</sup> requiring U of I to ensure any policies implicating student and faculty expression comport with its constitutional obligations.<sup>7</sup> Additionally, the United States Court of Appeals for the Ninth Circuit—the decisions of which are binding on U of I—has squarely held that the First Amendment protects faculty members’ speech “related to scholarship or teaching” when it addresses matters of public concern.<sup>8</sup>

No statute can authorize U of I to violate its students’ or faculty’s First Amendment rights.<sup>9</sup> The Supreme Court has held in rejecting legislative attempts to curtail “subversive” views that our nation’s commitment to academic freedom is “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”<sup>10</sup> These principles recognize that higher education depends on “wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.”<sup>11</sup>

As the Court warned some 65 years ago:

The essentiality of freedom in the community of American universities is almost self-evident. ... No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.<sup>12</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *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).

<sup>7</sup> See, e.g., *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d (9th Cir. 2009).

<sup>8</sup> *Demers v. Austin*, 746 F.3d 402, 410–12 (9th Cir. 2014) (rejecting application of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to “teaching and academic writing”).

<sup>9</sup> Notably, the university’s memo goes beyond merely informing faculty of statutes that pose a risk of individual criminal liability. Instead, it reaches beyond those statutes, requiring faculty “neutrality” in discussing particular subjects, singling out abortion and contraception. Absent, too, is any indication the university will decline to enforce these statutes as applied to teaching and academic writing protected by the First Amendment.

<sup>10</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 602–04 (1967).

<sup>11</sup> *Id.* at 603 (cleaned up).

<sup>12</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

In practice, these principles mean faculty do not shed their First Amendment rights at the classroom door, but instead remain free to address pedagogically relevant material, including topics or viewpoints elected officials might find odious.<sup>13</sup>

U of I's sweeping policy directly contravenes the university's legal obligations and impermissibly chills in-class speech by placing faculty in perpetual fear of punishment for their protected expression. It does not take a significant stretch of the imagination to see how the university's guidance will adversely impact classroom instruction. For example, a political science professor publishing a public policy argument that abortion should be lawful will have to self-censor to ensure the discussion is not perceived as being "in favor of abortion." A philosophy professor interested in prompting his or her students to consider the arguments for restricting access to abortion may play devil's advocate by arguing for such restrictions—a decision that would violate so-called "instructor neutrality."<sup>14</sup> Even a constitutional law professor's discussion of past court cases pertaining to abortion is at risk of being perceived as violating "instructor neutrality."

The university must defend—not erode—First Amendment rights on campus. It must begin by publicly retracting this unlawful policy. Continuing to transgress well-established First Amendment rights effects censorship on campus and will subject your institution to civil liability. This chilling effect is especially pronounced as faculty have been cautioned their teaching may yield *criminal* consequences if it is deemed to "promote" abortion. To protect our national commitment to academic freedom, FIRE will use all resources at our disposal to ensure that—as the Supreme Court articulated more than a half-century ago—teachers and students "remain free to inquire, to study and to evaluate, [and] to gain new maturity and understanding"<sup>15</sup> free from administrative censorship, including at the University of Idaho.

Sincerely,



Graham Piro  
Program Officer, Campus Rights Advocacy

Cc: Jim Craig, General Counsel

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<sup>13</sup> See, e.g., *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001).

<sup>14</sup> In this sense, the University of Idaho manages to transform a viewpoint-discriminatory statute into a provision that imperils even *pro-life* speech, demanding that pro-life faculty adhere to "neutrality" in their lectures.

<sup>15</sup> *Sweezy*, 358 U.S. at 250.