



# FIRE

Foundation for Individual  
Rights and Expression

September 29, 2022

Kristina M. Johnson  
Office of the President  
The Ohio State University  
205 Bricker Hall  
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*Sent via U.S. Mail and Electronic Mail (president@osu.edu)*

Dear President Johnson:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,<sup>1</sup> is concerned by The Ohio State University's (OSU) requirement that applicants for several faculty positions must submit statements discussing their interest in and contributions to diversity, equity, and inclusion (DEI).

While the DEI statement requirement may be nobly intentioned, it is susceptible to functioning as an ideological litmus test, impermissibly discriminating against applicants who fail to demonstrate sufficient commitment to ordained views on contested questions of politics and morality. Viewpoint-discriminatory DEI statement requirements implicate a prospective faculty member's most essential freedoms of expression and conscience, exceed the boundaries of the university's authority in such matters as established by the First Amendment and principles of academic freedom, and threaten to cast a pall of orthodoxy over the academic environment.

## **I. OSU Requires Prospective Faculty to Submit DEI Statements as Part of Their Applications to Faculty Positions**

Our understanding of pertinent facts, based on public information,<sup>2</sup> is that several job listings for assistant and tenure-track faculty positions across a wide range of OSU's academic departments contain similar language concerning the requirement that applicants submit a diversity statement describing their "demonstrated commitments and leadership in contribution to diversity, equity, and inclusion through research, teaching, mentoring, and/or

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<sup>1</sup> 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](http://thefire.org).

<sup>2</sup> We appreciate that you may have additional information to offer and invite you to share it with us.

outreach and engagement.”<sup>3</sup> The job posts list this directive alongside other required application materials, including a cover letter, research statement, teaching statement, *curriculum vitae*, publication list, and reference letters. These postings do not, however, provide definitions of DEI or information on how the university evaluates DEI statements, nor does OSU provide specific information about DEI statements on other parts of its website.

## **II. The First Amendment Prohibits OSU from Requiring Faculty to Demonstrate Commitment to Prescribed Ideological Views**

We recognize OSU’s legitimate interest in promoting an inclusive and enriching campus environment, including for students and faculty from backgrounds traditionally underrepresented in academia. However, as a public university bound by the First Amendment, OSU must uphold the academic freedom of its faculty and make its hiring decisions in a viewpoint-neutral manner. The university cannot reject or penalize job applicants because of their failure to profess allegiance to a particular political or ideological position.

It has long been settled law that the First Amendment is binding on public universities like OSU.<sup>4</sup> Accordingly, the decisions and actions of a public university—including the maintenance of policies implicating faculty expression<sup>5</sup>—must be consistent with the First Amendment.

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.”<sup>6</sup> The Supreme Court has repeatedly invalidated “government action that inhibits belief and association through the conditioning of public employment on political faith,”<sup>7</sup> including a government employer’s decision not to hire a job candidate based on the candidate’s political associations or beliefs.<sup>8</sup>

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<sup>3</sup> See, e.g., *Assistant Professor*, OHIO ST. UNIV. DEP’T OF CHEMISTRY AND BIOCHEMISTRY, July 26, 2022, <https://academicjobsonline.org/ajo/jobs/22168> [<https://perma.cc/V7L3-VZ5Q>], *Assistant Professor of Queer and/or Trans\* Studies*, WOMEN’S GENDER, AND SEXUALITY STUDIES, Aug. 16, 2022, <https://academicjobsonline.org/ajo/jobs/22361> [<https://perma.cc/WH44-CK4C>], *Faculty Position*, DEP’T OF ASTRONOMY, Aug. 10, 2022, <https://academicjobsonline.org/ajo/jobs/22296> [<https://perma.cc/NW7V-NPAV>].

<sup>4</sup> *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).

<sup>5</sup> *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

<sup>6</sup> *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 a belief with which the speaker disagrees”).

<sup>7</sup> *Elrod v. Burns*, 427 U.S. 347, 357 (1976).

<sup>8</sup> *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76-77 (1990); 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

These principles apply with particular force at public institutions of higher education, as free speech is the “lifeblood of academic freedom.”<sup>9</sup> Universities “occupy a special niche in our constitutional tradition,”<sup>10</sup> and academic freedom is an area “in which government should be extremely reticent to tread.”<sup>11</sup> As the Supreme Court explained in overturning legal barriers to faculty members with assertedly “seditious” views:<sup>12</sup>

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 to 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.

OSU’s Academic Rights and Responsibilities policy enshrines similar protections, guaranteeing that “[n]either students nor faculty should be disadvantaged or evaluated on the basis of their political opinions,”<sup>13</sup> and that “[g]rades and other academic decisions should be based solely on considerations that are intellectually relevant to the subject matter.”<sup>14</sup> Moreover, these policies stress that colleges and universities “should welcome diverse beliefs and the free exchange of ideas.”<sup>15</sup>

Yet, the DEI statement requirement transgresses these constitutional and institutional principles to the extent it requires prospective faculty to embrace specific perspectives on disputed political and ideological issues and to incorporate those views into their academic activities to be eligible for hire. There are no clear guidelines or rubrics for how to write a DEI statement, and the terms “diversity,” “equity” and “inclusion” are not precisely defined.

