



FIRE

Foundation for Individual
Rights and Expression

April 10, 2023

President Pamela Whitten
Office of the President
Indiana University
Bryan Hall 200
107 S. Indiana Ave.
Bloomington, Indiana 47405

Sent via U.S. Mail and Electronic Mail (pwhitten@iu.edu)

Dear President Whitten:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by reports that Indiana University told faculty leaders that they violated IU policy by sending an email to IU's faculty listserv about the potential effects of the state's proposed abortion law. Abortion and laws regulating reproductive healthcare are subjects of intense national debate, and faculty have the right to express themselves on matters of public concern—even those others find controversial. The faculty authors' email thus falls squarely within the First Amendment, which bars IU from investigating or punishing protected speech.

I. IU Warns Faculty Leaders for Sending Email About Abortion Legislation

On August 5, 2022, seven IU faculty members emailed IU's faculty listserv to express concerns about a proposed abortion bill they believed was a threat to the health and well-being of members of the IU community and to its reputation.² The authors opened the email by identifying themselves as “elected leaders of our respective Indiana University campuses and the university as a whole” and stated they were:

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 Steve Sanders, *Faculty presidents sent an email expressing concern about the state's new abortion law. IU told them they had violated policy*, MEDIUM (March 3, 2023), <https://medium.com/@stevesan/faculty-leaders-criticized-abortion-law-indiana-u-told-them-they-violated-policy-1f23591f10e5>. The recitation of facts here reflects our understanding of the pertinent facts based on public information. We appreciate that you may have additional information to offer and invite you to share it with us.

[p]rofessionally and ethically obligated to concern ourselves with . . . the health and wellbeing of our students, colleagues, and other members of the communities we serve, as well as the local national, and international standing of Indiana University as a reputable institution of higher learning known for its steadfast commitment to actively defending the principles of rationality, personal and intellectual freedom, and deference to demonstrable fact.³

They expressed concern that the bill threatened IU’s institutional interests in providing effective education and in attracting and retaining students, staff, and faculty on its campuses. They also expressed disagreement with Indiana Attorney General Todd Rokita’s public criticism and investigation of their medical school colleague, Dr. Caitlin Bernard, for legally providing abortion medication to a 10-year-old rape victim who was barred from obtaining an abortion in her home state.⁴ The authors concluded by calling on the Indiana General Assembly to reconsider the consequences of the proposed legislation, and on Rokita to stop his public criticism of Dr. Bernard. The authors each signed the email with their name, title, and elected position in faculty leadership.⁵

On August 31, IU Chief Compliance Officer Mike Jenson emailed the authors of the email, saying it violated IU policy because it conveyed “a personal opinion” and its content “was not approved by any university official with the authority to authorize it.”⁶ The co-authors are alleged to have violated University Policy GR-01: Contact with State Officials, Federal Officials, and Political Campaigns, and other Political Activities,⁷ which mandates that “all IU Community Members are expected at all times to distinguish between when they speak, write, or act in their personal capacity (including when they speak, write, or act on behalf of professional societies and other organizations) and when they speak, write, or act on behalf of the university’s interests.” Jenson specifically cited the opening sentence of their email that introduced the authors as elected leaders on campuses and the university as a whole, which he said caused a number of their colleagues to believe the message was IU’s stated position.⁸

Jenson warned that a violation of this policy was grounds to initiate a formal disciplinary process, but that he was instead reaching out to “request” that when they are speaking or writing publicly on “matters of partisan political activities or matters of public policy” they must make it “perfectly clear” they are expressing their personal opinion and not that of IU.⁹ Although it appears the investigation into the faculty co-authored email was resolved, the threat of a future investigation or punishment for protected speech under Jenson’s misinterpretation of the law still looms large.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

II. The First Amendment Bars IU from Investigating or Punishing the Faculty Co-Authors for the Email

As the First Amendment right to comment as citizens on matters of public concern protects the faculty co-authors' email to the faculty listserv, IU cannot use their email as grounds for punishment and thus has no basis for pursuing investigative or disciplinary processes in connection with it. It has long been settled law that the First Amendment binds public colleges like IU,¹⁰ such that their decisions and actions—including investigations and pursuit of disciplinary sanctions in response to faculty members' protected speech—must comply with the First Amendment.¹¹ Public college faculty do not “relinquish First Amendment rights to comment on matters of public concern by virtue of government employment,”¹² but remain free to speak on those matters. A government employer cannot penalize an employee for speaking as a private citizen on a matter of public concern unless it demonstrates its interests “in promoting the efficiency of the public services it performs” outweigh the interest of the employee “as a citizen, in commenting upon matters of public concern[.]”¹³

The faculty co-authors' email is speech on matters of public concern, which includes speech that “can be fairly considered as relating to any matter of political, social, or other concern to the community[.]”¹⁴ Laws regulating abortion and reproductive healthcare have been a matter of national debate for decades, and the email discusses pending abortion legislation in Indiana and its potential effects on the public and IU community.

