

FIRE

Foundation for Individual
Rights and Expression

October 7, 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:

FIRE¹ writes you again today in anticipation of the University of Idaho's (U of I's) forthcoming guidance concerning the No Public Funds for Abortion Act. Your October 5 memo to faculty said the university is developing "nuanced guidance" to "help [faculty] understand our state's laws."² This presents U of I an opportunity to provide necessary reassurances to faculty that it will defend their First Amendment rights, particularly where the state might bring criminal charges against a faculty member for violating the law. FIRE encourages the university to use every resource at its disposal to do so.

Your first memo on this subject, sent September 23, did not merely inform faculty the new law poses a risk of individual criminal liability; it stated U of I may *require* faculty to remain neutral when discussing abortion and contraception. The university also left open the question of whether it would enforce these statutes as applied to First Amendment protected-teaching and academic writing. Your more recent memo states that while the university cannot make any guarantees about how the state will choose to enforce the laws, there have been "no changes to [U of I's] academic freedom policy" and the "university supports faculty leading discussions on any related educational topic within the classroom."³ Given these opposing directives, U of I must clarify whether the university will indeed protect faculty's First Amendment rights.

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

² Scott Green, President & Torrey Lawrence, Provost and Executive Vice President, *Clarifying Points About State Abortion Law*, UNIV. OF IDAHO (Oct. 5, 2022) (on file with author).

³ *Id.*

First, U of I must confirm it will not interpret the state law broadly in any disciplinary decisions or proceedings. Second, it should clarify its neutrality guidance is not an institutional requirement, but rather functions solely as advice to faculty on mitigating potential criminal prosecution. Third, it must ensure no faculty are punished for their protected expression. As explained in our enclosed previous letter, no statute can authorize a public university to violate its faculty's First Amendment rights by, for example, initiating an investigation into protected speech or using expression to form the basis for any other punishment.

Because faculty rights are the beating heart of higher education, U of I should also commit to asking state lawmakers or other relevant officials to seek a formal Attorney General opinion concerning the scope of this new law. Combining that kind of clarification of the law's scope with U of I reassuring faculty that it will interpret the statute narrowly will provide the necessary protection for faculty instruction and academic work.

Finally, U of I is bound by legal precedent clearly holding that the First Amendment protects faculty speech "related to scholarship or teaching" when it addresses matters of public concern.⁴ To this end, the university should commit to providing resources and support to faculty if they are criminally charged for exercising their expressive rights in the performance of their duties.

Viewpoint-discriminatory policies limit classroom discussion by depriving faculty of important pedagogical tools in classroom teaching, including the ability to feign a position to encourage discussion and critical thinking, such as through "devil's advocacy" or Socratic dialogue.⁵ As our previous letter argued, a philosophy professor who wants to prompt 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."

The significant amount of public pushback U of I has received concerning this guidance does not constitute mere "misinformation," as your most recent memo stated, nor does it solely constitute external groups advancing their own political agendas. The public cares about freedom of expression and how generations of Americans are educated about the most vital issues in our society right now. As a government official and leader of a state university where faculty's basic freedoms are at stake, we hope you will approach the forthcoming guidance with all due seriousness.

⁴ *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").

⁵ *LAWSUIT: FIRE challenges Stop WOKE Act's limits on how Florida professors can teach about race, sex*, FIRE (Sept. 6, 2022), <https://www.thefire.org/lawsuit-fire-challenges-stop-woke-acts-limits-on-how-florida-professors-can-teach-about-race-sex>.

Be advised that FIRE is committed to using all resources at its disposal to ensure the university meets its binding legal obligation to protect faculty's core constitutional rights.

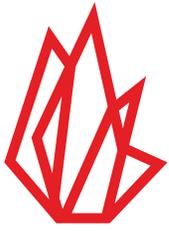
Sincerely,

A handwritten signature in black ink, appearing to read "Graham Piro". The signature is fluid and cursive, with the first name "Graham" and last name "Piro" clearly distinguishable.

Graham Piro
Program Officer, Campus Rights Advocacy

Cc: Torrey Lawrence, Provost and Executive Vice President

Encl.



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,¹ 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."² 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.³ 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."⁴ The university also warns that employees "who wish to counsel,

¹ 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.

² 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>.

³ *Id.*

⁴ *Id.*

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

The memo’s guidance notwithstanding, the First Amendment binds public universities,⁶ requiring U of I to ensure any policies implicating student and faculty expression comport with its constitutional obligations.⁷ 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.⁸

No statute can authorize U of I to violate its students’ or faculty’s First Amendment rights.⁹ 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.”¹⁰ 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.”¹¹

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.¹²

⁵ *Id.*

⁶ *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).

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

⁸ *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”).

⁹ 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.

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

¹¹ *Id.* at 603 (cleaned up).

¹² *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.¹³

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."¹⁴ 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"¹⁵ free from administrative censorship, including at the University of Idaho.

Sincerely,



Graham Piro
Program Officer, Campus Rights Advocacy

Cc: Jim Craig, General Counsel

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

¹⁴ 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.

¹⁵ *Sweezy*, 358 U.S. at 250.