



FIRE

Foundation for Individual
Rights and Expression

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Sent via U.S. Mail and Electronic Mail (avery.holton@utah.edu)

Dear Chair Holton:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by the University of Utah Department of Communication's Anti-Racism Code of Conduct. We appreciate universities have legitimate interests in promoting inclusive and enriching campus environments, including for students or faculty from backgrounds traditionally underrepresented in academia. However, the ARCC impermissibly compels faculty to voice and commit to prescribed views on contested questions of politics and morality, implicating faculty members' most essential freedoms of expression and conscience. The ARCC also exceeds the department's authority in matters of academic freedom and threatens to cast a pall of orthodoxy over the academic environment. To that end, we urge the department to eliminate or revise the ARCC and any corresponding documents to align with the university's binding First Amendment obligations.

I. The Department of Communication Approves the Anti-Racist Code of Conduct

In November 2020, the Department of Communication faculty voted to adopt the ARCC, which "impos[es] an **affirmative obligation** on all Departmental members to engage in anti-racist actions and support anti-racist Department institutions and norms."² The ARCC describes these obligations as follows:³

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² *Anti-Racist Code of Conduct*, Dep't of Commc'n, UNIV. OF UTAH, <https://communication.utah.edu/news/antiracistcodeofconduct.php> [<https://perma.cc/9D3J-VJ9Z>] (emphasis added).

³ *Id.*

1. Faculty, staff, and students in the Department create and contribute to a departmental culture in which members are active bystanders who identify and interrupt racism in all forms.
 - a. We work intentionally to eradicate speech or actions that stereotype, inferentially identify, culturally discriminate against, or harm people of color.
 - b. We disrupt and dismantle racist learning and work environments created through White normativity and discriminatory actions such as microaggressions, microassaults, and microinsults.
 - c. We interrupt and/or intervene in racist incidents in all university spaces that are utilized and inhabited by Department members, including physical spaces (offices, classrooms, bathrooms, conference rooms, lunch rooms) and online forums.
2. Recognizing that racism often occurs in tandem with other systems of oppression (e.g., sexism, classism, ableism, homophobia, transphobia, among others), faculty, staff, and students in the Department commit to a departmental culture that engages in anti-racism with an intersectional approach.

The ARCC also describes “several ways an individual can respond to microaggressions, microassaults, and microinsults, and other racist forms of harm they have experienced.” For example, an individual who reports an incident “may ask for Departmental leadership to directly intervene with the person alleged to have created the context for grievance” or “may ask for a mediated conversation(s).”⁴

Evidence that the ARCC “is communally recognized and endorsed” will include faculty reforming curriculum “to centralize work by scholars of color at the graduate and undergraduate level[,]” putting the ARCC in syllabi, and using the Anti-Racist Strategic Plan, among others.⁵ The ARSP, which establishes goals for the department, notes primary goals as recruiting and retaining “undergraduate students who are interested in anti-racism educational foci across areas of emphasis” and graduate students and faculty “whose research, teaching, and/or service focuses on anti-racism.”⁶ To achieve those goals, the ARSP outlines several objectives and action plans, such as developing undergraduate curricula “focusing on anti-racism scholarship, professions, and/or education[,]” creating a “syllabus statement on inclusion, diversity, equity, and access that specifically mentions the Department’s Anti-racist Code of Conduct[,]” requiring all faculty applicants to “submit a diversity statement describing how their research, teaching, and/or service would align with” the stated goals, and “including

⁴ *Id.*

⁵ *Id.*

⁶ *Department of Communication Anti-Racist Strategic Plan*, Dep’t of Commc’n, UNIV. OF UTAH, https://communication.utah.edu/_resources/documents/menu/anti-racism-strategic-plan.pdf [<https://perma.cc/NSA5-G5U4>].

anti-racism as a measurable criterion for faculty review.”⁷ The document does not elaborate on how these criteria will or should be measured, or how they will be enforced.

