



# FIRE

Foundation for Individual  
Rights and Expression

November 11, 2022

Dr. Adela de la Torre  
c/o Britany Santos-Derieg, Chief of Staff  
Office of the President  
San Diego State University  
5500 Campanile Drive  
San Diego, California 92182-8000

*Sent via U.S. Mail and Electronic Mail (bsantosderieg@sdsu.edu)*

Dear Dr. de la Torre:

FIRE<sup>1</sup> is concerned by San Diego State University's modifications to its reappointment, tenure, and promotion (RTP) criteria requiring faculty to discuss their efforts to advance diversity, equity, and inclusion (DEI).

We understand universities have a legitimate interest in promoting an inclusive and enriching campus environment, including for students or faculty from backgrounds traditionally underrepresented in academia. However, we are concerned the modifications to the RTP process will compel faculty to voice or demonstrate commitments to prescribed views on contested questions of politics or morality to avoid adverse consequences. This kind of imperative would amount to viewpoint discrimination and compelled speech proscribed by the First Amendment, threatening to cast a pall of orthodoxy over the academic environment.

## **I. SDSU University Senate Approves Changing DEI Criteria in RTP Review**

On September 6, SDSU's University Senate voted to adopt changes to the criteria used in the RTP processes for faculty.<sup>2</sup> While individual departments previously adopted their own diversity plans, the updated criteria imposed a university-wide requirement for faculty to detail DEI contributions in the RTP process.<sup>3</sup> The changes require candidates to include DEI contributions in their Personnel Data Summary (PDS)—the file submitted for RTP review—and

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<sup>1</sup> As you may recall from prior correspondence, FIRE is a nonpartisan, nonprofit dedicated to defending freedom of expression, conscience, and religion, and other individual rights on America's college campuses.

<sup>2</sup> Katelynn Richardson, *SDSU faculty vote to include DEI in promotion decisions*, COLL. FIX (Oct. 21, 2022) <https://www.thecollegefix.com/sdsu-faculty-vote-to-include-dei-in-promotion-decisions/>.

<sup>3</sup> Memorandum from Alyson Abel-Mills, Chair, Faculty Affairs Committee, University Senate and Pamela Lach, Chair, Academic Policy & Planning Committee, University Senate (Sept. 6, 2022) (on file with author).

provide guidance on how reviewers will assess faculty DEI contributions and narratives.<sup>4</sup> The new criteria elevate the diversity component already in RTP guidance, which previously described responsiveness to diversity as a value that *may* be incorporated where appropriate in faculty’s files.<sup>5</sup>

The changes approved by the senate call for faculty to explain how their achievements “further the goals of their unit of providing equitable service to all students and creating an inclusive community of scholars.”<sup>6</sup> The rationale for the changes defines “equity” as “creation of opportunities for historically underserved populations to have equal access to and participate in educational programs that are capable of closing the achievement gaps in student success and completion,” and explains that “[u]nderrepresented populations in higher education may be identified through race/ethnicity (e.g., African-American, Latinx, Native American, Southeast Asian and Pacific Islander), gender (e.g., women in the sciences, technology, engineering, and mathematics; trans individuals), ability, sexual orientation, economic status, first-generation college status, non-native English speakers, or any other group that has been documented as underrepresented in the candidate’s academic discipline.”<sup>7</sup>

Examples of teaching activities that demonstrate a commitment to DEI include “[d]eveloping courses, materials or curricula . . . that foster inclusivity and/or focus on themes of diversity, equity, and inclusion or the incorporation of underrepresented groups” and “[c]reation of assignments that encourage students to explore different gender, racial and cultural perspectives.”<sup>8</sup> The changes also provide that “[r]esearch that addresses or incorporates underrepresented populations and communities” and “[m]eaningful involvement with professional . . . or community organizations that support and/or advance underrepresented populations” qualify as other activities in which faculty can participate and write about to demonstrate the required commitment.<sup>9</sup>

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

It has long been settled law that the First Amendment binds public universities like SDSU,<sup>10</sup> such that its decisions and actions—including maintenance of policies implicating student and faculty expression<sup>11</sup>—must comply with the First Amendment. When government entities wish to “disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; *Reappointment, Tenure and Promotion at SDSU, Information for Reviewers*, SAN DIEGO STATE UNIV. (2022), [https://fa.sdsu.edu/\\_resources/files/tenuretrack\\_evaluations/videortpreviewer2022-2023.mp4](https://fa.sdsu.edu/_resources/files/tenuretrack_evaluations/videortpreviewer2022-2023.mp4).

