



May 10, 2021

President Michael Rao, Ph.D.
Office of the President
Virginia Commonwealth University
910 West Franklin Street
Box 842512
Richmond, Virginia 23284-2512

Sent via Electronic Mail (president@vcu.edu)

Dear President Rao:

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. For example, we've recently defended the expressive rights of a professor facing an investigation from his community college after his quiz questions concerning Islamic terrorism sparked social media criticism,¹ an adjunct faculty member fired by his community college for identifying as "antifa" in an interview with a local television station,² a faculty member suspended by his university for criticizing the idea of reparations and the perception of racism in the United States,³ and a professor whose university said it was "reviewing" her tweet sharply criticizing

¹ FIRE, *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>.

² FIRE, *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>.

³ Sabrina Conza, *FIRE calls on Saint Joseph's to reinstate and end investigation into professor for political tweets*, FIRE (Feb. 23, 2021), <https://www.thefire.org/fire-calls-on-saint-josephs-to-reinstate-and-end-investigation-into-professor-for-political-tweets>.

Rush Limbaugh on the day he died.⁴ Our website, thefire.org, contains additional examples of our nonpartisan commitment to faculty rights.

FIRE writes today out of concern for the threat to academic freedom and freedom of conscience posed by Virginia Commonwealth University's (VCU's) requirement that all applicants for faculty positions submit a Statement of Contributions to Diversity, Equity, and Inclusion (DEI Statement).

FIRE has little doubt that this requirement represents a well-intentioned effort to promote 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, VCU's guidelines and rubric for evaluating prospective faculty members' DEI Statements raises concerns that they may be used as a viewpoint-based litmus test in hiring decisions, raising constitutional problems.

Accordingly, we ask that the university take steps 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 on the basis of their political or ideological beliefs.

I. VCU's DEI Statement Requirement

VCU requires all prospective faculty to submit a DEI Statement with their job applications.⁵ The guidelines for writing a DEI Statement state, "VCU continually demonstrates a deeply engrained core value of diversity, inclusion and equity that ensures a climate of mutual trust and respect where individuals of differing cultural backgrounds, identities, abilities and life experiences are embraced, engaged and empowered to drive excellence and success."⁶ To that end, applicants for faculty positions are asked to "provide their own unique perspectives on their past, present and future aspirations and contributions to promoting diversity, inclusion and equity in their professional careers."⁷

Examples of such contributions include "[c]reation of programs that provide access and establish a pipeline in disciplines for students in traditionally underrepresented groups"; "[e]xposure to research opportunities for individuals historically excluded from disciplines on the basis of their gender or ethnic identity"; and "[r]ecognition of the challenges members of

⁴ Aaron Terr, *FIRE warns UAB not to punish professor over tweet about Rush Limbaugh's death*, FIRE (Feb. 23, 2021), <https://www.thefire.org/fire-warns-uab-not-to-punish-professor-over-tweet-about-rush-limbaughs-death>.

⁵ VCU OFFICE OF THE PROVOST, *Prospective Faculty*, <https://provost.vcu.edu/faculty/prospective> (last visited Apr. 21, 2021).

⁶ VCU, GUIDELINES FOR WRITING A STATEMENT OF CONTRIBUTIONS TO DIVERSITY, EQUITY AND INCLUSION, <https://provost.vcu.edu/media/provost-2018/documents/VCUGuidelinesforWritingaStatementofContributionstoDiversity-Revised9-21-2020.pdf>.

⁷ *Id.*

society face when they are members of underrepresented groups, people of color or women; or because of their religious, ethnic or gender identities or orientation.”⁸

The DEI Statements are evaluated according to a rubric, which assesses the evidence the applicant has provided in three “Commitment Areas”: knowledge, awareness, and application.⁹ The first two criteria evaluate the candidate’s knowledge of, awareness of, “experience with, and interest in dimensions of diversity that result from different identities, such as ethnic, socioeconomic, gender, sexual orientation, disability.”¹⁰ The “application” criterion considers the candidate’s participation in DEI-related activities, defining “optimal evidence” as “multiple activities in depth, with detailed information about both their role in the activities and the outcomes.”¹¹

II. The First Amendment Prohibits VCU from Requiring Prospective Faculty to Assent to Specific Ideological Views

As a public university bound by the First Amendment, VCU 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.

A. The First Amendment Applies to VCU as a Public University

It has long been settled law that the First Amendment is binding on public universities like VCU.¹² 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.”¹³ 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,”¹⁴ including a

⁸ *Id.*

⁹ VCU OFFICE OF THE PROVOST, DIVERSITY, EQUITY, AND INCLUSION STATEMENT RUBRIC, <https://provost.vcu.edu/media/provost-2018/documents/RubricDiversityStatement.09.14.2020.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *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).

¹³ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990).

¹⁴ *Elrod v. Burns*, 427 U.S. 347, 357 (1976).

government employer’s decision not to hire a job candidate based on the candidate’s political associations or beliefs.¹⁵

This principle applies with particular force at public institutions of higher education, as free speech is the “lifeblood 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 “No 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:

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.²⁰

VCU itself recognizes the critical importance of academic freedom, promising to

support and foster freedom of inquiry, discourse, teaching, research and publication by any member of the academic staff in their sphere of scholarly interest. It is also the policy of the University to protect the academic community against attempts, from within or without the University that would restrict the exercise of these freedoms. These policies are rooted in the recognition that academic freedom is essential to the search for truth and for the extension of knowledge.²¹

¹⁵ *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”).

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).

