



November 2, 2021

President Kent Fuchs
University of Florida
Gainesville, FL 32611

President Fuchs,

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. [We wrote](#) to the leadership of the University of Florida on October 31 calling on the University to reaffirm its commitment to academic freedom by reversing its prohibition on members of the faculty serving as expert witnesses in a lawsuit against the state of Florida.

Unfortunately, [your most recent statement](#) is a half-measure that does not yet satisfy the University's obligations under the First Amendment. I write not to repeat the points we made in our earlier letter, but to address the specific question of whether members of your faculty can be restricted to serving as expert witnesses only on a pro bono basis.

In this context, there is no constitutional distinction to be made between faculty members serving as paid expert witnesses and testifying pro bono. A federal circuit court was very clear about this issue when confronted with an example of the state of Texas attempting to prohibit faculty members at a state university from serving as paid expert witnesses in a lawsuit against the state. The fact that an expert witness might be compensated for his or her work does not lessen the constitutional protections for that activity.

In this case, we are dealing with just "speech." If all it takes to make speech commercial is that the speaker is paid to say it, then every writer with a book deal, every radio D.J., and every newspaper and television reporter is engaged in commercial speech. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801 (1988). Likewise, the fact that one is paid to be an expert witness, does not make his testimony commercial speech. . . . Therefore, the defining element of commercial speech is not that the speaker is paid to speak, but rather that the speech concerns the "economic interests of the speaker and its audience." *Hoover v. Morales*, 164 F.3d 221, 225 (5th Cir. 1998).



To the rhetorical question, “is speech still free if you get paid for it?,” that court answered with an emphatic “yes.” The constitutional right of these professors to testify in court is precisely the same whether they are being paid for their service or not.

The First Amendment strongly disfavors the kind of viewpoint discrimination against constitutionally protected speech that the University is currently contemplating. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 115 (1991). The University is seeking to draw a bright line between a professor speaking as a paid expert witness in a lawsuit against the state and any other instance in which a professor might serve as a paid expert witness, but it is constitutionally unacceptable to draw such a line. Indeed, the University suggests that professors can be compensated to speak if they testify *in favor of the state* but they cannot be compensated to speak if they testify *against the state*. This is constitutionally unsustainable.

Moreover, the University is now seeking to distinguish this particular example of professorial speech from all others. If it is contrary to the best interest of the university for a faculty member to be retained as an expert witness in a lawsuit against the state, would it equally be against the best interest of the university for a faculty member to write a book, a scholarly journal article, or a newspaper op-ed criticizing the state’s policies? Would it matter whether the professor is compensated for the op-ed or receives royalties from the book sales? Is the University proposing to suppress any criticism that members of its faculty might direct against the state unless they do so “pro bono on their own time”?

It cannot be a conflict of interest for a faculty member – in a private capacity and as an outside activity – to be retained as an expert witness in a lawsuit against the state when such work does not interfere with the ability of that faculty member to perform his or her ordinary duties for the University. Certainly the University cannot constitutionally single out this specific example of an outside activity and treat it differently simply because of the content of the speech. If the University allows members of the faculty to be compensated for their services while performing other outside activities, it cannot constitutionally prohibit them from doing so when those outside activities run contrary to the political and policy preferences of incumbent government officials.

The Academic Freedom Alliance stands firmly behind the professors in this matter and calls on the University of Florida to drop its requirement that these professors testify only on a pro bono basis.



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. Morteza Hosseini, Chair, Board of Trustees
David Richardson, Dean of the College of Liberal Arts and Sciences
Amy Meyers Hass, Vice President and General Counsel
David Bloom, Chair, Faculty Senate