



November 1, 2021

Dr. W. Kent Fuchs
Office of the President
University of Florida
226 Tigert Hall
P.O. Box 113150
Gainesville, Florida 32611

URGENT

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

Dear President Fuchs:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE appreciates that the University of Florida (UF) is one of the few institutions in the country whose policies earn a "green light" rating from FIRE. We are, however, deeply concerned by UF's decision to prohibit three professors from testifying in a voting rights lawsuit against the state of Florida. Restricting faculty members from participating in a judicial proceeding as expert witnesses is a profound violation of their First Amendment rights and academic freedom. We call on UF to immediately reverse this decision and allow the professors to participate in the lawsuit as expert witnesses with or without compensation.

I. UF Bars Faculty Members from Testifying in Voting Rights Lawsuit

The following is our understanding of the pertinent facts, based on publicly available information. We appreciate that you may have additional information to offer and invite you to share it with us.

On May 6, 2021, Florida Governor Ron DeSantis signed into law Senate Bill 90, a statute imposing new restrictions on voting in the state, including changes to voter identification requirements, voting by mail, the use of ballot drop boxes, third-party voter registration requirements, and rules governing activities at polling locations.¹ On May 17, a coalition of

¹ Press Release, Ron DeSantis, Governor Ron DeSantis Signs Bill to Safeguard the Sanctity of Florida Elections (May 6, 2021), <https://www.flgov.com/2021/05/06/governor-ron-desantis-signs-bill-to-safeguard-the->

voting rights advocates initiated a lawsuit against various state election officials to block implementation of S.B. 90.² The complaint in *Florida Rising Together v. Lee* alleges that the new law violates the Voting Rights Act, unlawfully restricts voters' rights to receive assistance at polling locations, and disproportionately burdens voting rights of the black and Latino population.³

The *Florida Rising Together* plaintiffs' lawyers sought to hire three University of Florida political science professors as expert witnesses: Daniel A. Smith, who chairs the Department of Political Science and studies "how initiatives, redistricting, and electoral laws shape political participation";⁴ Michael McDonald, whose research interests include elections, methodology, and voter turnout;⁵ and Sharon Wright Austin, who studies black Americans' political behavior.⁶ Pursuant to UF policy governing "outside activities and interests,"⁷ all three faculty members filed disclosure forms with UF concerning their planned participation in the lawsuit.

Upon review, UF denied the faculty members' requests. In rejecting Smith's request, David Richardson, Dean of the College of Liberal Arts and Sciences, told Smith that "[o]utside activities that may pose a conflict of interest to the executive branch of the State of Florida create a conflict for the University of Florida."⁸ Gary Wimsett, Assistant Vice President for Conflicts of Interest, denied McDonald's and Austin's requests for similar reasons, stating the requests created an "impermissible conflict of interest" and that, because "UF is a state actor, litigation against the state is adverse to UF's interests."⁹ UF had previously allowed Smith to testify in two voting rights lawsuits against Florida in 2018.¹⁰

On October 30, 2021, UF issued a statement in response to media reports about its rejection of the professors' requests, claiming it "did not deny the First Amendment rights or academic freedom of professors Dan Smith, Michael McDonald and Sharon Austin. Rather, the

sanctity-of-florida-elections; S.B. 90, 2021 Leg. Sess. (Fla. 2021), <https://www.flsenate.gov/Session/Bill/2021/90/BillText/er/PDF>.

² Press Release, Demos, Florida Voting Rights Advocates File Lawsuit Blocking Voter Suppression Law Targeting Black and Brown Voters (May 18, 2021), <https://www.demos.org/press-release/florida-voting-rights-advocates-file-lawsuit-blocking-voter-suppression-law-targeting>).

³ Class Action Complaint for Injunctive and Declaratory Relief, *Florida Rising Together v. Lee*, No. 4:21-cv-00201-AW-MJF (N.D. Fla. May 17, 2021), available at <https://www.demos.org/sites/default/files/2021-05/FRT%20v.%20Lee%20-%20Complaint.pdf>.

⁴ *Daniel A. Smith*, UNIV. OF FLA. COLL. OF LIBERAL ARTS AND SCIS., <https://polisci.ufl.edu/daniel-a-smith> (last visited Nov. 1, 2021).