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“[t]he state can neither directly nor indirectly interfere with an employee’s or potential employee’s rights to association and belief”).

<sup>9</sup> *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d 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 viewpoints 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.”).

<sup>10</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

<sup>11</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>12</sup> *Keyishian v. Bd. Of Regents*, 385 U.S. 589, 603 (1967) (cleaned up).

<sup>13</sup> *Academic Rights and Responsibilities*, THE OHIO STATE UNIV. OFF. OF ACAD. AFFAIRS, <https://oaa.osu.edu/academic-rights-and-responsibilities> [<https://perma.cc/45PL-UEB4>].

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

In the absence of agreed upon, objective, and precise definitions, these terms—which carry salient political connotations that are the subject of much debate<sup>16</sup>—will almost certainly serve as proxies for particular viewpoints or beliefs. Without more, these terms will necessarily signify different meanings and conceptual frameworks to different people—effectively leaving decisions regarding the satisfaction of these criteria to the discretion of the evaluator, thus inviting subjective and arbitrary decision-making. This discretion will all but inevitably be abused to punish views at odds with popular sentiment, or at odds with the views of the individuals tasked with evaluating a job candidate’s commitment to DEI. FIRE is concerned that candidates with minority, dissenting, or simply unpopular views on this topic will be at a marked disadvantage when being evaluated for faculty positions.

Requiring prospective or current faculty to submit DEI statements—or to otherwise demonstrate commitment to DEI—as part of hiring review threatens prospective faculty members’ scholarly autonomy in teaching and research and their right to dissent from the prevailing consensus on issues of public or academic concern without suffering diminished career prospects. FIRE would not object to OSU simply recognizing applicants’ and faculty members’ voluntarily chosen, relevant teaching, research, and service activities and accomplishments that might be characterized as DEI contributions. But mandatory DEI statements are a serious threat to the academic freedom of scholars with dissenting views or whose scholarly interests lie elsewhere.

FIRE has seen how vague or ideologically motivated DEI statement policies too easily function as litmus tests, penalizing dissenting faculty or selectively rewarding faculty who promote favored views in their teaching or research.<sup>17</sup> We are concerned the DEI statement requirement establishes a means to discriminate against applicants who disagree with—or whose track record reflects insufficient dedication to—OSU’s positions on matters of public and academic concern.

To further illustrate our concern by analogy, we trust that OSU would readily recognize the problem with evaluating applicants based on affirmation of the importance of “patriotism,” “individualism,” or “racial color-blindness,” or on involvement in activities or organizations

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<sup>16</sup> The concept of “equity,” for example, is a subject of significant debate in higher education. *See, e.g.*, Todd Zakrajsek, *Do we need equity or equality to make things ‘fair’? Actually, we need both*, TIMES HIGHER EDUC. (Sep. 25, 2022), <https://www.timeshighereducation.com/campus/do-we-need-equity-or-equality-make-things-fair-actually-we-need-both> (arguing for the application of universal design to teaching because equity “in higher education is exceedingly important, but without equality many faculty and students will probably persist with the belief that it’s unfair to give some students additional time on exams or allow them to videotape a presentation instead of delivering it live”); Steven Mintz, *How to Stand Up for Equity in Higher Education*, INSIDE HIGHER ED (Apr. 20, 2022), <https://www.insidehighered.com/blogs/higher-ed-gamma/how-stand-equity-higher-education> (arguing 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”); 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 “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”).

<sup>17</sup> *See FIRE statement on the Use of Diversity, Equity, and Inclusion Criteria in Faculty Hiring and Evaluation*, FIRE (June 2, 2022) <https://www.thefire.org/issues/fire-statement-on-the-use-of-diversity-equity-and-inclusion-criteria-in-faculty-hiring-and-evaluation>.

promoting these values. Just as with DEI, these criteria entail inherently political or moral viewpoint-dependent assessments that impose negative consequences on prospective faculty with personal or professional commitments and beliefs that differ from those of OSU or other academics. Without a careful, viewpoint-neutral specification of what these evaluative criteria will mean in practice, these faculty candidates will face negative consequences for following the dictates of their own consciences. This infringes on prospective faculty members' academic freedom and freedom of conscience and undermines OSU's welcoming of "diverse beliefs and the free exchange of ideas."<sup>18</sup>

### **III. Conclusion**

FIRE recognizes that OSU 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. OSU must also, of course, ensure that its educational environment is free from unlawful discriminatory conduct. But the university's pursuit of DEI must stay within the boundaries established by the First Amendment and principles of academic freedom. We ask OSU to consider the consequences of its DEI statement requirement on prospective faculty whose views, pedagogical choices, or associations are unpopular or simply out-of-step with the majority on or off campus.

OSU should judge faculty based on the quality of their academic work, not their degree of conformity to certain ideological tenets. To protect academic freedom and honor faculty members' individuality and expressive rights, FIRE calls on OSU to eliminate or revise this requirement. We respectfully request a substantive response to this letter no later than Thursday, October 13, 2022.

Sincerely,



Graham Piro  
Program Officer, Campus Rights Advocacy

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<sup>18</sup> *Academic Rights and Responsibilities*, supra note 13.