



December 7, 2021

Cynthia K. Larive
Chancellor's Office
Kerr Hall
University of California, Santa Cruz
500 Kerr Road
Santa Cruz, California 95064

Sent via U.S. Mail and Electronic Mail (chancellor@ucsc.edu)

Dear Chancellor Larive:

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 writes today out of concern for the threat to academic freedom and freedom of conscience posed by the University of California, Santa Cruz's requirement that applicants for various faculty positions submit a Statement of Contributions to Diversity, Equity, and Inclusion ("DEI Statement").

We understand that universities have a legitimate interest in promoting an inclusive and enriching learning environment for all students, including those from backgrounds that have been traditionally underrepresented or marginalized in academia and American society. However, the First Amendment and principles of academic freedom constrain the ways in which a university may pursue that goal. UC Santa Cruz's DEI Statement policy creates an ideological litmus test, discriminating against faculty applicants on the basis of their views on contested questions of politics and morality. This exceeds the boundaries of what the First Amendment and principles of academic freedom allow and threatens to cast a pall of orthodoxy over the academic environment.

FIRE calls on UC Santa Cruz to rescind or revise this policy to meet the university's legal obligations, and ensure that no candidates for faculty positions will be rejected or disfavored because of their political or ideological beliefs.

I. UC Santa Cruz's DEI Statement Requirement

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

Under University of California policy, “Contributions in all areas of faculty achievement that promote equal opportunity and diversity should be given due recognition in the academic personnel process, and they should be evaluated and credited in the same way as other faculty achievements.”¹ UC Santa Cruz has established guidelines and a rubric for evaluating faculty candidates’ DEI statements.²

The rubric provides that low scores are to be assigned to DEI Statements that “discount the importance of diversity,” show that the candidate “[s]eems not to understand or be aware of the personal challenges that underrepresented individuals face in academia,” or shows that the candidate does not “feel any personal responsibility for helping to eliminate barriers.”³ A candidate would also score poorly for “stat[ing] that it’s better not to have outreach or affinity groups aimed at underrepresented individuals because it keeps them separate from everyone else, or will make them feel less valued.”⁴ In terms of experience with DEI work, applicants can expect low to middling scores if they lack a “[c]onsistent track record that spans multiple years” of conducting DEI activities in and out of the classroom that encompasses teaching, research, and service and goes beyond “activities that are already the expectation of faculty.”⁵

By contrast, high scores are to be assigned to statements that show that the candidate “[u]nderstands the challenges faced by underrepresented individuals, and the need for all students and faculty to work to identify and eliminate barriers to their full and equitable participation and advancement,” and “[i]ntends to be a strong advocate for diversity, equity and inclusion within the department/school/college and also their field.”⁶

A review of open faculty positions at UC Santa Cruz reveals that virtually every job posting, regardless of department or discipline, asks applicants to submit a DEI Statement “addressing

¹ UNIV. OF CAL., ACADEMIC PERSONNEL POLICY 210-3(c), https://ucop.edu/academic-personnel-programs/_files/apm/apm-210.pdf.

² UC Santa Cruz’s website defines “diversity” as the “variety of personal experiences, values, and worldviews that arise from differences of culture and circumstance. Such differences include race, ethnicity, gender, age, religion, language, abilities/disabilities, sexual orientation, gender identity, socioeconomic status, geographic region, and more[.]” *What is meant by Diversity, Equity, and Inclusion?*, UNIV. OF CAL., SANTA CRUZ, <https://apo.ucsc.edu/diversity.html>. “Equity” is contrasted with “equality, where everyone receives the same support regardless of circumstance.” *Id.* The university states that “equity focuses on fair treatment, and access to supports and opportunities necessary for advancement and success,” and “acknowledges structural issues and barriers such as racism, sexism, homophobia, bullying, and sexual harassment that have prevented the full participation of individuals from marginalized groups.” *Id.*

³ UNIV. OF CAL., SANTA CRUZ, UCSC STARTING RUBRIC TO ASSESS CANDIDATE CONTRIBUTIONS TO DIVERSITY, EQUITY, AND INCLUSION, <https://apo.ucsc.edu/policy/communications/docs/ucsc-rubrics-c2deistatements.pdf>.

⁴ *Id.*

⁵ *Id.* As an example, the rubric prescribes a low score if a candidate mentored women but that was “one of the only activities undertaken and it wasn’t clear that the candidate actively conducted outreach to encourage women to join the lab.”

