



September 27, 2022

C. Scott Green president@uidaho.edu
President of the University of Idaho
875 Perimeter Drive, MS 3151
Moscow, ID 83844-3151

Dear President Green,

The Academic Freedom Alliance (AFA) is a coalition of faculty members from across the country and across the ideological spectrum who are committed to upholding the principles of academic freedom and professorial free speech.

The ability to freely teach and discuss controversial issues in the university classroom is a core principle of academic freedom and an important First Amendment value. We write to express our deep concern with the guidance that the general counsel's office has provided to employees of the University of Idaho regarding compliance with the state's new abortion laws and particularly with the guidance regarding classroom discussions of issues relating to abortion.

We, of course, understand that the university wants to make faculty aware of their legal obligations and caution them about possible legal risks under state law. However, it is critical that universities assume a leadership posture in such situations and emphasize to state political leaders the importance of preserving academic freedom in state universities and the risks that they create with imperfectly crafted statutes and regulations.

It is well established that public universities like the University of Idaho are constrained by the First Amendment of the U.S. Constitution. The federal courts have specifically recognized that classroom speech by professors is constitutionally protected. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014). The *Demers* court specifically held that "teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor" at the university level is protected under the First Amendment. The United States Court of Appeals for the Sixth Circuit just months ago emphatically reaffirmed that the First Amendment does not tolerate state actions "that cast a pall of orthodoxy over the classroom" or that "stifle[s] a professor's viewpoint on a matter of public import." Quite simply, "the First Amendment protects the free-speech rights of professors when they are teaching." *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021).



It is true that the Idaho Code § 18-8705 prohibits the use of public funds to “promote abortion,” but construing that statutory language to require state university professors to “remain neutral on the topic” is a vast overreach and inconsistent with the requirements of the First Amendment. The U.S. Supreme Court has emphasized that a law is constitutionally invalid “if it prohibits a substantial amount of protected speech.” *United States v. Williams*, 553 U.S.

285, 292 (2008). The Idaho Code situates the prohibition on promoting abortion within a larger statute designed to prohibit the performance and facilitation of abortions. Federal circuit courts have just recently examined the constitutional issues arising from similar federal statutory language in the immigration context. When Congress criminalized not only conduct involving criminal facilitation or solicitation but also pure speech involving abstract advocacy, the courts have concluded that the First Amendment requires that those statutes be applied narrowly so as to exclude pure speech such as the kind of promotion of abortion that might occur in a classroom discussion. “The statute’s plain language is ‘susceptible of regular application to protected expression,’ reaching vast amounts of protected speech uttered daily.” *United States v. Hernandez-Calvillo*, 39 F.4th 1297, 1313 (10th Cir. 2022). In such circumstances, the restriction of classroom teaching on topics relating to abortion through the criminal law is impermissible under the First Amendment.

It is imperative that the University of Idaho not merely inform the faculty of the potential risks of teaching with such a law on the books but also strongly voice its objections to any such interpretation or application of the state law. The general counsel’s guidance sends a chilling message to every member of the faculty who must discuss difficult and controversial material relating to abortion as part of their teaching duties. The statute itself might not recognize “academic freedom [as] a defense to violation of law,” but the First Amendment is an overriding limitation on the power of the state legislature to impose such a restriction on classroom teaching in state university classrooms. The Academic Freedom Alliance takes no view on the question of the proper public regulation of abortion, and its members represent a range of perspectives on the matter. The Alliance stands firmly, however, in support of the rights of faculty members in any state university, to express their views, irrespective of the content of their views, and whether or not they come down in opposition to or support of the state’s policies. The Alliance calls on the university to advocate on behalf of the free expression rights of its faculty and calls on state official to swiftly clarify that the state criminal law should not be interpreted to apply to classroom discussions that do not involve the facilitation or solicitation of unlawful acts.



Sincerely,

A handwritten signature in black ink, appearing to read "KW", with a long, sweeping horizontal line extending to the right.

Keith Whittington
Chair, Academic Committee, Academic Freedom Alliance
William Nelson Cromwell Professor of Politics, Princeton University

cc.

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