



September 3, 2020

Dr. Daniel Jaffe
Executive Vice President and Provost
The University of Texas at Austin
110 Inner Campus Drive STOP G1000
Austin, Texas 78712-1701

Sent via Electronic Mail (provost@utexas.edu)

Dear Provost Jaffe:

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.

Since 1999, FIRE has routinely intervened when the expressive and academic freedom rights of faculty members nationwide have been threatened by institutional or outside actors, and we defend these rights without regard to the viewpoint or ideology at issue. In the past several months, for example, we reached a successful settlement on behalf of an adjunct faculty member fired by his Iowa community college for identifying as “antifa” in an interview with a local television station,¹ and also successfully defended the academic freedom rights of a professor facing an investigation from his Arizona community college after his quiz questions concerning Islamic terrorism sparked social media criticism.² Our website, thefire.org, contains additional examples of our nonpartisan commitment to faculty rights.

¹ Press Release, Found. for Individual Rights in Educ., *VICTORY: College settles with ‘antifa’ professor fired for criticizing President Trump on Facebook, avoids First Amendment lawsuit from FIRE* (Apr. 27, 2020), <https://www.thefire.org/victory-college-settles-with-antifa-professor-fired-for-criticizing-president-trump-on-facebook-avoids-first-amendment-lawsuit-from-fire>.

² Press Release, Found. for Individual Rights in Educ., *VICTORY: Chancellor affirms professor’s academic freedom after Arizona college panicked over test questions about Islamic terrorism* (May 11, 2020), <https://www.thefire.org/victory-chancellor-affirms-professors-academic-freedom-after-arizona-college-panicked-over-test-questions-about-islamic-terrorism>.

FIRE writes you today out of concern for the threat to academic freedom and freedom of conscience posed by the University of Texas at Austin’s (“UT Austin’s”) proposed Faculty Diversity, Equity, and Inclusion, Strategic Plan (“the Plan”).³

Specifically, the Plan—proposed by your office—includes the following with respect to hiring and promotion:

[Colleges and schools] will include applicant commitment to inclusivity and support for diverse populations, as well as experience and future plans in these areas as a hiring criterion. This diversity, equity, and inclusion criterion will be stipulated in each job posting. All applicants should address any past contributions, as well as their commitment to diversity, equity, and inclusion somewhere in their application materials. [Colleges and schools] are encouraged to seek this information in the form of a separate statement. Each search will be advertised in venues frequented by diverse candidates. The Provost’s Office will support this effort through its Faculty Recruitment Diversity Initiative.

[. . .]

Contributions to university and community diversity, equity, and inclusion will be a criterion for faculty merit and a positive factor in promotion considerations.

Each [college and school] will develop mechanisms for evaluating faculty contributions to diversity in their units for considerations of merit and promotion.

Each [college and school] will have a member of its promotion and tenure (P&T) committee who is responsible to assure that diversity is considered in promotion deliberations.

Deans should consult with diversity officers before creating dean’s letters for promotion.

FIRE recognizes that this proposal may represent a well-intentioned effort to encourage faculty members to productively engage with all students and colleagues, including those from backgrounds that have been traditionally underrepresented or marginalized in academia and American society. Although the preamble of the Plan indicates that UT Austin is “committed to recruiting, employing, and supporting highly qualified faculty members with a wide range

³ A draft of the Plan was shared anonymously with the National Association of Scholars, and is available here: <https://www.nas.org/storage/app/media/New%20Documents/faculty-diversity20200703215570.pdf>.

of backgrounds, ideas, and viewpoints,” the proposal’s mandates present a serious threat of establishing a viewpoint-based litmus test for both hiring and promotion.

The Plan does not appear to define “diversity and inclusion.” In the absence of a clear definition, these terms may well serve as proxy for particular political viewpoints or beliefs. FIRE is concerned that faculty members with minority, dissenting, or simply unpopular views will be at a marked disadvantage when being evaluated for promotions. Without more, vague and amorphous terms like “diversity and inclusion” 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 and thus inviting subjective and arbitrary decision-making. This discretion will all but inevitably be abused to punish views at odds with popular sentiment or the views of those tasked with evaluating a faculty member’s commitment to “diversity and inclusion.” This concern is heightened by the Plan’s proposal that, before creating letters for promotions, college and school deans should consult with diversity officers, subjecting many faculty members’ professional futures at UT Austin to the subjective discretion of a small group of individuals and their perspectives on “diversity and inclusion.”

Even if unintentional, impermissible viewpoint-based outcomes are unfortunately easy to imagine. For example, conservative professors—believing that their views are not widely represented at UT Austin—might argue that attending the Conservative Political Action Conference (CPAC) should be rewarded under the proposed criterion as a contribution to diversity of thought. However, one would assume that liberal professors would be displeased to learn that a conservative professor received a more favorable evaluation because the professor attended CPAC. The many possible variations on this problem illustrate the threat of the vague definition.

To further illustrate our concern by analogy, we trust that your office would readily recognize the problem with rewarding faculty members who demonstrate “contributions to patriotism.” Just as with “diversity and inclusion,” evaluating broad, subjective terms like “patriotism” requires an inherently political, viewpoint-dependent calculation. Without a careful, viewpoint-neutral specification of what these evaluative criteria will mean in practice, faculty members with personal or professional beliefs and commitments that differ from those of their peers or evaluators will be penalized. This is an unacceptable result at a public institution of higher education. Faculty members must not face negative consequences for following the dictates of their own conscience in determining for themselves their involvement with student groups, professional development and programming, and outside organizations. *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.”); *West Virginia State Board of Education 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.”).

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 courts, the Supreme Court of the United States has made clear that such requirements violate the First Amendment. *See Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). We of course understand that UT Austin has not proposed to require faculty to demonstrate certain actions in support of “diversity and inclusion” as an express condition of employment or promotion. But explicitly rewarding such participation—or penalizing its absence—is a worrying step toward a similar result.

We write you privately today to ask UT Austin to consider the consequences of this proposal on those 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 UT Austin’s faculty, we urge you to revise the Plan accordingly.

We appreciate your time and attention to our concerns.

Sincerely,



Katlyn A. Patton

Program Officer, Individual Rights Defense Program and Public Records