

Exhibit 5



November 17, 2022

County Prosecutor Jan M. Bennetts
Ada County Prosecutor's Office
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Boise, ID 83702
adacountyprosecutor@adacounty.id.gov

Scott Bandy, Chief Deputy Prosecutor
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Shawna Dunn, Chief Deputy Prosecutor
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By email and certified mail

**RE: County Prosecutions of College and University Staff and Students Under Idaho
Abortion Statutes**

Dear County Prosecutor Bennetts, Chief Deputy Prosecutor Bandy, and Chief Deputy Prosecutor
Dunn:

As the chief defender of the First Amendment in our state, the ACLU of Idaho is deeply concerned about the potential application of the No Public Funds for Abortion Act ("NPFPA Act") and Idaho Code § 18-603 in college and university settings. Several public colleges and universities in Idaho have advised their employees and students that those statutes put them at risk of criminal prosecution for engaging in advocacy of reproductive autonomy. The ACLU of Idaho has been contacted by individuals who seek to engage in constitutionally protected activity which the NPFPA Act may be interpreted to criminalize. We write to you to seek assurances that you will not pursue prosecutions against university faculty, staff, or students under the NPFPA Act or Section 18-603 for advocacy of reproductive autonomy.

Idaho’s No Public Funds for Abortion Act prohibits the use of “public funds made available by the state . . . to provide, perform, or induce an abortion; assist in the provision or performance of an abortion; *promote abortion*; *counsel in favor of abortion*; refer for abortion; or provide facilities for an abortion or for training to provide or perform an abortion.”¹ Violations of the NPFFA Act can result in criminal penalties for “misuse of public funds,” punishable through fines or imprisonment.² Section 18-603 of the Idaho Code provides that any non-physician who “willfully publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, *or for the prevention of conception*, or who offers his services by any notice, advertisement, or otherwise to assist in the accomplishment of any such purpose, is guilty of a felony.”³

These statutes are broadly worded and vague. Thus, university and college officials have interpreted them as imposing a risk of criminal liability on faculty and staff who may be deemed to “promote” abortion through their work.⁴ The University of Idaho told its employees to remain “neutral” in classroom discussions about abortion⁵ and continues to make employees aware of the “criminal penalties” and the “uncertainty and risk with respect to discussions regarding abortion.”⁶ Boise State University and Lewis-Clark State College have similarly warned employees of the potential for criminal prosecutions for engaging in constitutionally protected speech.⁷

We have received reports that universities are barring faculty and staff, including student workers, from providing information about abortion and contraception to students inside and outside the classroom. Additionally, on some campuses, Section 18-603 is interpreted so broadly that under the resulting restrictions, condoms can only be advertised as preventing sexually transmitted diseases, not as preventing pregnancy.⁸ We have also learned that universities are restricting the type of information student groups can disseminate not only about abortion, but also about contraceptives and reproductive health more generally.

College and university interpretations of the NPFFA Act have thus chilled discussions about abortion and contraception on university campuses all across our state. Professors fear criminal prosecution for teaching or writing on topics germane to their areas of expertise and some are considering substantial changes to their curricular plans in light of university guidance. Staff feel restrained in the type of support they can provide students. Students and student groups have been similarly silenced in their educational and extracurricular activities.⁹

¹ Idaho Code § 18-8705(1) (emphasis added).

² Idaho Code § 18-8709 (citing to Idaho Code § 18-5702).

³ Idaho Code § 18-603 (emphasis added).

⁴ See attached Memo to University of Idaho Employees from General Counsel (Sept. 23, 2022) (herein UI September 23 Guidance); Boise State University Frequently Asked Questions: No Public Funds for Abortion Act and Idaho Abortion Laws (herein BSU Guidance); Lewis-Clark State College Memorandum Concerning Compliance with Idaho Law Title 18, Chapter 87: No Public Funds for Abortion Act (herein LCSC Guidance).

⁵ See UI September 23 Guidance.

⁶ See attached University of Idaho Frequently Asked Questions—Guidance for University Employees and Community Regarding State Laws on Abortion and Contraception.

⁷ See BSU Guidance; LCSC Guidance.

⁸ See UI September 23 Guidance.

⁹ Universities have also shared the same guidance cited above with student workers.

The First Amendment of the United States Constitution bars state government actors like college and university administrators from compelling faculty and students to avoid discussing topics just because they present controversial or unpopular viewpoints.¹⁰ But Idaho public college and university administrators are signaling that faculty and students may be criminally liable for engaging in speech on abortion and contraception-related topics. Criminally prosecuting faculty, staff, and students who wish to engage in discussions “promoting” abortion and contraceptives plainly would be unconstitutional under the First Amendment. Since you, not college and university administrators, hold the power to enforce criminal statutes, we ask for your assurances that you will not prosecute university faculty, staff, or students for such discussion under the NPPFA Act, Section 18-603, or other Idaho statutes. To avoid an illegitimate chilling of protected speech on the part of faculty members and students at Idaho universities in your jurisdiction, we seek the following assurances:

1. **Faculty teaching, scholarship, and public speech.** Please assure us that you will not prosecute public university faculty who, in the course of their employment, teach, research, or engage in other speech in the classroom, curricular assignments, scholarly journals, online or in the public media that presents ideas that favor or promote abortion or contraception in the following ways:
 - a. Presenting quantitative and qualitative data on the benefits of abortion, contraception, and reproductive rights;
 - b. Presenting positive discussion of policies, political movements, and laws supporting or highlighting the benefits of abortion, contraception, and reproductive rights, for example, discussing violence in the anti-choice movement, the improvement in quality of life for some due to abortion, or evidence suggesting that the *Dobbs* decision will result in disproportionate deaths of women of color;
 - c. Discussing the historical use of abortion, abortifacients, self-managed abortion, and contraceptives;
 - d. Presenting information highlighting the historical opposition to abortion and harms caused by the anti-choice movement;
 - e. Discussing reproductive health in indigenous communities, including stances on abortion and reproductive rights;
 - f. Presenting literature or information promoting bodily autonomy, including abortion, contraception, and reproductive rights; or,

¹⁰ See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Healy v. James*, 408 U.S. 169 (1972); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021); *Tinker v. Des Moines Indep. Cty. Sch. Dist.*, 393 U. S. 503 (1969).

- e. Hosting sex ed events with pro-choice groups such as Planned Parenthood and Idaho Abortion Rights.

If you have any questions about this request, please reach out to us at erodarte@acluidaho.org.

Sincerely,

/s/ Aadika Singh
Legal Director
ACLU of Idaho

/s/ Erica Rodarte
Legal Fellow
ACLU of Idaho

/s/ Seth F. Kreimer, Esq.
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