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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION**

IDAHO FEDERATION OF TEACHERS et al.,

Plaintiffs,

v.

RAÚL LABRADOR, in his official capacity as
Attorney General of the State of Idaho, et al.,

Defendants.

Case No. 1:23-CV-353

**DECLARATION OF MARKIE
MCBRAYER IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

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**DECLARATION OF MARKIE MCBRAYER IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, Markie McBrayer, hereby declare that:

1. My name is Markie McBrayer. I am over the age of 18 years. I have personal knowledge of the following facts and if called to testify could and would competently do so.

2. As I explain more fully below, the No Public Funds for Abortion Act (“NPFAA”) has chilled my academic speech related to my political science courses and interfered with my teaching of core ideas and principles through lectures, class discussions, and supervision of student research and writing related to abortion. Because of the NPFAA, I cannot freely teach my classes in the manner I find most effective, and I am limited in my ability to help my students engage with policy issues related to abortion. The NPFAA thus diminishes my role as an educator and deprives my students of opportunities to think critically about, analyze, and engage with differing viewpoints, impairing their educational experience.

Background

3. I currently serve as an Assistant Professor of Political Science at the University of Idaho.

4. I received a Bachelor of Business Administration degree in Marketing from the University of Texas at Austin in 2008, a Master of Arts in Urban and Environmental Policy and Planning from Tufts University in 2012, and a PhD in Political Science from the University of Houston in 2017.

5. I have more than five years of professional teaching experience in higher education. While completing my PhD at the University of Houston, I served as a Future Faculty Fellow in 2016. From 2018 to 2019, I served as Lecturer, and from 2019 onwards, I have served as an Assistant Professor of Political Science, at the University of Idaho.

6. My teaching and research center on American politics and policy. I focus primarily on the areas of public policy; representation; social inequality in the American context, particularly at the local level; and statistical methodology.

7. I have authored several publications, including Markie McBrayer & Robert Lucas Williams, *The Second Sex in the Second District: The Policy Effects of Electing Women to County Government*, 76 Pol. Rsch. Q. 825 (2022); Markie McBrayer, Bert Baumgaertner, & Florian Justwan, *The Effects of COVID-19 on External Political Efficacy*, 50 Am. Pol. Rsch. 97 (2021); and Markie McBrayer, Roberto Lucas Williams, & Andrea Eckelman, *Local Officials as Partisan Operatives: The Effect of County Officials on Early Voting Administration*, 101 Soc. Sci. Q. 1475 (2020).

8. I have been a member of the American Political Science Association and the Southern Political Science Association since 2014, the Public Management Research Association since 2016, and the Midwest Political Science Association since 2017.

9. I received the Teaching Innovations Award from the University of Idaho in 2021.

The NPFAA and My Academic Speech

10. On May 10, 2021, Idaho Governor Brad Little signed the NPFAA into law and the Act went into effect that same day.

11. The NPFAA states that “[n]o public funds . . . shall be used in any way to . . . promote abortion; [or] counsel in favor of abortion.” Idaho Code § 18-8705(1) (2021). Additionally, “[n]o person, agency, organization, or any other party that receives [public] funds . . . may use those funds to . . . promote abortion.” *Id.* § 18-8705(2).

12. The NPFAA provides that a violation of these provisions by a public employee “shall be considered a misuse of public moneys punishable under section 18-5702,” which

authorizes criminal punishments, including fines and terms of imprisonment. *Id.* §§ 18-8709, 18-5702. It further provides that a violation of these provisions will result in termination for cause from public employment and require “restitution of any public moneys misused.” *Id.* § 18-5702(5).

13. I am concerned that the NPFAA’s prohibition on promoting and counseling in favor of abortion applies to the content of some of my courses, as described below. I fear that I could be subject to prosecution if I continue to teach my courses as I have in the past. In particular, I believe the NPFAA mandates that I teach only one perspective on abortion, which is inconsistent with the discipline of political science and the goals of higher education. Further, because I find the scope of the NPFAA vague and unclear, I cannot safely determine what academic speech might be construed as promoting or counseling in favor of abortion.

14. Although the University of Idaho has issued various forms of guidance related to the NPFAA since the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), it has not alleviated my concerns regarding the risk of prosecution for my academic speech. For example, on September 23, 2022, the University of Idaho issued a memorandum from the General Counsel’s Office, which instructs that “[a]cademic freedom is not a defense to violation of law, and faculty or others in charge of classroom topics and discussion must themselves remain neutral on the topic and cannot conduct or engage in discussions in violation of these prohibitions without risking prosecution.” Kim Decl. Ex. 1 at 6. In subsequent guidance, the University of Idaho President’s Office and the General Counsel’s Office issued statements that further highlighted the uncertainty professors face under the law and the risk of potential prosecution. Kim Decl. Ex. 2 at 1; Kim Decl. Ex. 3 at 1–2, 5.