⁵ *Michael McDonald*, UNIV. OF FLA. COLL. OF LIBERAL ARTS AND SCIS., <https://polisci.ufl.edu/michael-mcdonald> (last visited Nov. 1, 2021).

⁶ *Dr. Sharon Austin*, UNIV. OF FLA. COLL. OF LIBERAL ARTS AND SCIS., https://afam.clas.ufl.edu/dir_message (last visited Nov. 1, 2021).

⁷ *Resources*, UNIV. OF FLA. CONFLICTS OF INTEREST PROGRAM, <https://coi.ufl.edu/resources> (last visited Nov. 1, 2021).

⁸ Florida Rising Plaintiffs' Opposition to Motion to Quash Subpoena for Rule 30(B)(6) Deposition of the Executive Office of the Governor, Exh. E, *Florida Rising Together v. Lee*, No. 4:21-cv-00201-AW-MJF (N.D. Fla. Oct. 29, 2021).

⁹ *Id.*

¹⁰ Michael Wines, *Florida Bars State Professors From Testifying in Voting Rights Case*, N.Y. TIMES (Oct. 29, 2021), <https://www.nytimes.com/2021/10/29/us/florida-professors-voting-rights-lawsuit.html>.

university denied requests of these full-time employees to undertake outside paid work that is adverse to the university's interests as a state of Florida institution."¹¹ In a subsequent statement, a UF spokesperson said that "if the professors wish to do so pro bono on their own time without using university resources, they would be free to do so."¹²

II. UF's Decision Prohibiting Faculty Members from Testifying in Court Violates the First Amendment

UF's decision to bar Professors Smith, Austin, and McDonald from testifying as expert witnesses in *Florida Rising Together v. Lee* contravenes the university's obligations under the First Amendment and its own laudable promises of free speech and academic freedom.

A. The First Amendment Applies to UF as a Public University

It has long been settled law that the First Amendment is binding on public universities like UF.¹³ Accordingly, the decisions and actions of a public university must be consistent with the First Amendment.

The Supreme Court of the United States has recognized that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern to the First Amendment[.]"¹⁴

In addition, UF claims a commitment to upholding its First Amendment obligations that "runs deeper than simply a legal requirement."¹⁵ UF promises not to "stifle the dissemination of any idea, even if some members of our community find it wrong-headed, offensive, or hateful."¹⁶ University policy recognizes that "academic freedom and responsibility are essential to the full development of a true university"¹⁷ and "integral to the conception of the University as a community of scholars engaged in the pursuit of truth and the communication

¹¹ *University Statement on Academic Freedom and Free Speech*, UNIV. OF FLA., <http://statements.ufl.edu/statements/2021/october/university-statement-on-academic-freedom-and-free-speech.html> (last visited Nov. 1, 2021).

¹² Danielle Ivanov, *UF professors could testify in voting rights case if they are unpaid, spokeswoman says*, GAINESVILLE SUN (Oct. 31, 2021), <https://www.gainesville.com/story/news/education/campus/2021/10/31/university-of-florida-spokeswoman-three-professors-could-testify-if-unpaid/6223947001>.

¹³ *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).

¹⁴ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

¹⁵ *Freedom of Expression Statement*, UNIV. OF FLA., <http://statements.ufl.edu/statements/2019/april/freedom-of-expression-statement.html> (last visited Nov. 1, 2021).

¹⁶ *Id.*

¹⁷ UNIV. OF FLA., RULES OF DEPARTMENT OF EDUCATION DIVISION OF UNIVERSITIES UNIV. OF FLA. § 6C1-7.018(1)(a) (rev. 1998), <https://regulations.ufl.edu/wp-content/uploads/2012/09/7018.pdf>.

of knowledge in an atmosphere of tolerance and freedom.”¹⁸ To that end, a “faculty member must fulfill his/her responsibility to society and to his/her profession by manifesting academic competence, scholarly discretion, and good citizenship.”¹⁹ UF’s admirable commitments to free speech and academic freedom helped the university land in the top 20 of FIRE’s 2021 College Free Speech Rankings, which ranked 154 schools.²⁰

UF’s prohibition on the professors’ participation in *Florida Rising Together v. Lee* is an abandonment of its constitutional obligations and essential promises of free speech and academic freedom.

