UNIVERSITY OF CALIFORNIA, ACADEMIC SENATE

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June 2, 2022

ACADEMIC SENATE DIVISION CHAIRS

Re: Recommendations for Department Political Statements

Dear colleagues:

At its May 2022 meeting, the Academic Council endorsed the attached recommendations from the University Committee on Academic Freedom (UCAF). The recommendations address the freedom of campus academic departments to issue or endorse statements on political or controversial issues, and outline processes that will ensure the judicious and transparent use of statements.

First, the Council endorses the overriding principle articulated by UCAF that departments should not be precluded from issuing or endorsing statements in the name of the department. Freedom of expression and academic freedom are core tenets of the UC educational mission, and individual faculty members and groups of faculty have a right to speak publicly about political or controversial issues. UCAF consulted with both UC General Counsel and the relevant UC administrators to confirm that law and University policy permits departments to make statements on University-owned websites, as long as those statements do not take stands on electoral politics, so this principle does not change policy or allow something previously prohibited.

Council also agrees with UCAF that departments should use their right to issue political statements responsibly and judiciously. To this end, it is important for departments to include disclaimers with statements that make clear the department does not speak for the University as a whole. UCAF also recommends that departments develop bylaws that describe the process of deliberation and communication the department will use to develop and post a statement, define the unit voting on the statement, and solicit minority or opposition statements.

UCAF offers a menu of options departments may choose from to describe whose views the statement represents; however, Council joins UCAF's reluctance to recommend that departmental statements always be accompanied by a list of individual supporter names, as doing so may chill speech, strain the academic freedom of those who hold minority views, and create a limited public forum that legally requires the publication of minority viewpoints. UCAF recommends that departments consult with campus Committees on Academic Freedom when considering a statement on a controversial issue to help them navigate these options and potential pitfalls.

Finally, the Council emphasizes that it endorses these recommendations as best practices, not mandates to campuses. Moreover, the specific recommendation to develop bylaws is not intended to stifle the issuance or endorsement of statements between now and when bylaws are written and approved.

We believe that these recommendations will support existing faculty free speech and academic freedom rights, while protecting the integrity and reputation of the University. We ask division chairs to facilitate their distribution to department chairs, deans, chancellors, and campus CAFs.

Please do not hesitate to contact me if you have additional questions.

Sincerely,

Robert Horwitz, Chair
Academic Council

Cc: President Drake
Provost Brown
Chief Policy Advisor McAuliffe
Chief of Staff Kao
UCAF
Campus Senate Directors
Executive Director Baxter

Encl.

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May 25, 2022

ROBERT HORWITZ, CHAIR
ACADEMIC SENATE

RE: DEPARTMENT STATEMENTS

Dear Robert,

In October 2021, I wrote to you with recommendations from the University Committee on Academic Freedom ("UCAF") regarding the departmental publication of statements on controversial or "political" matters. On behalf of the Academic Council ("Council"), you circulated our recommendations systemwide, generating many varied and thoughtful comments from campuses across the system. Council discussed these comments at a meeting on March 30, 2022, which I and UCAF Vice-Chair Melike Pekmezci attended, and at a meeting on May 25, 2022, which I attended.

Council agreed generally with both of our recommendations, but in light of the comments received and the views of Council members, Council asked that UCAF consider certain revisions to its recommendations. Council expressed no desire to recommend that the University administration preclude departments from making statements or police the content of such statements. To the contrary, there was agreement on Council that the practice of departments issuing statements, which is already allowed under law and U.C. policy, must be allowed to continue – but with additional recommendations regarding best practices to ensure such statements are developed and published judiciously and with guidelines, standards, or bylaws in place that reduce the likelihood that publication of such statements will chill, suppress, or misrepresent minority viewpoints.

UCAF met on April 1, 2022 to discuss Council's requests and the comments Council received. I also consulted with UCOP General Counsel to confirm UCAF's understanding of the relevant law and U.C. policy.

