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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

IDAHO STATE UNIVERSITY FACULTY)	
ASSOCIATION FOR THE PRESERVATION)	
OF THE FIRST AMENDMENT, an Idaho)	Case No. _____
Unincorporated Nonprofit Association,)	
)	
Plaintiff,)	COMPLAINT
)	
vs.)	
)	
IDAHO STATE UNIVERSITY , ARTHUR)	
VAILAS, and BARBARA ADAMCIK,)	
)	
Defendants.)	
_____)	

I. COMPLAINT

Plaintiff, Idaho State University Faculty Association for the Preservation of the First Amendment (hereinafter “Plaintiff” or “ISUFAPFA”), an Idaho Unincorporated Nonprofit Association formed pursuant to Idaho Code §§ 53-701 et seq., brings this complaint against Defendant Idaho State University (hereinafter “ISU”), its employees and agents, and Defendants

Arthur Vailas and Barbara Adamcik to safeguard the rights of its members under the United States Constitution. In support thereof, Plaintiff alleges the following:

II. PRELIMINARY STATEMENT

This is an action under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution of the United States to challenge the deprivation of the rights of Plaintiff's members under the First and Fourteenth Amendments to the United States Constitution and seeking injunctive relief to prevent the continuing deprivation of its members' First Amendment rights. Through censorship and denial of access, Defendants have prevented Plaintiff's members and members of the Provisional Faculty Senate (hereinafter "PFS")¹ from utilizing a faculty-wide email listserv to propagate messages related to the work of the PFS on behalf of the faculty. Messages blocked by the Defendants include messages related to the First Amendment and others intended to inform the faculty of the PFS's progress on their constitution, all while ISU and its employees and agents utilize the same faculty-wide email listserv to promote a counter-agenda and policies favored by the Defendants. This content-based restriction on access to a resource previously used without restriction by the PFS and its faculty members is in violation of the rights asserted by Plaintiff under the United States Constitution. Plaintiff seeks injunctive relief (temporary, preliminary, and permanent) in order to prohibit Defendants from continuing to deny Plaintiff's members access to the faculty-wide listserv in violation of their First Amendment freedoms.

¹ The Provisional Faculty Senate is a body of faculty elected by the faculty of Idaho State University to represent all faculty and craft a constitution and bylaws for shared governance of the University.

III. JURISDICTION AND VENUE

1. Plaintiff brings this action pursuant to 42 U.S.C. §1983 to redress a deprivation of civil rights under color of state law. Jurisdiction is invoked in this Court pursuant to 28 U.S.C. §§ 1331, and 1343.

2. The Eleventh Amendment is not implicated in this matter as the Plaintiff seeks prospective relief for the ongoing violation of Plaintiff's members' First Amendment Rights.²

3. Venue is properly set in the United States District Court for the District of Idaho pursuant to 28 U.S.C. § 1391 because the actions alleged in this complaint occurred in this District and on information and belief, all parties reside or exist in this District.

4. Plaintiff's members are faculty of Idaho State University and Plaintiff represents their interests before this Court. Plaintiff has standing to assert this claim on behalf of its members pursuant to Idaho Code § 53-707(2) because one or more of Plaintiff's members have standing to assert a claim in their own right, the interest that Plaintiff seeks to protect are germane to its purposes and neither the claim asserted nor the relief requested requires the participation of a member. Standing is further proper because the injunctive relief sought will inure to the benefit of Plaintiff's members.³

² Plaintiff has brought this cause of action against Defendant's Vailas and Adamcik in their official capacities, which the law interprets as bringing the claim against the state itself and such an action would normally be prohibited by the Eleventh Amendment. There is, however, "[a] narrow exception . . . 'where the relief sought is prospective in nature and is based on an ongoing violation of the plaintiff's *federal* constitutional or statutory rights.'" *Id.* at 967-968 (quoting *Central Reserve Life of N. Am. Ins. Co. v. Struve*, 852 F.2d 1158, 1161 (9th Cir. 1988)) (emphasis in original). Under this exception – termed the *Ex Parte Young* doctrine – "official-capacity actions for prospective relief are not treated as actions against the State." *Will*, 491 U.S. at 71 n. 10 (internal quotations omitted)."