B. Faculty Members Have a Right to Speak as Private Citizens on Matters of Public Concern

Recognizing that “a citizen who works for the government is nonetheless a citizen,” the Supreme Court has declared that “[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.”²¹ When government employees speak as citizens about matters of public concern, “they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”²² Mere disapproval of the content of a faculty member’s expression—much less anticipated expression—is insufficient.²³

Like other public employees, faculty members at public universities do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”²⁴ As Supreme Court precedent makes clear, this includes the right to testify in court: “Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.”²⁵

i. The professors would testify in their capacity as private citizens

While their testimony would draw on their academic expertise, Professors Smith, Austin, and McDonald would serve as expert witnesses in *Florida Rising Together v. Lee* in their personal capacities, not as employees speaking on behalf of UF. Courts have recognized that “[s]worn

¹⁸ Collective Bargaining Agreement between the University of Florida Board of Trustees and the United Faculty of Florida § 10.1 (2021-24) [“CBA”], available at <https://hr.ufl.edu/wp-content/uploads/2021/08/2021-2024-UFF-UF-Collective-Bargaining-Agreement.pdf>.

¹⁹ *Id.* § (1)(b).

²⁰ 2021 College Free Speech Rankings, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <https://rankings.thefire.org/rank> (last visited Nov. 1, 2021).

²¹ *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

²² *Id.*

²³ *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (“Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.”).

²⁴ *Connick v. Myers*, 461 U.S. 138, 145 (1983).

²⁵ *Lane v. Franks*, 573 U.S. 228, 238 (2014).

testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.”²⁶ Providing testimony in court is not within these professors’ ordinary job duties, and UF’s disclosure requirements acknowledge that their legal consulting falls under “outside activities.”

ii. The professors’ testimony would address a matter of public concern

The professors’ testimony “can be fairly considered as relating to any matter of political, social, or other concern to the community,” as required to be a matter of public concern.²⁷ The Supreme Court has stated that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”²⁸ A state law altering voting rules and procedures and legal challenges to that law are inherently matters of public concern. The enactment of S.B. 90 has generated extensive national media coverage,²⁹ and the professors’ expert opinions on its validity or potential impact on voting in state and national elections indisputably constitute speech on issues of substantial public interest.

iii. UF has no legitimate interest in preventing the professors from serving as expert witnesses

A public employer may regulate its employees’ speech on matters of public concern only when the government’s interest “in promoting the efficiency of the public services it performs through its employees” outweighs “the interests of the [employee], as a citizen, in commenting upon matters of public concern.”³⁰ To meet that high bar, the public employer must demonstrate that the 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.”³¹ Notably, “a stronger showing” of disruption “may be necessary if the employee’s speech more substantially involve[s] matters of public concern,”³² as a controversial state law affecting voting rules and procedures surely does.

UF cannot demonstrate that the professors’ testimony would impede the performance of their job duties or interfere with university operations. UF’s sole reason for disallowing their participation in the lawsuit is that it would create a “conflict of interest” for the university or be “adverse to UF’s interests” because UF is a state entity, and Florida state officials are defendants in the case. The notion that a government actor such as UF can suppress truthful testimony in court out of a general concern that the testimony would be “adverse” to the

²⁶ *Id.* at 238.

²⁷ *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

²⁸ *Connick*, 461 U.S. at 140.

²⁹ See, e.g., Jaclyn Diaz, *Florida Governor Signs Law That Limits Voting By Mail And Ballot Drop Boxes*, NPR (May 6, 2021), <https://www.npr.org/2021/04/30/992277557/florida-legislature-approves-election-reform-bill-that-includes-restrictions>.

³⁰ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

³¹ *Rankin*, 483 U.S. at 388.

³² *Connick*, 461 U.S. at 150; *Whitney v. City of Milan*, 677 F.3d 292, 298 (6th Cir. 2012).

government's interests is completely alien to the First Amendment and harmful to the administration of justice.

As an initial matter, UF policy provides that employees' outside activities create a "conflict of interest" when they "interfere with—or reasonably appear to interfere with—their professional obligations to the University."³³ The policy thus narrowly targets only those activities that impair faculty members' ability to fulfill their job duties. UF's collective bargaining agreement encourages outside activities, recognizing that they "may support faculty professional growth and reputation, create and disseminate new knowledge and ideas, and further the University's mission of excellence in education, research, and service."³⁴ The agreement further specifies that UF may not use these provisions "to deny or retaliate against the legitimate exercise of rights protected by this Agreement," specifically including rights to academic freedom.³⁵ UF makes no claim—and there is no credible argument—that the professors' participation in the lawsuit would interfere with their professional obligations to the university.