Below, I clarify and reiterate that nothing in the law or University policy prohibits departments from making statements. I then discuss and briefly summarize UCAF's response to the comments Council received, with an emphasis on the danger that departmental statements pose with respect to minority viewpoints. I conclude with a discussion of UCAF's revised recommendations.

1. The widespread practice of departments making statements on controversial, arguably "political" topics is permitted under existing law and U.C. policy.

As we noted in our October 2021 letter, across the U.C. system, departments make statements on a number of topics. This is a widespread practice that is not new. It is currently allowed under law and U.C. policy. UCAF's October 2021 recommendations, as well as the revised recommendations articulated below, are intended to ensure that when departments make such statements, they do so responsibly and thoughtfully, and with transparency. To be clear, though, UCAF's recommendation is not that the University allow something that is currently prohibited. Departments are permitted to make statements. In fact, as some commenters acknowledged, a *prohibition* on the ability of departments to issue statements on controversial issues would represent a monumental change in U.C. policy and practice that neither Council nor UCAF believes is warranted or justified.

Some commenters invoked PACAOS-40, a university policy we cited in our original letter.[1] This policy states in relevant part: "The name, insignia, seal, or address (including the electronic address) of the University or any of its offices or units shall not be used for or in connection with religious, political, business or other purposes or activities except as consistent with University policy, campus implementing regulations, and applicable law."

PACAOS-40 does not preclude the practice of departmental statements on a wide variety of topics. Because relevant U.C. policy restricting use of U.C. resources for "political" purposes has long been interpreted and applied within the University as addressing *electoral* politics (candidates and ballot initiatives), and because there is no law prohibiting the University from issuing more general statements related to "political" issues, PACAOS-40 simply does not apply to statements about other matters that could be considered "political," such as Israel/Palestine, Black Lives Matter, hybrid instruction during COVID, strikes by grad students or lecturers, mask mandates, etc.

This narrow definition of "political" explains why the University regularly takes stands on controversial topics in the exercise of its governmental right to free speech, despite direction in PACAOS-40 that, "[a]s a State instrumentality, the University must remain neutral on religious and political matters." While this provision prevents the University from taking a position on, say, the outcome of the race for Governor of California, it does not preclude the University from, say, suing the Trump administration for rescinding the DACA program,[2] filing an amicus brief in the U.S. Supreme Court in support of affirmative action,[3] praising the jury verdict in a high profile murder case,[4] or commenting on a

[1] *See* October 20, 2021 Letter from UCAF to Academic Council at 2 n.5.

[2] *See* Press Release, *University of California sues Trump administration on unlawful repeal of DACA program*, Sept. 8, 2017 (quoting then-President Janet Napolitano: "Neither I, nor the University of California, take the step of suing the federal government lightly . . . . To arbitrarily and capriciously end the DACA program, which benefits our country as a whole, is not only unlawful, it is contrary to our national values and bad policy"), available at https://www.universityofcalifornia.edu/press-room/university-california-sues-trump-administration-unlawful-repeal-daca-program.

[3] *See* Press Release, *UC files amicus brief in affirmative action case*, Nov. 2, 2015 (explaining that the University's brief "offers the court compelling evidence of the challenge institutions of higher education face when trying to promote diversity — among other critical educational objectives — when they are prohibited from using race-conscious measures in college admissions"), available at https://www.universityofcalifornia.edu/press-room/uc-files-amicus-brief-affirmative-action-case.

[4] *See* Press Release, UC commends Chauvin murder trial verdict, April 20, 2021 ("As the prosecution made abundantly clear, Derek Chauvin grossly and maliciously overstepped his duties as a police officer when he killed George Floyd."), available at https://www.universityofcalifornia.edu/press-room/uc-commends-chauvin-murder-trial-verdict.

governmental policy decision related to climate change.[5] For this reason, the University views departmental statements as *consistent with* existing systemwide policy and applicable law, so long as they do not take stands on electoral politics, and so long as they do not purport to speak for the University as a whole.