<sup>6</sup> Memorandum from Alyson Abel-Mills, Chair, Faculty Affairs Committee of San Diego State University Senate and Pamela Lach, Chair, Academic Policy & Planning Committee of San Diego State University Senate (Sept. 6, 2022) (on file with author).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>11</sup> *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

an individual’s First Amendment right to avoid becoming the courier for such message.”<sup>12</sup> This principle applies with particular force at public institutions of higher education, as free speech is the “lifeblood of academic freedom.”<sup>13</sup> Universities “occupy a special niche in our constitutional tradition,”<sup>14</sup> and academic freedom is an area “in which government should be extremely reticent to tread.”<sup>15</sup> As the Supreme Court explained in overturning legal barriers to faculty members with assertedly “seditious” views:<sup>16</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 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.

SDSU therefore may not condition faculty employment or advancement on pledging allegiance to a contested set of ideological beliefs. Yet the newly approved RTP guidelines transgress First Amendment principles by requiring faculty members to embrace specific perspectives on disputed political and ideological issues and to embed those beliefs in their academic activities to be eligible for promotion and tenure. Such a litmus test impinges on faculty members’ scholarly autonomy and freedom to dissent from prevailing consensus on issues of public or academic concern without suffering diminished career prospects.

FIRE would not object to SDSU recognizing faculty members’ voluntarily chosen, relevant teaching, research, and service activities and accomplishments that might be characterized as DEI contributions. But the new DEI requirement still threatens academic freedom even if it gives them some leeway to choose qualifying activities. It coerces faculty whose academic interests may lie elsewhere—but who wish to maximize their chances of obtaining tenure or promotion—to substantially reorient their scholarly pursuits or service to conform with SDSU’s ideological preferences. The requirement even reaches beyond the classroom and laboratory, selectively rewarding faculty who engage in DEI-related activism outside the university community.

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<sup>12</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>13</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>14</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

<sup>15</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>16</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up).

SDSU's conception of DEI—which focuses primarily on group identities based on immutable characteristics and endorses “equity”-based solutions that target specific groups—is laden with ideological assumptions that currently drive substantial debate and controversy.<sup>17</sup> However strongly SDSU may believe in certain tenets of DEI, it has no authority to force its faculty to take any particular side of this debate. Yet the new guidelines establish a means to discriminate against faculty who disagree with—or whose track record reflects insufficient dedication to—SDSU's positions on DEI. FIRE is thus concerned that faculty with minority, dissenting, unpopular, or even nuanced views on the subject will face a marked disadvantage in seeking tenure and promotion.

The fact that the University Senate, rather than SDSU administrators, voted on and approved the changes to the criteria 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 rights of their peers.

To further illustrate our concerns by analogy, we trust SDSU would readily recognize the problem with evaluating faculty based on affirmation of the importance of “patriotism,” “racial colorblindness,” or “individualism,” or their demonstration of activities that promote these values. Just as with DEI, these criteria entail inherently political or moral viewpoint-dependent assessments that impose negative consequences on faculty with personal or professional beliefs and commitments that may differ from those of their colleagues or the university. To nonetheless force faculty to espouse and promote views they don't hold infringes their academic freedom, expressive rights, and liberty to follow the dictates of their own consciences.

### **III. Conclusion**

FIRE urges SDSU to consider the consequences of the new RTP criteria on faculty whose views, pedagogical choices or associations are unpopular or simply out-of-step with the majority, on or off campus. SDSU should judge all faculty based on the quality of their academic work, not

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<sup>17</sup> See, e.g., 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 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”); Steven Mintz, *How to Stand Up for Equity in Higher Education*, INSIDE HIGHER ED (Apr. 20, 2021), <https://www.insidehighered.com/blogs/higher-ed-gamma/how-stand-equity-higher-education> (arguing for equity in higher education, which “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”); Conor Friedersdorf, *Can Chloé Valdary Sell Skeptics on DEI?*, 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.”).

their degree of conformity to certain ideological tenets. To protect academic freedom and honor faculty members' individuality, FIRE calls on SDSU to eliminate or revise this mandate.

We appreciate your time and attention to our concerns. We respectfully request a response to this letter no later than November 29, 2022.

Sincerely,

A handwritten signature in cursive script that reads "Anne Marie Tamburro".

Anne Marie Tamburro  
Program Officer, Campus Rights Advocacy

Cc: Nola Butler-Byrd, Ph.D., Senate Chair