15. On September 28, 2022, I also sought individual guidance from the University of Idaho General Counsel's Office on whether students could still complete research assignments on abortion policy under the NPFAA. That same day, the General Counsel's Office responded:

Looking at the language of Idaho's [NPFAA,] prohibiting University employees from "promoting abortion", there may be risk involved in such an assignment based on how students view any grading rubric. What is challenging here, in this context, is that current Idaho law criminalizes actions to "promote abortion" in addition to the procedure itself. The risk is that how the assignment is graded could lead to accusations that you are favoring abortion by your grading, whether you intended to or not. This is something that could be raised by a disgruntled student who is simply dissatisfied with their grade. The language of the statute creates this element of risk because of the general language regarding promoting abortion.

Ex. A at 1; *see also* Ex. B at 1.

16. The University of Idaho's response to the NPFAA and the University of Idaho General Counsel's individual guidance to me have not assuaged my concerns regarding the risk of prosecution based on my academic speech. Nor have they offered clarity on the law's applicability to professors and our classrooms. For these reasons, I no longer feel I can teach abortion-related topics. As described below, I have therefore changed my courses to the detriment of my teaching and my students' learning.

The NPFAA's Impact on My "Politics, Policy, and Gender" Course

17. Since 2022, I have taught "Politics, Policy, and Gender," which is an upper-level course that examines women's participation in the political process, with a particular focus on the United States. It is designed to introduce students to the study of gender and politics, including current debates and questions within the field. I will be teaching this course again in the Fall 2023 term.

18. The first section of the course discusses historical and theoretical foundations for women's traditional role in society and how that impacts their political participation. The second section of the course covers how women experience and shape the political process. And the third

section of the course concludes with a discussion of women, policy, and the policy process. During the third section of the course, students select a class topic of their choosing related to gender and politics for discussion during Week 13 of the semester. In the past, students have selected the topic of abortion.

19. The course also includes a research paper and presentation assignment. Students complete different stages of this assignment throughout the semester. In the first stage, students develop and submit research questions, which can include questions on abortion and related topics. In the second stage, students develop and submit a literature review. At this stage, students seek my help in finding academic and policy sources for their review. I generally share several sources with students to assist in their research. I also grade students' submissions throughout the semester, as well as their final paper and presentation as part of their final course grade.

20. One of my pedagogical goals is to expose students to a wide variety of viewpoints and theoretical frameworks so that they can make sense of the world, think critically about important issues, and discover their own perspectives and interests. The NPFAA directly impacts my pedagogy because its prohibitions on viewpoints that "promote" or "counsel in favor" of abortion limit my ability to present multiple viewpoints on this topic in my teaching and academic advising.

21. In particular, the NPFAA forced me to censor part of my curriculum in my "Politics, Policy, and Gender" course. At the beginning of the Fall 2022 term, my students selected the topic of abortion for discussion during Week 13 of the course. In preparation for this particular class, I was planning to lecture on abortion policy, including by presenting state-by-state public opinions as they relate to abortion and discussing the disjuncture between public opinion and abortion policy in states that restrict abortion. Upon re-examining the NPFAA, as well as the

University of Idaho guidance, I determined that I could no longer give the classroom lecture or permit discussion about abortion policy. As a result, I notified my students that they would have to select an alternative topic, and we instead planned to cover women's healthcare policy that did not relate to abortion. Although the students were able to select a different topic, the change made the class less enriching for my students. As my students themselves recognized by initially selecting this topic, abortion is one of the most pressing issues at the intersection of gender and politics. In removing the topic of abortion from the class, I therefore deprived my students of an important opportunity to think critically about, analyze, and discuss this policy issue. In particular, I was unable to lecture about and moderate discussion for my students in line with my pedagogy, presenting multiple viewpoints on the topic of abortion. Nevertheless, due to my fear of prosecution under the NPFSA, I will continue to prohibit my students from selecting the topic of abortion for the course, including in the upcoming Fall 2023 term.

22. The NPFSA has also chilled the way I advise my students on their research paper and presentation assignments in the course. In the Fall 2022 term, a few of my students selected abortion and related topics for their assignment. One of these students came to my office hours seeking support to find academic resources for their research. I did not engage in my general practice of directly sharing academic resources on abortion policy and politics with this student, for fear that recommending materials that present a viewpoint favorable to abortion would violate the NPFSA. Instead, I limited my advising role to suggesting various keyword searches so this student could locate academic sources on their own. I no longer feel like I can provide the appropriate advising to students who may need to review articles, data sets, or other academic literature on abortion because I fear that some of these materials may present viewpoints in favor of abortion in violation of the NPFSA.

23. The NPFAA has also impacted my grading of students' research assignments. As described above, I sought individual guidance from the University of Idaho General Counsel's Office on whether students could still complete assignments on abortion policy under the NPFAA. However, the General Counsel's Office responded that, under the NPFAA's "general language regarding promoting abortion," my grading of students' papers on the topic of abortion could "lead to accusations that [I was] favoring abortion by [my] grading." Ex. A at 1; Ex. B at 1.