II. The First Amendment Prohibits the Department from Requiring Faculty to Engage in Anti-Racist Actions and Support Anti-Racist Norms

U of U is a public university bound by the First Amendment to respect faculty free expression and academic freedom.⁸ This means departments may not force faculty and faculty applicants to endorse a prescribed ideology, reform their curriculum without regard to their academic freedom, and/or eradicate protected speech. It cannot compel speech by telling faculty they must “intervene” in situations administrators subjectively deem “racist” or otherwise inappropriate, nor may it force faculty to express acceptance or promote ideas about race they may not hold. The university also cannot ban “microaggressions, microassaults, or microinsults,” unless such speech rises to the level of discriminatory harassment or a true threat unprotected by the First Amendment.

A. The Department May Not Compel Faculty or Faculty Applicants to Express Particular Viewpoints

When government entities wish 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.”⁹ This principle applies with particular strength at public institutions of higher education, as free speech is the “lifeblood of academic freedom.”¹⁰ Universities “occupy a special niche in our constitutional tradition,”¹¹ and academic freedom is an area “in which government should be extremely reticent to tread.”¹² As the Supreme Court explained in overturning legal barriers to faculty members with assertedly “seditious” views:¹³

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

⁷ *Id.*

⁸ *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

⁹ *Wooley v. Maryland*, 430 U.S. 705, 717 (1977); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (government “may not compel affirmance of belief with which the speaker disagrees”).

¹⁰ *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3rd Cir. 2008); *see also Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 836 (1995) (“For the University, by regulation, to cast disapproval on particular viewpoint of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

¹¹ *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

¹² *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

¹³ *Keyishian v. Bd. Of Regents*, 385 U.S. 589, 603 (1967) (cleaned up).

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.

The department, therefore, may not compel faculty or faculty applicants to endorse a department-prescribed ideology. Yet the ARCC and ARSP transgress First Amendment principles by requiring faculty members to intervene in allegedly racist incidents, commit to an anti-racism culture, and add an inclusion, diversity, equity, and access statement to their syllabi. Faculty applicants are also required to submit “a diversity statement describing how their research, teaching, and/or service would align with” department goals. All these requirements force faculty to embrace and promote particular perspectives on disputed political and ideological issues of diversity, equity, and inclusion. These requirements impinge on faculty members’ and faculty applicants’ scholarly autonomy and freedom to dissent from prevailing consensus on issues of public concern.

The department may certainly shape and express its own aspirational values and may *encourage* faculty and faculty applicants to adopt statements that reflect such values or act in a certain way, so long as that encouragement does not cross the line into implicit coercion. What the department cannot do, however, is compel faculty and faculty applicants to express fealty to a specific ideological viewpoint. Compulsory speech not only violates the speaker’s expressive rights but dilutes the message’s meaning. As the Supreme Court explained in ruling that public schools cannot compel students to salute the flag, “To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.”¹⁴ This point was echoed by Justices Black and Douglas, who wrote that “[w]ords uttered under coercion are proof of loyalty to nothing but self-interest.”¹⁵

To further illustrate our concern by analogy, we trust the department would readily recognize the problem with requiring faculty to salute the U.S. flag¹⁶ or compelling faculty to publish the Pledge of Allegiance in their syllabi, or hiring faculty based on affirmation of the importance of “patriotism,” “racial colorblindness,” or “individualism.” Yet the ARCC expresses an inherently ideological viewpoint about race that requires faculty to become personal couriers of the department’s views and imposes negative consequences on faculty applicants with beliefs that differ from those of the department. To force faculty and faculty applicants to espouse and promote views they do not hold infringes their academic freedom, expressive

¹⁴ *Barnette*, 319 U.S. at 641.

¹⁵ *Id.* at 644 (Black, J., concurring).