2. Departmental statements have the potential to infringe on academic freedom.

The fact that existing law and policy permits departments to issue statements does not resolve the matter. It is true that some commenters feel strongly that the publication of such statements can constitute an important expression of academic freedom. Others believe that departmental *silence* on controversial topics represents a form of expression, such that departments have an obligation to speak lest their silence be construed as lack of interest in, or support of, the status quo. A majority of the commenters, however, warned that departmental statements can, under certain circumstances, *infringe* on academic freedom and are often unwise and ill-advised.

UCAF agrees that departmental statements can threaten or violate the academic freedom of members of the department who do not share the views of a majority of their colleagues. We noted in our October 2021 letter that, "when departments issue statements in the name of the department – or when they endorse, as a department, a statement issued by someone else – minority viewpoints within the department may be suppressed. Especially for those within the department who enjoy less power and authority – for example, students, staff, and untenured faculty – the departmental statement may have a chilling effect on their speech that can infringe on academic freedom."

Many commenters agreed with, and amplified, this sentiment. Some pointed out that not only may department statements *suppress* minority views, they also may unfairly *misrepresent* minority views. For example, when a department issues a statement without disclaimer or qualification, it purports to speak for the entire department. Presumably, the statement represents the views of all department faculty, but it may also be construed as representing department staff and students as well. Unless the department has undergone a process to secure agreement from all of these individuals, it is possible the statement ascribes to members of the department who do not agree with the statement (or who do not agree that the department should issue such statements) a viewpoint they do not actually share.

To say that these members have the right to publish their own statements in opposition to the departmental statement is not sufficient. A member of a department has the right not to speak at all on a particular matter and should not be conscripted to do so only for the purpose of noting their disagreement with colleagues whose views would otherwise be attributed to them. It violates academic freedom to speak for a department member who does not agree with the statement, and it violates academic freedom to coerce a department member to speak on a matter about which they do not wish to speak.

A majority of UCAF members do not believe the University should change its policy and practice to prohibit department statements.[6] However, UCAF's view is that most departments that issue statements

[5] *See* Press Release, UC President Napolitano statement on the Paris climate agreement, June 1, 2017 ("UC supports the efforts of the governor, California's congressional delegation, and state legislators to ensure that California stays at the forefront of combating climate change."), available at https://www.universityofcalifornia.edu/press-room/uc-president-napolitano-statement-paris-climate-agreement.

[6] In particular, we find compelling the concerns about enforcement of such a policy articulated by U.C. Berkeley's Committee on

on controversial topics under-appreciate the concerns noted above. While we recognize that departmental statements are permitted by law and policy, we agree with Council that it is appropriate to recommend best practices for departments to consider adopting to lessen the impact of the concerns raised by commenters across the U.C. system.

We turn to those recommendations now.

Reiteration of Recommendation #1: Departmental statements should always be accompanied by a clear disclaimer that the department is not speaking for the University.

The vast majority of commenters across the system endorsed the first recommendation in UCAF's October 2021 letter, that departmental statements be accompanied by a clear disclaimer that the department does not speak for the University.

In light of some confusion about the meaning of the word "political" in this context, we recommend an additional clarification, represented in the second sentence of the paragraph immediately below.

Recommendation #1: When a departmental statement is issued or endorsed indicating support, endorsement, or opposition with regard to any commercial, religious, or political activity or issue, the statement should be accompanied by a disclaimer in the form of an explicit statement that the department's statement should not be taken as a position or endorsement of the University of California, or of the campus, as a whole. This recommendation applies to any statements that could be construed as political or controversial, with the exception of departmental statements advocating for or against candidates running for electoral office or initiatives on the ballot for a vote by the electorate, which are prohibited by law and University policy.

Revised Recommendation #2: Departments should establish bylaws, guidelines, or standards governing the publication of departmental statements to ensure the judicious and transparent use of such statements.