²¹ VCU, *Academic Rights and Responsibilities*, <https://policy.vcu.edu/universitywide-policies/policies/academic-rights-and-responsibilities.html> (last visited Apr. 21, 2021).

VCU's DEI Statement requirement risks transgressing these constitutional and institutional principles to the extent that applicants for faculty positions are rejected or disfavored in the hiring process for demonstrating insufficient fealty to the university's views on DEI.

B. VCU Cannot Reject or Disadvantage Candidates for Faculty Positions Based on Their Political or Ideological Views

VCU's constitutional obligation to uphold expressive freedom precludes the university from requiring prospective faculty to affirm certain beliefs. The mandatory DEI Statement may, in practice, require prospective faculty to express their alignment with the university's views on diversity, equity, and inclusion. But VCU cannot, consistent with the First Amendment, prescribe an orthodox position for its faculty on any question of politics or ideology.

The guidelines and rubric for the DEI Statement do not precisely define the terms “diversity,” “equity,” and “inclusion.” In the absence of agreed-upon, objective, and precise definitions, these terms—which carry salient political connotations that are the subject of much debate and controversy²²—may well serve as proxy 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, 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 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.

Our concern about viewpoint discrimination is amplified by the note in VCU's rubric that it was adapted from a rubric used by the University of California, Berkeley (UC Berkeley) to assess faculty candidates' contributions to DEI.²³ While the link in VCU's document to that rubric is no longer active, UC Berkeley's current sample rubric—available at a separate webpage—is troubling. 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

²² See, e.g., Nicholas C. Burbules, *Antinomies in the Concepts of Diversity, Equity and Inclusion*, INSIDE HIGHER ED (Apr. 15, 2021), <https://www.insidehighered.com/views/2021/04/15/conflicts-between-peoples-interpretations-diversity-equity-and-inclusion-opinion> (exploring different meanings of “diversity,” “equity,” and “inclusion” for people who support these values); Conor Friedersdorf, *Can Chloé Valdary Sell Skeptics on DEI?*, THE ATLANTIC (Jan. 31, 2021), <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.”).

²³ DIVERSITY, EQUITY, AND INCLUSION STATEMENT RUBRIC, *supra* note 9.

same.”²⁴ UC Berkeley’s sample rubric thus leaves no doubt that the university intends to use DEI statements to penalize or reject faculty candidates who hold disfavored political views.

The results of one of UC Berkeley’s DEI initiatives are not encouraging. In the 2018-19 academic year, UC Berkeley’s Life Sciences division conducted a faculty search and, during a first review, “evaluated candidates based solely on contributions to diversity, equity and inclusion.”²⁵ Only candidates who met a “high standard” in this area were advanced for further review, narrowing a pool of 893 candidates down to 214.²⁶ In other words, over 75% of the candidates who met basic qualifications were rejected for their insufficient commitment to UC Berkeley’s views on DEI, without any serious consideration of their teaching, research, and other service qualifications.

VCU must not go down this same path. Will VCU, which similarly requires submission of a DEI Statement in the initial step of the application process, immediately screen out candidates who fail to conform to their evaluators’ or the university’s views on DEI? VCU’s DEI Statement requirement, inspired by UC Berkeley’s, gives reason to believe that applicants for faculty positions at VCU will be judged primarily on their loyalty to a political cause, rather than on their academic qualifications. But VCU, as a public university bound by the First Amendment, cannot require its faculty to affirm any specific political or ideological conception of DEI and to demonstrate their commitment to that preferred set of beliefs with evidence of their efforts to promote it. This amounts to 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”²⁷ in defiance of decades of Supreme Court precedent and VCU’s own policies protecting academic freedom.

To further illustrate our concern by analogy, we trust that VCU would readily recognize the problem with evaluating prospective faculty based on their demonstration of “involvement in local, state, or national organizations that promote patriotism in society.” Just as with “diversity, equity, 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 candidates with personal or professional beliefs and commitments that differ from those of their evaluators will face negative consequences for following the dictates of their own conscience. This is an unacceptable result at a public institution of higher education.²⁸

²⁴ 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 Apr. 26, 2021).

²⁵ UC BERKELEY, INITIATIVE TO ADVANCE FACULTY DIVERSITY, EQUITY AND INCLUSION IN THE LIFE SCIENCE[S] AT UC BERKELEY, YEAR END SUMMARY REPORT: 2018-2019 at 2, https://ofew.berkeley.edu/sites/default/files/life_sciences_initiative_year_end_report_summary.pdf.

²⁶ *Id.*

²⁷ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

²⁸ See *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

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.²⁹

FIRE recognizes that VCU 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. VCU may also, of course, ensure that its educational environment is free from unlawful discriminatory conduct. What VCU cannot do, however, is force faculty candidates to confess by word and act their faith in the university’s perspective on diversity, equity, and inclusion.

III. VCU Must Revise or Rescind Its Unconstitutional Mandate

We ask VCU 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. To protect academic freedom and to honor the individuality of university faculty members, we urge VCU to revise or eliminate this mandate.

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 May 24, 2021.

Sincerely,



Aaron Terr

Program Officer, Individual Rights Defense Program and Public Records

Cc: Keith T. Parker, Rector, Board of Visitors
 H. Benson Dendy III, Vice Rector, Board of Visitors
 Gail Hackett, Ph.D., Provost and Senior Vice President for Academic Affairs
 Deborah Noble-Triplett, Ph.D., Senior Vice Provost for Academic Affairs

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.”).

²⁹ See *Sweezy v. New Hampshire*, 354 U.S. 234, 235–36 (1957); see generally *Keyishian*, 385 U.S. 589.