¹⁶ The Supreme Court struck down a state’s power to compel such an act nearly 80 years ago, recognizing that “the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).

rights, and liberty to follow the dictates of their own consciences, and is unacceptable at an institution bound by the First Amendment.¹⁷

B. The Department May Not Infringe Faculty Academic Freedom or Eradicate Protected Speech

The “[n]ation’s future depends on” the ability of students to gain “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.”¹⁸ This is why classroom discussion and lectures—including materials, views, and remarks that may be antithetical to the department’s goals in this case—are “protected by the First Amendment” when “germane to the classroom subject matter.”¹⁹

Therefore, the department may not reform the undergraduate and graduate level curriculum to compel faculty to focus on an anti-racist education and “centralize work by scholars of color.” Notably, the document does not define these key terms or detail precisely how faculty can meet or fall short of this requirement. It nonetheless violates faculty members’ academic freedom to select course content as well as their right and that of their students to engage in pedagogically relevant classroom discussions.

This is true even if those discussions or ideas may offend others on campus. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive, precluding the department from “eradicat[ing] speech or actions” that go against its goals or dismantling certain types of learning. Whether speech is protected by the First Amendment is a “legal, not moral, analysis.”²⁰

Having leadership “directly intervene” or having “mediated conversation(s)” in response to microaggressions, microassaults, and microinsults goes directly against this principle, as it is unacceptably punitive and chills expressive activity. When a faculty member is dragged into one of these resolution matters by those with disciplinary authority, they may assume their conduct could result in punishment and will reasonably self-censor, as will other faculty when they see their colleagues punished for exercising their expressive rights.

Additionally, the lack of definition for “microaggressions,” “microassaults,” and “microinsults” renders the ARCC impermissibly overbroad and vague. A policy is overbroad “if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.”²¹ The ARCC ignores that a great deal of speech that one may characterize as a microaggression, microassault, or microinsult is nonetheless entitled to First

¹⁷ See *Wooley*, 430 U.S. at 717 (“[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.”); *Barnette*, 319 U.S. at 642 (“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.”).

¹⁸ *Keyishian*, 385 U.S. at 603 (1967).

¹⁹ *Hardy v. Jefferson*, 260 F.3d 671, 683 (6th Cir. 2001).

²⁰ *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

²¹ *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989).

Amendment protection. Relatedly, the ARCC is vague because it “fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes” or “invites arbitrary and discriminatory enforcement.”²² The ARCC’s failure to properly define key terms to reach only an objective, narrow range of unprotected speech gives the department unfettered discretion to punish a wide range of faculty speech on the basis that it fails to sufficiently promote the department’s goals.

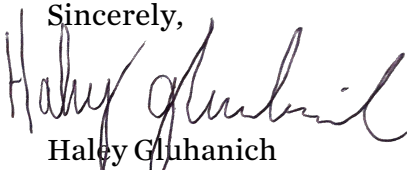
III. Conclusion

The fact that the department faculty rather than U of U administrators voted on and approved the ARCC does not mitigate our concerns. Counter-majoritarian individual rights like free speech and academic freedom are not subject to popular vote. Their very purpose is to protect speakers against retribution for voicing unpopular views or conducting unpopular research. Faculty cannot simply vote away the academic freedom and speech rights of their peers.

FIRE urges the department to consider the consequences that the ARCC will have on faculty whose views, pedagogical choices, or associations are out-of-step with the department’s goals. In any event, it must meet its binding legal obligations under the U.S. Constitution.

We appreciate your time and attention to our concerns and respectfully request a substantive response to this letter no later than the close of business on April 6, 2023, confirming the department will protect academic freedom, honor faculty members’ individuality, and meet the university’s binding legal obligations by eliminating or revising the ARCC and ARSP.

Sincerely,



Haley Gluhanich
Program Officer, Campus Rights Advocacy

Cc: Hollis Robbins, Dean, College of Humanities
President Taylor Randall c/o Special Assistant Teresa Kehl,

²² *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9th Cir. 1984).