Sadid v. Idaho State University, 2011 WL 3489893, 7, (D.Idaho, 2011)

³ If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind. E.g., *National Motor Freight Assn. v. United States*, 372 U.S.

IV. PARTIES

5. Plaintiff, Idaho State University Faculty Association for the Preservation of the First Amendment, is an Idaho Unincorporated Nonprofit Association formed pursuant to the Idaho Uniform Unincorporated Nonprofit Association Act, Idaho Code §§ 53-701 et seq. Plaintiff has standing to assert the claims herein on behalf of its members pursuant to Idaho Code § 53-707(2) as detailed above.

6. Defendant Idaho State University (hereinafter "ISU"), is now, and at all relevant times herein was, a "body politic and corporate, with its own seal and having power to sue and be sued in its own name" (*See* Idaho Code § 33-3003) and is now and at all relevant times herein "was established in the city of Pocatello, Idaho, an institution of higher education to be designated and known as the Idaho State University, consisting of such colleges, schools or departments as may from time to time be authorized by the Idaho State Board of Education." *See* Idaho Code § 33-3001.

7. Defendant Arthur C. Vailas, is now, and at all relevant times herein was acting pursuant to custom and policy derived from the official capacity delegated to him by the Idaho State Board of Education and ISU, and is being sued in both his individual and representative capacities.

8. Defendant Barbara Adamcik is now and at all relevant times herein was acting pursuant to custom and policy derived from the official capacity delegated to her by ISU, and is being sued in both her individual and representative capacities.

246, 83 S.Ct. 688, 9 L.Ed.2d 709 (1963). *See* Data Processing Service v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Cf. Fed. Rule Civ. Proc. 23(b)(2).

Warth v. Seldin, 422 U.S. 490, 515, 95 S.Ct. 2197, 2213 (U.S.N.Y. 1975)

V. STATEMENT OF THE FACTS

9. Defendant ISU provides information technology (“IT”) systems, including computers and email systems, to its Administration, faculty, staff, and students to support the mission of the University.

10. Access is granted by ISU to authorized users and organizations within ISU.

11. Access and use policies affecting authorized users can be found in the Policies and Procedures of Idaho State University - specifically, in Part 3. Services, Functions and Facilities Use, Section VIII. Information Technology (5-05), C. Acceptable Use Policy.

12. According to section 5(b) of the Acceptable Use Policy, “It is the intent of ISU to provide access to all authorized users. Given the critical nature of information systems, however, network and Internet use *may be revoked as necessary, and in accordance with due process procedures*, to protect the access of everyone.” (Emphasis added)

13. On February 17, 2011, the Idaho State Board of Education (hereinafter “SBOE”) voted to suspend the Faculty Senate at Idaho State University after the Faculty Senate voted “no confidence” in ISU President Arthur Vailas.

14. The Faculty Senate was a body of faculty comprised of members elected by faculty to represent the faculty in the shared governance of Idaho State University.

15. The Chair of the Faculty Senate and the Faculty Senate, as an organization, were authorized users of ISU IT systems.

16. Up until February 17, 2011, the date the Faculty Senate was disbanded, the Chair of the Faculty Senate had the ability to send emails to all faculty through the use of the email listserv, Facultymemos.

17. Until the Faculty Senate was disbanded, its Chair routinely sent emails to the faculty to announce upcoming meetings and other matters of interest to the faculty.

18. At no time prior to February 17, 2011, had the Chair of the Faculty Senate or the Faculty Senate been denied authorization to use the Facultymemos listserv to reach out to its constituents, all faculty.

19. The Facultymemos listserv is also routinely used by the Administration of ISU, other organizations within ISU, other committees, councils, etc., for the purpose of contacting all faculty through the use of a single and convenient email address.

20. On April 21, 2011, the SBOE authorized the creation of a new provisional faculty senate to develop a new constitution and bylaws for approval by the university president and the SBOE.

