



FIRE

Foundation for Individual
Rights and Expression

September 7, 2023

Todd Saliman
Office of the President
University of Colorado Boulder
1800 Grant Street Suite 800
Denver, Colorado 80203

Sent via U.S. Mail and Electronic Mail (OfficeOfThePresident@cu.edu)

Dear President Saliman:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned that the University of Colorado Boulder requires faculty applicants to express commitment to the university's views on Diversity, Equity, and Inclusion (DEI). While CU Boulder may shape and advocate its own institutional DEI values, it cannot, as a public institution bound by the First Amendment's free expression and academic freedom guarantees,² condition faculty hiring on applicants' allegiance to particular beliefs.

FIRE very much appreciates that CU Boulder is one of the few institutions in the country whose policies earn our "green light" rating.³ To maintain this important status and meet its constitutional obligations, CU Boulder should promptly rescind or adapt its faculty applicant DEI requirement to meet First Amendment standards.⁴

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

² *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).

³ A full explanation of our speech code ratings is available at thefire.org/spotlight/using-the-spotlight-database, and you can read more about how FIRE rates CU Boulder at <https://www.thefire.org/colleges/university-colorado-boulder>.

⁴ For your convenience, FIRE has suggested revisions below, should you opt to go that route.

Our concerns arise from how a number of current CU Boulder job postings require a “Diversity and Inclusion Statement,”⁵ which asks applicants to detail how their scholarship, teaching, and service would contribute to advancing diversity, equity, and inclusion,” or how discrimination has affected their life.⁶ The rubric for assessing these statements further requires applicants to “[e]xpress[] [a] desire to be a strong advocate for DEI within the department/school/college and their field.”⁷ This requires expression of specific contested views, including, for example, that “[h]istorically minoritized” groups “have historically been a part of systems within the United States in which they have been denied access to economic, political, and cultural participation as a group,” and attesting as much for multiple demographics designated by CU Boulder.⁸ This view of DEI is currently the subject of much public debate, even among staunch DEI proponents.⁹ Forcing faculty applicants to profess a commitment to CU Boulder’s particularized views in this area thus creates tension with the range of perspectives on these issues.

The First Amendment protects those varying perspectives on public college and university campuses and prohibits those institutions from forcing faculty applicants to parrot institutional views. As the Supreme Court has long held, 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.”¹⁰

⁵ See e.g., *Visiting Scholar in Conservative Thought and Policy*, Special Instructions, UNIV. OF COLO. BOULDER, <https://jobs.colorado.edu/jobs/JobDetail/Visiting-Scholar-in-Conservative-Thought-and-Policy/49822> [<https://perma.cc/GX34-5VJS>]; *Assistant Professor*, UNIV. OF COLO. BOULDER, <https://jobs.colorado.edu/jobs/JobDetail/Assistant-Professor/51176> [<https://perma.cc/5QTQ-BJ68>]; *Teaching Assistant Professor in the Herbst Program for Engineering, Ethics and Society – Science and Technology*, UNIV. OF COLO. BOULDER, <https://jobs.colorado.edu/jobs/JobDetail/Teaching-Assistant-Professor-in-the-Herbst-Program-for-Engineering-Ethics-and-Society-Science-and-Technology/50799> [<https://perma.cc/D2TX-6EDZ>].

⁶ *Open Rank – Tenure-Track Law Professor*, Special Instructions, UNIV. OF COLO. BOULDER, <https://jobs.colorado.edu/jobs/JobDetail/Open-Rank-Tenure-Track-Law-Professor/49908> [<https://perma.cc/WQE7-66CW>].

⁷ *Guide to Assess Diversity, Equity, & Inclusion (DEI) Statements & Contributions*, DEI Advancement Plans, Excellent (3), UNIV. OF COLO. BOULDER, https://www.colorado.edu/hr/sites/default/files/attached-files/rubric_to_assess_dei_statements.pdf [<https://perma.cc/28S3-KWJH>].

⁸ *Id.* CU Boulder lists these as: “American Indian, Native American, and Indigenous; Black and African American; Asian American and Pacific Islander; Latinx/a/o; LGBTQ+ communities: Lesbian/Gay/Bisexual/Transgender +; women-identified communities, communities with disabilities, and communities with lower socioeconomic status.”

⁹ See, e.g., Robert Maranto, Michael Mills and Catherine Salmon, *What do we really mean by ‘diversity, equity and inclusion’?*, THE HILL, Nov. 11, 2022, <https://thehill.com/opinion/education/3718803-what-do-we-really-mean-by-diversity-equity-and-inclusion>; Jim Ryan, *DEI: The Case for Common Ground*, May 30, 2023, UVAToday, <https://news.virginia.edu/content/dei-case-common-ground>.

¹⁰ *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) (holding the government “may not compel affirmance of a belief with which the speaker disagrees”).

