



May 24, 2022

Ana Mari Cauce
Office of the President
University of Washington
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Sent via U.S. Mail and Electronic Mail (pres@uw.edu)

Dear President Cauce:

FIRE¹ is concerned by the University of Washington Faculty Senate’s proposal to amend the Faculty Code to require that tenure and promotion candidates “reflect on past and planned contributions to diversity, equity, and inclusion in the self-assessment of their qualifications for tenure or promotion.”²

We understand that universities have a legitimate interest in promoting an inclusive and enriching campus environment, including for those from backgrounds traditionally underrepresented in academia. However, the Senate’s proposal raises concerns that the amendments may compel faculty to voice or demonstrate commitment to certain views on contested questions of politics or morality in order to avoid adverse consequences in tenure and promotion consideration. This kind of imperative would amount to viewpoint discrimination and compelled speech proscribed by the First Amendment and academic freedom protections, threatening to cast a pall of orthodoxy over the academic environment.

As you have recognized, the First Amendment establishes that “public institutions — such as the UW — cannot discriminate based on the viewpoints expressed, no matter how repugnant.”³ Likewise, under the First Amendment, public entities “may not compel

¹ As you may recall from past correspondence, the Foundation for Individual Rights in Education (FIRE) is a nonpartisan nonprofit dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America’s college campuses.

² Faculty Senate Agenda, Exh. H, UNIV. OF WASH. (May 12, 2022) (on file with author).

³ Ana Mari Cauce, *Free expression and what it means for all of us*, UNIV. OF WASH. OFF. OF THE PRESIDENT (Oct. 17, 2017), <https://www.washington.edu/president/2017/10/17/free-expression> [<https://perma.cc/RA7E-W9PB>]; see also *Healy v. James*, 408 U.S. 169, 180 (1972) (holding that public universities are bound by the First Amendment); *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 836 (1995) (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech

affirmance of a belief with which the speaker disagrees.”⁴ This principle applies with particular force at public institutions of higher education, as free speech is the “lifeblood of academic freedom.”⁵ Universities “occupy a special niche in our constitutional tradition,”⁶ and academic freedom is an area “in which government should be extremely reticent to tread.”⁷ As the Supreme Court explained in overturning legal barriers to faculty members with assertedly “seditious” views:

Our 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 of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.⁸

The proposed amendments to the Faculty Code may transgress these principles by requiring faculty members to affirm certain perspectives on disputed political and ideological issues and/or to embed those beliefs in their academic activities, in exchange for promotion and tenure. Such a litmus test would violate faculty members’ freedom to dissent from the prevailing consensus on issues of public or academic concern without suffering diminishing career prospects.

The proposal does not define “diversity,” “equity,” or “inclusion,” but instead acknowledges that individual schools and units have different definitions of “diversity” while linking to sample guidance from other universities.⁹ Although the proposed language may not be viewpoint-discriminatory on its face, the lack of detail and the absence of agreed-upon, objective, and precise definitions for “diversity, equity, and inclusion” pose serious risks that these terms will become proxies for particular viewpoints or beliefs, particularly given their salient political connotations that currently drive significant debate and controversy.¹⁰

and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

⁴ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

⁵ *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).

⁶ *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

⁷ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁸ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up).

⁹ Faculty Senate Agenda, Exh. H, *supra* note 2.

¹⁰ See, e.g., Dan Morenoff, *We Must Choose ‘Equality,’ Not ‘Equity’*, NEWSWEEK (Apr. 25, 2022), <https://www.newsweek.com/we-must-choose-equality-not-equity-opinion-1699847> (arguing that equity wrongly requires “active discrimination against those who’d do too well under equal treatment” and defines fairness as “whatever it takes to produce matching results for disparate groups”); Steven Mintz, *How to Stand Up for Equity in Higher Education*, INSIDE HIGHER ED (Apr. 20, 2021), <https://www.insidehighered.com/blogs/higher-ed-gamma/how-stand-equity-higher-education> (arguing for equity in higher education, which “implies much more than equal opportunity; it entails equality of resources, ideas, respect and outcomes” and extends to pedagogical reforms such as “decolonizing the curriculum”); Conor Friedersdorf, *Can Chloé Valdary Sell Skeptics on DEI?*, ATLANTIC (Jan. 31, 2021),