21. The newly elected senators of the PFS assembled on May 5, 2011, and elected their officers, established an executive committee, and moved forward with the work tasked to the PFS by the SBOE.

22. On August 23, 2011, Defendant Adamcik sent an email to all faculty via the Facultymemos listserv welcoming their return for the fall semester.

23. Attached to Adamcik's August 23, 2011, email was a letter dated August 22, 2011, which in part indicated that a major focus of the coming year would be for Adamcik to work with the PFS as the PFS drafted a constitution and bylaws as tasked by the SBOE.

24. On August 26, 2011, as Chair of the PFS, Philip Cole sent an email directly to all faculty via the Facultymemos listserv announcing the upcoming August 29, 2011, PFS meeting.

25. Philip Cole sent similar emails directly to the Facultymemos listserv on September 9, 2011, September 16, 2011, and September 22, 2011, announcing agenda items and upcoming meetings of the PFS.

26. Between August 2011, and October 2011, the PFS worked on drafting a constitution and bylaws that would incorporate the needs of the faculty in the shared governance of ISU.

27. On November 7, 2011, at a regular meeting of the PFS, PFS senator Mikle Ellis moved to send the revised constitution out for a general faculty vote on Wednesday, November 16, 2011. The motion was seconded, put to a vote, and passed unanimously.

28. The next PFS meeting was scheduled for Monday, November 14, 2011.

THE CRITICAL NOVEMBER 8, 2011 TIPPING POINT – FIRST EMAIL BLOCKED

29. On November 8, 2011, acting on behalf of absent PFS Chair, Philip Cole, Vice-chair David Delehanty, as directed by the motion passed on November 7, 2011, attempted to send an email to the Facultymemos listserv for distribution to all faculty regarding the upcoming faculty vote on November 16, 2011.

30. On November 8, 2011, David Delehanty was unable to send the email regarding the vote to all faculty via the listserv Facultymemos.

31. On November 8, 2011, David Delehanty emailed Defendant Vailas and Defendant Adamcik as a courtesy to inform them of the upcoming faculty vote on the draft constitution.

32. In the November 8, 2011, email David Delehanty informed Defendants Vailas and Adamcik that if ratified by the faculty on November 16, 2011, the PFS would ask that the

draft constitution be forward by Defendant Vailas to the SBOE for approval at the SBOE's December 2011, meeting.

33. On November 8, 2011, Defendant Adamcik responded by email to David Delehanty informing him that she wanted to meet with David Delehanty and Philip Cole on November 9, 2011, to discuss the email regarding the upcoming university-wide faculty vote on the draft constitution on November 16, 2011.

34. On November 10, 2011, Philip Cole forwarded David Delehanty's November 8, 2011 message to all faculty to his colleagues on the PFS and asked them to forward the email to their faculty constituents because David Delehanty's November 8, 2011, email, sent on behalf of the PFS, was not authorized by the Administration, and specifically by Defendant Adamcik, for release to all faculty via the Facultymemos listserv.

35. On November 11, 2011, Defendant Adamcik, using the faculty-wide listserv Facultymemos, sent an email to all faculty with an attached letter.

36. The letter attached to Adamcik's November 11, 2011, email was also dated November 11, 2011.

37. In the letter, Defendant Adamcik informed the faculty that she had met with David Delehanty on the 9th of November to request that the PFS postpone the November 16 poll until sometime in December 2011.

38. In the letter Defendant Adamcik informed the faculty that the constitution is a very important document and additional time should be available to fine tune it so that it will be acceptable to both the faculty body and to the president, Defendant Vailas. Further she added that any vote carried out by the PFS on Wednesday, November 16, 2011, was not sanctioned by her.

39. On November 14, 2011, Philip Cole, emailed a request through the administrative assistant for the PFS to Defendant Adamcik seeking permission to send the voting procedures for the November 16, 2011, referendum to all faculty via the Facultymemos listserv.

40. Defendant Adamcik never responded or granted permission for Philip Cole's November 14, 2011, email to go to all faculty via Facultymemos.