⁶ *Id.*

your understanding of the barriers facing traditionally underrepresented groups and your past and/or future contributions to diversity, equity, and inclusion through teaching and professional or public service,” and directs applicants to the university’s webpage containing the guidelines and rubric.⁷ A DEI Statement is mandatory for some positions and optional for others. Several postings also state, “Initial screening of applications will be based on the Statement of Contributions to Diversity, Equity, and Inclusion.” For example, this language is included in the job postings for assistant professor positions in experimental computer systems,⁸ digital hardware electronics,⁹ and statistical data science.¹⁰

II. The First Amendment Bars UC Santa Cruz from Requiring Prospective Faculty to Assent to Specific Ideological Views

As a public university bound by the First Amendment, UC Santa Cruz may not condition faculty employment on professing allegiance to a contested set of moral or political beliefs.

A. The First Amendment Applies to UC Santa Cruz as a Public University

It has long been settled law that the First Amendment is binding on public universities like UC Santa Cruz.¹¹ Accordingly, the decisions and actions of a public university—including hiring decisions—must be consistent with the First Amendment.

“The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees’ freedom to believe and associate, or to not believe and not associate.”¹² The Supreme Court of the United States has repeatedly “invalidat[ed] or recogniz[ed] as invalid government action that inhibits belief and association through the conditioning of public employment on political faith,”¹³ including a government employer’s decision not to hire a job candidate based on the candidate’s political associations or beliefs.¹⁴ “The government may not condition employment on taking an oath that one has not or will not engage in protected speech, such as criticizing government policy or discussing political doctrine.”¹⁵

⁷ *Open Recruitments*, UNIV. OF CAL., SANTA CRUZ, <https://recruit.ucsc.edu/apply>.

⁸ *Computer Science & Engineering: Assistant Professor- Experimental Computer Systems*, UNIV. OF CAL., SANTA CRUZ, <https://recruit.ucsc.edu/JPF01165>.

⁹ *Electrical and Computer Engineering: Assistant Professor in Digital Hardware Electronics*, UNIV. OF CAL., SANTA CRUZ, <https://recruit.ucsc.edu/JPF01166>.

¹⁰ *Statistics Department: Assistant Professor of Statistical Data Science*, UNIV. OF CAL., SANTA CRUZ, <https://recruit.ucsc.edu/JPF01172>.

¹¹ *Healy v. James*, 408 U.S. 169, 180 (1972).

¹² *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990).

¹³ *Elrod v. Burns*, 427 U.S. 347, 357 (1976).

¹⁴ *Rutan*, 497 U.S. at 76–77. *See also Wagner v. Jones*, 664 F.3d 259, 269 (8th Cir. 2011) (reversing trial court’s dismissal of plaintiff’s lawsuit alleging she was denied a position as a legal research and writing instructor at the University of Iowa College of Law because of her political views, as “[t]he state can neither directly nor indirectly interfere with an employee’s or potential employee’s rights to association and belief”).

¹⁵ *Dalack v. Village of Tequesta*, 434 F.Supp.2d 1336, 1344 (S.D. Fla. 2006) (citing *Cole v. Richardson*, 405 U.S. 676, 680 (1972)).

This principle applies with particular force at public institutions of higher education, as free speech is the “lifblood of academic freedom.”¹⁶ Universities “occupy a special niche in our constitutional tradition,”¹⁷ and academic freedom is an area “in which government should be extremely reticent to tread.”¹⁸ This is no less true in the context of hiring decisions, as “[n]o more direct assault on academic freedom can be imagined than for the school authorities to [refuse to hire] a teacher because of his or her philosophical, political, or ideological beliefs.”¹⁹ As the Supreme Court explained in overturning legal barriers to faculty members with “seditious” views:²⁰

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.

UC Santa Cruz’s DEI Statement policy transgresses these constitutional principles by rejecting or disfavoring faculty applicants who demonstrate insufficient fealty to the university’s preferred views on DEI.

B. UC Santa Cruz Cannot Reject or Disadvantage Candidates for Faculty Positions Based on Their Personal Views

UC Santa Cruz cannot, consistent with the First Amendment, prescribe an orthodox position for its faculty on any question of politics or ideology. The administratively created rubric for evaluating DEI Statements does exactly that, signaling to prospective faculty that they will be at a marked disadvantage in the hiring process if they fail to express their alignment with the university’s value-laden views on social, political, and moral issues.