Without more, these terms will necessarily signify different meanings and conceptual frameworks to different people, effectively leaving decisions about whether an applicant satisfies the criteria to the unfettered discretion of evaluators, thereby inviting subjective and arbitrary decision-making—it is all but inevitable they will abuse this discretion to punish views at odds with either (or both of) popular sentiment regarding DEI or the views of the evaluator(s). FIRE is thus concerned that faculty with minority, dissenting, or simply unpopular views on the subject will face a marked disadvantage in seeking tenure and promotion.

The Faculty Senate’s proposal refers to guidance from, among other universities, the University of California system.¹¹ That guidance recommends creation of a rubric to assess faculty candidates’ DEI statements, and the sample rubric of one UC institution, UC Berkeley, shows how DEI evaluation readily becomes an exercise in viewpoint discrimination. The rubric gives low scores to candidates who, for example, say “it’s better not to have outreach or affinity groups aimed at particular individuals because it keeps them separate from everyone else, or will make them feel less valued,” or who state their intention to “ignore the varying backgrounds of their students and ‘treat everyone the same.’”¹² In this way UC Berkeley’s sample rubric leaves no doubt that it intends the statements to provide a means to penalize or reject faculty candidates who express disagreement with—or whose track record reflects insufficient dedication to—the institution’s positions on DEI. UW must not go down this same path.

To further illustrate our concern by analogy, we trust that UW would readily recognize the problem with evaluating faculty based on affirmation of the importance of “patriotism,” “colorblindness,” or “individualism,” or their demonstration of activities that promote these values. Just as with “diversity, equity, and inclusion,” these criteria entail inherently political or moral viewpoint-dependent assessments that impose negative consequences on faculty with personal or professional beliefs and commitments that differ from those of their colleagues or the university. This would infringe faculty members’ freedom to follow the dictates of their own consciences.

FIRE asks UW to consider the consequences of the proposed amendments on faculty whose views, pedagogical choices, or associations are unpopular or simply out-of-step with the majority on or off campus. To protect academic freedom and honor UW faculty members’ individuality, we call on you to veto the proposed amendments. At a minimum, FIRE urges you to issue an executive order defining DEI in an expansive and ideologically neutral manner, preferably by recognizing activities that promote ideological diversity, academic

<https://www.theatlantic.com/ideas/archive/2021/01/can-chloe-valdary-sell-skeptics-dei/617875> (describing proliferation of DEI programs in the aftermath of the police killing of George Floyd: “The diversity, equity, and inclusion industry is booming as corporations, government agencies, high schools, colleges, and nonprofit organizations clamor for its services. Advocates insist that formal instruction in anti-racism yields more inclusive, equitable institutions. Skeptics object to what they characterize as coerced indoctrination in esoteric theories, or charge that prominent consultants like Robin DiAngelo, author of the best-selling *White Fragility*, traffic in false and divisive racial stereotypes.”).

¹¹ Faculty Senate Agenda, Exh. H, *supra* note 2.

¹² UC BERKELEY, *Rubric for Assessing Candidate Contributions to Diversity, Equity, Inclusion, and Belonging*, <https://ofew.berkeley.edu/recruitment/contributions-diversity/rubric-assessing-candidate-contributions-diversity-equity> (last visited May 23, 2022) [<https://perma.cc/R3PT-2ZJJ>].

freedom, open-mindedness, epistemic humility, and a campus climate in which a diversity of views can flourish. We caution, however, that even the establishment of a broad and inclusive conception of DEI via executive order is unlikely to eliminate the significant risks of abuse of the policy to discriminate against faculty insufficiently committed to a narrower, ideologically freighted notion of DEI.¹³

We appreciate your time and attention to our concerns. We respectfully request a response to this letter no later than June 7, 2022.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Terr', with a long horizontal flourish extending to the right.

Aaron Terr
Senior Program Officer, Individual Rights Defense Program

¹³ Moreover, because executive orders are issued and reversed more easily than Faculty Senate legislation, UW ideally would include these clarifying provisions in the legislation itself.