41. As of November 14, 2011, Philip Cole was still an authorized user of ISU's IT resources.

42. As of November 14, 2011, Philip Cole had never been informed that he had violated the acceptable use policies for IT resources or that he had his privileges revoked.

43. As of November 14, 2011, two requests by Philip Cole to use the Facultymemos listserv had gone unanswered and two emails for legitimate business of the PFS had been blocked from distribution to all faculty via an authorized resource.

44. As of November 14, 2011, Philip Cole's use of the faculty listserv, Facultymemos, had been denied without the due process afforded by ISU's Acceptable Use Policy, section 5(b).

45. According to the minutes of the December 12, 2011, regular meeting of the PFS, a motion was made by Mikle Ellis and seconded by David Delehanty to inform all faculty of a recent decision by the Idaho Supreme Court (*Sadid v. Idaho State University*, 151 Idaho 932, 265 P.3d 1144 (November 30, 2011)) as it impacted the ability of all Idaho state employees to make public statements as individuals under the protection of the First Amendment if (1) it is not a part of their official duties, and (2) it is a matter of public concern.

46. Philip Cole informed Messieurs Ellis and Delehanty that before he could email a copy of the Idaho Supreme Court decision to all faculty, he would need the permission of Defendant Adamcik to use the Facultymemos listserv.

47. Because Defendant Adamcik was present at the December 12, 2011, meeting of the PFS, Mikle Ellis asked her if she would approve the email request of Philip Cole.

48. Defendant Adamcik denied Philip Cole permission to use Facultymemos to distribute the Idaho Supreme Court decision on protected speech to the faculty.

49. Mikle Ellis then asked Defendant Adamcik if she was actually going to block a message on free speech.

50. Defendant Adamcik responded that yes she was.

51. Since the December 12, 2011, PFS meeting, Philip Cole has made several requests to send emails to all faculty via the Facultymemos listserv to carry out official business of the PFS, but none of the requests have been approved.

52. On January 31, 2012, despite blocking access to Facultymemos to the PFS and Philip Cole for use in disseminating information to all faculty regarding the draft constitution, Defendant Adamcik utilized the Facultymemos listserv to send out her own message to all faculty regarding feedback received from the various colleges, at her behest, on the November 7th draft constitution, and to send out the Administration's sanctioned draft version of the constitution.

53. On February 1, 2012, Philip Cole asked Defendant Adamcik for permission to send out a meeting announcement for the PFS to all faculty via the Facultymemos listserv.

54. Despite Philip Cole having previously had the ability to send out meeting announcements directly to Facultymemos in August and September of 2011, approval was not forthcoming for the February 1, 2012, request to send out a meeting announcement.

55. Despite the PFS and its Chair, Philip Cole, no longer being able to utilize the Facultymemos listserv, other departments or organizations within ISU have direct access to the Facultymemos listserv without the need to seek pre-approval from Defendant Adamcik.

56. On December 16, 2011, Dr. Herbert Maschner, Director of the Idaho Museum of Natural History (“IMNH”), an entity funded by the SBOE and supervised by ISU, sent a holiday card on behalf of the IMNH to all faculty directly through the use of the Facultymemos listserv.

57. As of the time of filing of this complaint, Philip Cole has never been informed or advised that he is not an authorized user of ISU’s IT resources.

58. As of the time of filing of this complaint, Philip Cole has never been informed that he has violated the acceptable use policy for ISU’s IT resources, or that his privileges have been revoked.

VI. CLAIMS

FIRST CAUSE OF ACTION

Violation of First Amendment Right to Free Speech

Violation of Civil Rights Pursuant to Title 42 U.S.C. § 1983, First and Fourteenth Amendments to the U.S. Constitution

59. Plaintiff restates and re-alleges paragraphs 1 through 58 of this Complaint, and incorporates them in herein.

60. The IT resources and email systems of ISU are non-public forums for communication within ISU for the purposes of carrying out ISU's mission.