Likewise, it is clear the faculty spoke as private citizens. The “critical question” in determining whether the speech was that of an employee or private citizen is “whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.”¹⁵ Ordinarily, institutions of higher education employ faculty to teach students, to engage in scholarship, and to provide service to the institution. Publicly commenting on pending legislation or investigations and statements by the Attorney General's office is not within the scope faculty members' daily responsibilities. The First Amendment thus protects their email.

That would remain the case even if the faculty here sent the email in the course of their employment. While public employees' speech as a general rule may not be protected if it occurs pursuant to their normal job duties,¹⁶ the fact that faculty at public colleges and universities

¹⁰ *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).

¹¹ *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

¹² *Connick v. Myers*, 461 U.S. 138, 140 (1983).

¹³ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁴ *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

¹⁵ *Lane v. Franks*, 573 U.S. 228, 240 (2014).

¹⁶ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

necessarily express themselves on such matters as part of their normal job duties as educators and scholars has led many U.S. Circuit Courts to hold that general rule does not apply to faculty’s academic speech.¹⁷ Instead, they enjoy academic freedom, which the Supreme Court has called a “special concern of the First Amendment,”¹⁸ to discuss difficult and controversial issues—even while on the job.

To determine whether the First Amendment protects a faculty member’s speech on a matter of public concern, courts balance the interests of the employee in commenting as a citizen against the government’s interest as an employer in promoting efficient performance of public services through its employees.¹⁹ To justify regulation or punishment, the government must demonstrate speech “impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.”²⁰ In the context of colleges and universities, the “desire to maintain a sedate academic environment does not justify limitations on a teacher’s freedom to express [themselves] on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.”²¹

Although Jenson claimed the faculty co-authors’ email “generated complaints to multiple units,” he provided no supporting evidence that those complaints constituted a substantial disruption, much less one that would rise to a level outweighing faculty members’ clear interests in expressing opinions on proposed state legislation. While it is possible the email may have stirred some discussion or disagreement among their colleagues, that alone does not create an institutional burden sufficient to overcome a public employee’s strong free speech interests.

III. Conclusion

As the First Amendment protects the faculty co-authors’ email, IU should not have investigated or threatened them with punishment for their protected speech. Jenson’s investigation into the email and veiled threat of future grounds for discipline created an impermissible chilling effect on faculty who fear they will be punished for future protected expression.

Of course, this principle does not speakers from every consequence of their expression—including disagreement from students, faculty, the broader community, or the university itself. Such debate is a form of “more speech” that the First Amendment prefers to censorship as a remedy to expression that one, or some—including administrators—find objectionable.²²

¹⁷ *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014); see also *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021); *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019); *Adams v. Trs. of Univ. of N.C.-Wilmington*, (6th Cir. 2011).

¹⁸ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

¹⁹ *Pickering*, 391 U.S. at 568.

²⁰ *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); see also *Nichols v. Dancer*, 657 F.3d 929, 933 (9th Cir. 2011).

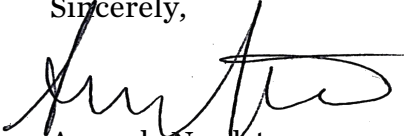
²¹ *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2009).

²² *Whitney v. California*, 274 U.S. 357, 377 (1927).

But the First Amendment limits the *types* of consequences that government actors may impose, and who may impose them.

We request a substantive response to this letter no later than the close of business on April 24, 2023, confirming that IU will not investigate or punish faculty for protected expression, and will uphold its constitutional obligation to permit employees to speak as on matters of public concern, including abortion, in the future.

Sincerely,

A handwritten signature in black ink, appearing to read 'Amanda Nordstrom', written over a light blue horizontal line.

Amanda Nordstrom
Program Officer, Campus Rights Advocacy

Cc: Rahul Shrivastav, Executive Vice-President
Andrew Klein, Executive Vice-President
Anthony Prather, Vice-President and General Counsel