We cannot dictate what departments do. We hope, though, that we can encourage departments to be more thoughtful and judicious in their publication of statements about controversial topics. To that end, and in light of Council's request, we have reconsidered and revised our recommendations with respect to how departments report whose views a departmental statement represents.

We had previously recommended that when departments issue such statements, they should "indicate in some manner whose views within the department the statement represents." We also recommended that departments "ensure that minority viewpoints are provided a reasonable and proportionate opportunity to express their views on the same platform as the departmental statement."

Academic Freedom (ACFR): "ACFR expressed significant reservations about the enforcement process for such a policy. At minimum, it would require deans, vice provosts, or senior university officers to decide what speech is permissible for departments in a collective capacity. ACFR drew two conclusions: i. Such a concentration of power to police speech is itself a potential threat to academic freedom. ii. Such a policy would potentially require senior university officers to sanction department chairs for violating the policy. ACFR was not confident that said officers could articulate a clear standard for such sanctions and would be willing to follow through on them."

Upon reflection, and consideration of the comments received, we revise our recommendations as follows:

1) Departments should develop standards governing the practice of issuing statements on controversial topics. The concerns expressed in the comments Council received are too important to ignore. UCAF believes departments would do well to deliberate and decide for themselves whether, when, and how they will issue such statements, and then memorialize these standards in written bylaws or guidelines that govern departmental practice and are publicly available. These bylaws or guidelines should be flexible enough to take into account the varied contexts within which the desire to issue a statement might arise.

2) As part of this process, departments should decide who is included in the "department" when the department makes a statement. Is it tenured faculty? All faculty? Staff? Graduate students? All undergraduate majors? The answers may vary from department to department, but departments should be transparent about who is included when the department speaks as a department. Departments ought to include in their deliberations all those for whom they claim to speak when issuing departmental statements. And, whenever possible, departments should collect the vote anonymously to minimize chilling effect or pressure on members of the department with minority views.

3) Any department statement on a controversial matter should be accompanied by some explanation of whose views it represents. Such an explanation can take a number of forms. For example, departments could:

    a. accompany all statements with a disclaimer that the statements do not necessarily reflect the views of every member of the department;

    b. accompany all statements with a report that the statements reflect "unanimity," "a supermajority," "majority" of the department members, whatever the case may be;

    c. issue all statements in the name of the Dean or chair of the department;[7]

    d. list the results of a departmental vote on whether to issue the statement (i.e., "25 out of 30 department members voted to endorse this statement"); or

    e. list the individual names of department members who agree with the statement.

    We are inclined towards the first two options listed above, which ensure that departmental statements are not misconstrued as representing the views of everyone in the department and do not risk identifying department members with minority views who may not wish to be publicly identified. We also note, as we did in our October 2021 letter, that the final option – listing the names of people who support the department statement – risks creation of a limited or designated public forum that legally *requires* the publication of minority viewpoints on the same platform. We are persuaded by the commenters who questioned the wisdom of opening up departmental websites

[7] Such statements would be considered departmental speech, as distinguished from individual/private statements that any U.C. employee (including deans and chairs) can make in their personal capacity without use of UC resources.

as a forum for debate on controversial issues, which is an additional reason why we do not favor the final option listed above.

4) Time permitting, departments should consult with their campus Committee on Academic Freedom (CAF) when considering publication of a departmental statement on a controversial issue. As UCAF noted in our October 2021 letter, we reject the notion that the University administration should police the content of departmental statements to determine whether they are within the purview of the department's expertise. At the same time, we urge departments to be judicious in their use of such statements. By recommending consultation with CAFs on campus, we are encouraging conversation with faculty and students who have been specifically charged with considering potential violations of academic freedom. Only more thoughtful exercise of departmental expression can result from such discussion. Likewise, while we do not seek formal University enforcement of the recommendations contained in this letter, we do view the campus CAFs as reasonable venues for individual faculty members to seek guidance if they believe a department statement with which they disagree has infringed on or violated their academic freedom rights.

UCAF appreciates the opportunity to comment further on this matter.

Sincerely,

Ty Alper, Chair