24. Upon re-examining the NPFAA and receiving this guidance, I determined I could no longer grade research assignments where the student had chosen abortion as their subject. I therefore felt forced to give everyone in the class the same passing grade, whether they had chosen abortion or another topic related to gender, politics, and policy. I considered eliminating the research assignments from the course in the Fall 2023 term to reduce the possibility that students select a topic on which I cannot adequately advise or grade them. After much careful consideration, I decided not to do so because research is a vital component to upper-level classes, which prepare students for their capstone project. I also decided not to limit students' ability to choose abortion-related topics because exploring diverse policy topics and viewpoints is also vital to this course. However, if a student were to pursue an abortion-related topic as part of their research assignment in the future, I would again be forced to give everyone the same passing grade.

25. As a result of the NPFAA, I have also decided to include disclaimers in my course in order to notify my students that I cannot teach in the area of abortion. In Week 6 of the course in the Fall 2022 term, I provided a verbal disclaimer at the start of one of my classes describing the NPFAA and the university's interpretation of the NPFAA, and explaining that, as a result of the NPFAA's prohibitions on promoting or counseling in favor of abortion, I could not lecture on or lead any classroom discussions related to abortion. In Week 7 of the course, I shared the

guidance I received from the General Counsel's Office in response to my question as to whether students could still complete research assignments on abortion policy. I also explained that, as a result of the NPFSA and that guidance, I could no longer grade assignments on abortion-related topics and that if a student chose such a topic, I would have to give all students a passing grade for completion only. I plan to provide similar disclaimers at the beginning of the semester to my students in the Fall 2023 term.

The NPFSA's Impact on My "American Politics and Policy" Course

26. Since 2020, I have also taught "American Politics and Policy," which is a course designed to introduce students to public policy and policymaking in the American context. I have taught this course twice at the University of Idaho, in Fall 2020 and Fall 2022. I will be teaching this course again in the Fall 2023 term.

27. The first section of the course examines key theories in the field of public policy, particularly as they relate to the policy process, including how social values and stigmas can be reflected in policies. The second section of the course examines specific policy domains, like education, the environment, and social policy, to name a few. Although the topic of abortion is not part of students' assigned reading materials, the course organically leads to discussions about abortion due to its salience in American politics and policy, and it is especially relevant during the first section of the course where we explore policies that implicate social values and stigmas.

28. The course also includes a policy brief assignment. Students complete different stages of their policy brief throughout the semester—first submitting potential ideas, then defining the problem and evaluating potential policy solutions, and finally, developing policy recommendations. I generally share several sources with students to assist in their research. I also

grade students' submissions throughout the semester, as well as their final policy brief, as part of their final course grade.

29. Due to the NPFAA, I feel that I can no longer safely allow for classroom discussion that relates to abortion, for fear that others will view how I moderate that discussion as promoting or counseling in favor of abortion. For that reason, when I teach this class in the future, I will not permit any discussion on abortion. At the beginning of the semester, I will also share with students a disclaimer in class, which will include the language of the NPFAA, and explain how the NPFAA's prohibition of speech that could "promote" or "counsel in favor" of abortion means we cannot hold any discussions on abortion.

30. As a result of the NPFAA, I have also decided to completely remove the policy brief assignment from my "American Politics and Policy" course to eliminate the possibility that students select an abortion-related topic on which I cannot adequately advise or grade them. Research is a vital aspect of many of my courses, especially my upper-level courses, such as my "Politics, Policy, and Gender" course. Given the current restrictions under the NPFAA, I ultimately had to weigh the educational benefits of keeping the policy brief assignment as part of "American Politics and Policy," an introductory course, with the threat of enforcement against me. I understand the removal of this assignment, along with my inability to teach on abortion-related topics, will have a serious impact on my students' education.

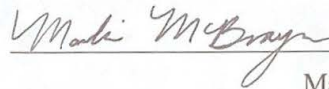
Conclusion

31. I cannot educate my students on political science and policy issues related to abortion without presenting a wide variety of viewpoints on this topic. But the NPFAA prevents me from teaching in this way and therefore inhibits academic and intellectual debate and discussion on abortion policy. The law appears to reflect the Idaho legislature's view that public

educators can only teach a state-approved position on abortion. But to teach only one view or perspective on a given topic, simply because the legislature disagrees with any other viewpoint, runs fundamentally counter to the study of politics and policy. To succumb to this directive would be a disservice to my students who care deeply about politics and policy, wish to grapple with difficult and complex topics, and deserve a well-rounded and comprehensive education. Completely omitting all discussion of abortion is likewise academically and intellectually irresponsible, especially as abortion policy is so central to the study of gender and politics. But under the current law, I do not feel that I can fully perform my role as an educator, and I fear for my safety and the safety of my children, given that my teaching could subject me to criminal prosecution.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 28, 2023 in MOSCOW, Idaho.



Markie McBrayer