The professors' involvement in the case would not pose a conflict of interest for UF as an institution, either. To the extent the university asserts an institutional interest in not taking any position contrary to the executive branch of the state government, that interest is unaffected by allowing the professors to participate in the lawsuit. As explained, the professors would be testifying in their personal capacities, not on behalf of the university. The university recognized as much when it permitted one of the professors to testify in previous voting rights lawsuits against the state government in 2018.

Importantly, UF's desire to silence expressive outside activities that the university generally deems adverse to its interests is not a legitimate government interest, let alone one sufficient to overcome faculty members' right to speak on matters of public concern. "The State may not burden the speech of others in order to tilt public debate in a preferred direction."³⁶ Accordingly, UF may not bar Smith, Austin, and McDonald from testifying simply because their testimony may express views contrary to those of UF or the Florida government, weaken the state's defense of the lawsuit, upset government officials, or affect the university's relationship with those officials. "[T]he first amendment protects the right to testify truthfully at trial,"³⁷ and it is a "core postulate of free speech law" that "[t]he government may not discriminate against speech based on the ideas or opinions it conveys."³⁸

In *Hoover v. Morales*, the United States Court of Appeals for the Fifth Circuit confronted a virtually identical situation.³⁹ In that case, professors at public universities in Texas challenged policies prohibiting faculty from serving as consultants or expert witnesses in litigation against the state of Texas, or when doing so would create a supposed "conflict of

³³ *Conflicts of Commitment and Conflicts of Interest*, UNIV. OF FLA., <https://policy.ufl.edu/policy/conflicts-of-commitment-and-conflicts-of-interest> (last visited Nov. 1, 2021).

³⁴ CBA at § 26.1(a).

³⁵ CBA at § 26.1(c).

³⁶ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–79 (2011).

³⁷ *Smith v. Hightower*, 693 F.2d 359, 368 (5th Cir. 1982).

³⁸ *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019).

³⁹ 164 F.3d 221 (5th Cir. 1998).

interest” with the state.⁴⁰ The Fifth Circuit flatly rejected the rationale behind these policies:⁴¹

Boiled down to its core, the State is simply arguing that the State’s interest is in preventing state employees from speaking in a manner contrary to the State’s interests.

Whatever else we might say about that “justification”, the State’s amorphous interest in protecting its interests is not the sort which may outweigh the free speech rights of state employees under *Pickering*. The notion that the State may silence the testimony of state employees simply because that testimony is contrary to the interests of the State in litigation or otherwise, is antithetical to the protection extended by the First Amendment.

Notably, the policies at issue in *Hoover* were unconstitutional even as applied to paid expert witnesses. Quoting the Supreme Court, the Fifth Circuit stated, “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.”⁴²

The court further held that the policies unconstitutionally drew a distinction between speakers based on the content of their speech—faculty members were prohibited from testifying or acting as consultants for those opposing the state in litigation, but permitted to engage in those activities on behalf of the state. As the court declared, “Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”⁴³

UF has no authority to prohibit Smith, Austin, and McDonald from commenting on S.B. 90 in a work of scholarship, on social media, or in a newspaper op-ed, even if those expressive activities run counter to UF’s interests. Likewise, it cannot forbid them from doing so in a court of law. Speech does not lose constitutional protection because government officials disapprove of its message. The potential negative reaction of state government officials to the professors’ testimony in open court in no way constitutes a disruption to university operations sufficient to abridge the professors’ freedom of speech. And even if the professors were paid for their service as expert witnesses, that would not diminish their First Amendment rights.⁴⁴ UF simply has no legitimate reason to bar the professors’ participation in the lawsuit.

⁴⁰ *Id.* at 226.

⁴¹ *Id.*

⁴² *Id.* at 225 (quoting *Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 801 (1988)).

⁴³ *Id.* at 227 (quoting *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

⁴⁴ *Riley*, 487 U.S. at 801. In addition, the university’s initial decision denying the professors’ requests to serve as expert witnesses did not cite the fact that they would be compensated as a reason for the denial, strongly suggesting that this is a post-hoc rationalization of a decision based only on the anticipated content of the professors’ testimony.