61. As an authorized user, the PFS, and its Chair, or its Chair's designee, such as the Vice-chair, have the right under ISU policy to access and use the listserv, Facultymemos.

62. When instituted on or about November 8, 2011, Defendants' requirement that the PFS Chair or his designee seek prior approval to send faculty-wide emails via Facultymemos was an abridgement of an authorized access to Facultymemos without regard to ISU's own policies, or the First Amendment to the Constitution of the United States.

63. Defendants actions to censor and block the speech of the PFS, and its Chair or designee, since November 8, 2011, constitute an unreasonable time, place, and manner restriction on free speech based on the content of the sender's message.⁴

64. Defendants' content-specific restriction and outright block of an authorized user of the Facultymemos listserv inhibit Plaintiff's members' exercise of their right to free speech as recognized under the First and Fourteenth Amendments to the Constitution of the United States.

⁴ Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Greenburgh Civic Ass'n*, *supra*, 453 U.S., at 129, 101 S.Ct., at 2684. In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 103 S.Ct. 948, 955 (U.S.Ind.,1983)

SECOND CAUSE OF ACTION

**Violation of First Amendment Right to Free Speech:
Suppression of Free Speech without Due Process**

Violation of Civil Rights Pursuant to Title 42 U.S.C. § 1983, First and Fourteenth Amendments to the U.S. Constitution

65. Plaintiff restates and re-alleges paragraphs 1 through 64 of this Complaint, and incorporates them in herein.

66. The IT resources and email systems of ISU are non-public forums for communication within ISU for the purposes of carrying out ISU's mission.

67. As an authorized user, the PFS, and its Chair, or its Chair's designee, such as the Vice-chair, have the right under ISU policy to access and use the listserv, Facultymemos.

68. When instituted on or about November 8, 2011, Defendants' requirement that the PFS Chair or his designee seek prior approval to send faculty-wide emails via Facultymemos was an abridgement of an authorized access to Facultymemos without regard to ISU's own policies, or the First Amendment to the Constitution of the United States.

69. Defendants' actions to censor and block the speech of the PFS, and its Chair or designee, since November 8, 2011, constitute an unreasonable time, place, and manner restriction on free speech based on the content of the sender's message.

70. Defendants' content-specific restriction and outright block of an authorized user of the Facultymemos listserv inhibit Plaintiff's members' exercise of their right to free speech as recognized under the First and Fourteenth Amendments to the Constitution of the United States.

71. Defendant's restriction of the use of the faculty-wide listserv Facultymemos was done without providing the due process afforded authorized users under ISU's Acceptable Use Policy, section 5(b).

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for judgment against Defendants as follows:

- A. That this Court issue a Temporary Restraining Order and/or Preliminary Injunction prohibiting Defendants from continuing to deprive Plaintiff's members' access to and the use of the faculty-wide email listserv, Facultymemos, until such time as the Court can hold a hearing on Plaintiff's request for a preliminary injunction;
- B. That this Court permanently enjoin and restrain Defendants from prohibiting Plaintiff's members' access to and the use of the faculty-wide listserv, Facultymemos;
- C. That this Court award Plaintiff its costs and expenses of this action, including reasonable attorneys fees, in accordance with 42 U.S.C. § 1988 and other applicable law;⁵ and
- D. That this Court grant such other and further relief as the Court deems equitable, just, and proper.

Dated this 14th day of February, 2012.

PLAINTIFF
By Plaintiff's Attorney

CAMACHO MENDOZA COULTER LAW GROUP, PLLC

/s/

R.A. (RON) COULTER

⁵ After *Hutto*, therefore, it must be accepted as settled that an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment. And if the principle of making such an award is beyond the reach of the Eleventh Amendment, the same must also be true for the question of how a "reasonable attorney's fee" is to be calculated. See *Hutto, supra*, 437 U.S., at 696-697, 98 S.Ct., at 2576-2577.

Missouri v. Jenkins by Agyei, 491 U.S. 274, 278-280, 109 S.Ct. 2463, 2466 - 2467 (U.S.Mo.,1989)