Under the rubric, prospective faculty are not to dispute the university’s views on the challenges facing underrepresented groups, the causes of their underrepresentation, or how best to address those issues. If, for example, an applicant believes that racial affinity groups or other DEI initiatives are ineffective, they must hide or contradict that view to avoid being penalized in the evaluation process. Even if the candidate reached that conclusion based on their own academic research or inquiry, it evidently would impair their application, regardless of the impact and soundness of their scholarship. Prospective faculty must be “strong advocates” for UC Santa Cruz’s views on DEI, dedicate a significant portion their

¹⁶ *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).

¹⁷ *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

¹⁸ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

¹⁹ *Wagner*, 664 F.3d 259 at 269 (alteration in original) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 581 (1972) (Douglas, J., dissenting)).

²⁰ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up).

careers to demonstrating their commitment to those views, and believe that all faculty members and students have a responsibility to advance the university's DEI mission.

The risk of an unconstitutional application of the policy in this context is particularly pointed, as the initial screening of applications for various positions is limited to the candidate's DEI Statement. That is, UC Santa Cruz is immediately weeding out prospective faculty who dissent from the university's position on DEI without a holistic evaluation of their academic qualifications.

UC Santa Cruz's DEI Statement policy amounts to unconstitutional viewpoint discrimination and compelled speech that intrudes upon faculty rights to academic freedom, free expression, and freedom of conscience, "cast[ing] a pall of orthodoxy over the classroom"²¹ in defiance of decades of Supreme Court precedent.²² By demanding rigid ideological conformity on issues of DEI, UC Santa Cruz both violates the rights of prospective faculty and shrinks the universe of ideas to study or express on campus. Faculty must retain wide latitude to think and speak freely. They must be judged on their academic merit, not on their agreement with the wisdom of the institution's public policies or viewpoint.

To further illustrate our concern by analogy, we trust that UC Santa Cruz would readily recognize the problem with evaluating prospective faculty based on their affirmation of the importance of "patriotism," "civility," or "free markets," or their demonstration of involvement in organizations or activities that promote these values. Just as with "diversity, equity, and inclusion," these criteria would entail inherently political or moral viewpoint-dependent assessments that impose negative consequences on faculty candidates with personal or professional beliefs and commitments that differ from those of the university or their evaluators. This is an unacceptable result at a public institution of higher education. Current and prospective faculty must be free to follow the dictates of their own consciences.

As the American Association of University Professors aptly observed over 100 years ago:²³

To the degree that professional scholars, in the formation and promulgation of their opinions, are, or by the character of their tenure appear to be, subject to any motive other than their own scientific conscience and a desire for the respect of their fellow experts, to that degree the university teaching profession is corrupted; its proper influence upon public opinion is diminished and vitiated; and society at large fails to get from its scholars, in an unadulterated form, the peculiar and necessary service which it is the office of the professional scholar to furnish.

²¹ *Id.*

²² *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

²³ AM. ASS'N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE, <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>.

Our nation is only a few generations removed from public university faculty being required to submit to state interrogation regarding their possible involvement with “subversive” organizations or being forced to sign loyalty oaths disavowing socialism or communism as a condition of employment. Because of the bravery of faculty who challenged the constitutionality of such requirements in federal court, the Supreme Court has made clear that such requirements violate the First Amendment.²⁴

FIRE recognizes that UC Santa Cruz may shape and express its *own* aspirational values as an institution, including the promotion of diversity, equity, and inclusion, however the university may define those concepts within the bounds of the law. UC Santa Cruz must also, of course, ensure that its educational environment is free from unlawful discriminatory conduct, and require that its faculty agree not to engage in discriminatory conduct. What the university cannot do, however, is force faculty candidates to confess by word and act their faith in the university’s moral and political values.

III. UC Santa Cruz Must Rescind or Revise Its Unconstitutional DEI Statement Policy

We ask UC Santa Cruz to consider the consequences of its DEI Statement policy on prospective 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 to honor the individuality of university faculty members, we call on UC Santa Cruz to eliminate or revise this unconstitutional policy.

We appreciate your time and attention to our concerns. We respectfully request receipt of a response to this letter by the close of business on December 21, 2021.

Sincerely,



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

²⁴ See *Sweezy v. New Hampshire*, 354 U.S. 234, 235–36 (1957); see generally *Keyishian*, 385 U.S. 589.