C. *UF's Decision Imposes a Prior Restraint on Speech*

UF's disapproval of the professors' request to appear as expert witnesses in *Florida Rising Together v. Lee* is a prior restraint on speech, compounding the constitutional violation. Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights."⁴⁵ The Supreme Court views such restrictions on speech most unfavorably, observing that "[a]ny prior restraint on expression comes [. . .] with a 'heavy presumption' against its constitutional validity."⁴⁶ The risk prior restraints present is so great that the "chief purpose" in adopting the First Amendment was to prevent their use.⁴⁷ They are valid only in the most demanding of circumstances.

Silencing expression adverse to the government's interests is not such a circumstance—as explained above, it is not even a legitimate state interest. UF cannot meet the high constitutional bar to justify imposition of a prior restraint on the professors' testimony.

III. UF's Decision Undermines Academic Freedom and the Administration of Justice

Far from interfering with their professional responsibilities, the professors' application of scholarly expertise outside of academia is a fundamental exercise of their academic freedom. It is consistent with UF's stated interest in fostering "good citizenship" and its fourfold mission of "teaching, research, scholarship and service," through which "students, faculty and staff embrace the ideal of sharing the benefits of our research and knowledge for the public good."⁴⁸ UF faculty members have no obligation to march in lockstep with the university and express only those positions on public issues that serve the interests of the university or government officials. Such a requirement would eviscerate faculty members' academic freedom.

As the American Association of University Professors states in its 1940 Statement of Principles on Academic Freedom and Tenure: "Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition."⁴⁹ It follows that "[a]cademic freedom can serve the public good only if universities as institutions are free from outside pressures in the realm of their academic mission."⁵⁰

By preventing its faculty from using their expert knowledge to help a court adjudicate issues of substantial public importance, UF runs afoul of these basic principles and contradicts its own mission and promise to not "stifle the dissemination of any idea."⁵¹ The university also

⁴⁵ *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

⁴⁶ *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

⁴⁷ *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

⁴⁸ *Service & Outreach*, UNIV. OF FLA., <https://www.ufl.edu/about/service-outreach> (last visited Nov. 1, 2021).

⁴⁹ AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, <https://www.aaup.org/file/1940%20Statement.pdf> (footnote omitted).

⁵⁰ Frederick P. Schaffer, *A Guide to Academic Freedom*, J. COLLECTIVE BARGAINING IN THE ACAD., Vol. 0, Art. 12 (2014), available at <https://thekeep.eiu.edu/cgi/viewcontent.cgi?article=1325&context=jcba>.

⁵¹ *Freedom of Expression Statement*, *supra* note 15.

undermines the ability of the judicial system to produce fair and reliable outcomes. As preeminent First Amendment scholar Eugene Volokh observed:⁵²

[I]f anything, expert witness work in court should be seen as especially protected from restriction. It provides extra information to courts resolving legal claims. It is considered in the relatively calm and thoughtful environment of the judicial process. It is subject to rebuttal by the state's own expert witnesses. And presumably the state of Florida should have a broader interest in following the law, including federal law when it trumps state law (see the U.S. Constitution's Supremacy Clause). Professors' conveying their expert knowledge to judges is thus especially valuable to the pursuit of truth (as well as to the administration of justice)[.]

UF must recommit to unequivocally supporting its faculty members' academic freedom.

IV. Conclusion

UF's decision to restrain potential expert witnesses from testifying in a civil proceeding because they may offer opinions at odds with the university's interests offends the First Amendment, principles of academic freedom, and society's vital interest in the effective truth-determining function of the courts. FIRE calls on UF to immediately reverse this illiberal and indefensible decision and allow Professors Smith, Austin, and McDonald to appear as expert witnesses—paid or unpaid—in *Florida Rising Together v. Lee*.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Friday, November 5, 2021.

Sincerely,



Aaron Terr
Program Officer, Individual Rights Defense Program and Public Records

Cc: Brande S. Smith, Senior Counsel

⁵² Eugene Volokh, *Univ. of Florida Blocks Professors' Expert Witness Work in Case Against Florida Government*, VOLOKH CONSPIRACY (Oct. 31, 2021), <https://reason.com/volokh/2021/10/31/univ-of-florida-blocks-professors-expert-witness-work-in-case-against-florida-government> (last visited Nov. 1, 2021).