That principle applies with particular force at public institutions of higher education, as free speech is the “lifblood of academic freedom.”¹¹ CU Boulder therefore cannot reject or penalize applicants for failure to profess allegiance to any particular or ideological position. Such conditioning constitutes impermissible viewpoint discrimination, which the Supreme Court has called an “egregious” form of censorship.¹² Government employers cannot regulate expression when the specific motivating ideology, opinion, or perspective of the speaker is the rationale for doing so.¹³ By conditioning employment on adherence to a contested set of political views, CU Boulder’s DEI litmus test impinges faculty applicants’ scholarly autonomy and freedom to dissent from the prevailing consensus on issues of public or academic concern.¹⁴

In addition to the issues presented by the importance CU Boulder assigns to a faculty applicant’s contributions to “diversity,” “equity,” and “inclusion,” the guidelines and rubric for the DEI statement are problematic for the independent reason that they do not precisely define these and other key terms. Absent agreed-upon, objective, and precise definitions, these terms—which carry salient political connotations subject to much debate and controversy¹⁵—will almost certainly serve as proxies for particular viewpoints or beliefs. Without clear definitions, the terms will signify different meanings and conceptual frameworks to different

¹¹ *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.”).

¹² *Rosenberger*, 515 U.S. at 829.

¹³ *Id.*

¹⁴ See, e.g., Conor Friedersdorf, *What does DEI even mean?*, THE ATLANTIC, Apr. 6, 2023, <https://www.theatlantic.com/newsletters/archive/2023/04/what-does-dei-even-mean/673657/> (“The DEI debate undoubtedly includes lots of substantive disagreements, but I suspect it would be somewhat less polarizing and intractable if everyone involved clarified their views with more specificity and concreteness rather than debating the matter in terms of abstract generalities.”); Nicholas C. Burbules, *Antinomies in the Concepts of Diversity, Equity and Inclusion*, INSIDE HIGHER ED, Apr. 14, 2021, <https://www.insidehighered.com/views/2021/04/15/conflicts-between-peoples-interpretations-diversity-equity-and-inclusion-opinion> (exploring different definitions of “diversity,” “equity,” and “inclusion” for supporters of those values).

¹⁵ “Equity,” for example, is hotly debated 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., Sept. 25, 2022, <https://www.timeshighereducation.com/campus/do-we-need-equity-or-equality-makethingsfair-actually-we-need-both> (arguing for 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/higheredgamma/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.”).

people, effectively leaving decisions about whether an applicant satisfies the DEI requirements to the discretion of evaluators, inviting subjective and arbitrary decision-making.

FIRE would not object to CU Boulder recognizing relevant teaching, research, and service activities and accomplishments that that faculty applicants voluntarily choose to submit. But even if the DEI requirement gives faculty some leeway in choosing activities to fulfill it, the requirement still threatens their academic freedom. Universities succeed in their unique role as “peculiarly the ‘marketplace of ideas’” only by engaging in the objective search for knowledge unburdened by undue pressures.¹⁶

The DEI statement requirement risks disfavoring faculty applicants who do not adopt university-prescribed views or who demonstrate insufficient fealty to them. It contains subjective criteria that CU Boulder can easily abuse to punish faculty applicants with minority, dissenting, or even nuanced views on DEI-related issues that may be at odds with popular sentiment or evaluators’ views. Preferring, for example, faculty who “[s]erved as a leader in a student or professional organization that supports historically minoritized individuals” allows administrators to enforce their own ideologies.¹⁷ While we do not expect such an outcome is intended, it is unfortunately easy to imagine arising in practice, and would lead the university to becoming an echo chamber for its preferred views.

Tweaks to the current language to bring it in line with First Amendment standards could include additional statements like “CU’s commitment to diversity, inclusion and equity is not aimed at producing ideological conformity. The university is also committed to sustaining an academic environment built on the free exchange of ideas and viewpoints.” As you will undoubtedly note, this exemplar revision expands the definition of “diversity” to allow a wider breadth of opinions and ideologies. Additionally, CU Boulder could adjust the language in the rubric to show the same by including a preference for “clear awareness of, experience with and interest in dimensions of diversity that result from different identities or perspectives.” Including such language will help ensure viewpoint-neutrality in evaluating the statements applicants submit.

Our nation is but a few generations removed from requiring university faculty to submit to state interrogations into their possible involvement with “subversive” organizations or having to sign loyalty oaths disavowing socialism or communism as a condition of employment.¹⁸ We understand CU Boulder has not required faculty to engage in specific actions in support of DEI as a condition of employment or promotion. But explicitly rewarding such participation—and penalizing its absence—is a worrying step similar to prior historical mistakes.

To protect academic freedom and to honor the individuality of CU Boulder’s faculty, we request a substantive response to this letter no later than close of business September 21, 2023,

¹⁶ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

¹⁷ *Guide to Assess Diversity, Equity, & Inclusion*, supra note 7.

¹⁸ See *Sweezy v. New Hampshire*, 354 U.S. 234, 235–36 (1957); see generally *Keyishian*, 385 U.S. 589.

confirming that CU Boulder will revise or rescind the DEI statement requirement and affirm to faculty that they maintain their academic freedom.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ida Namazi', written in a cursive style.

Ida Namazi
Program Officer, Campus Rights Advocacy

Cc: Jeremy Hueth, University Counsel