

Executive Summary

The University of Arizona has been invited to sign a federal “Compact for Academic Excellence in Higher Education,” which ostensibly offers new federal benefits in exchange for broad compliance commitments.

We respectfully *advise against agreement* to the Compact by UA leaders and its governing authorities, and offer *detailed reasons* to support our recommendation. We do so based upon the publicly available information about the Compact, taking it on its own Terms. We also do so in the spirit of thoughtful engagement on serious matters of institutional concern, mindful that these decisions not only will affect the University in the short run, but well into the future.

At a maximum, we believe UA must protect academic freedom, institutional independence, and legal integrity while addressing our financial needs.

At a minimum, it must undertake due diligence as follows:

- Seek and obtain greater clarity on the numerous legal, financial, and operational implications of the document.
- Engage state and directly affected peer institutions to seek a coordinated response.
- Ensure transparent consultation with faculty, students, and external stakeholders.

There are institutionally significant legal and practical flaws in the Compact that we regard as compelling reasons not to sign.

Among the most serious of these is that the alleged new benefits of compliance are unclear - they are implied, but there is no explanation of how this “priority to federal funds” would operate, or assurance that University of Arizona would actually benefit. The letter accompanying the Compact says the new benefits could include “allowance for increased overhead payments where feasible, substantial and meaningful federal grants, and other federal partnerships.”

But the Compact itself merely says:

“[T]he U.S. university system benefits in a variety of ways from its extraordinary relationship with the U.S. government. These include (i) access to student loans, grant programs, and federal contracts; (ii) funding for research directly or indirectly; (iii) approval of student and other visas in connection with university matriculation and instruction; and (iv) preferential treatment under the tax code.”

These are standard federal benefits that UA and other universities already enjoy.

The Compact continues:

*“To advance the national interest arising out of this unique relationship, this Compact for Academic Excellence in Higher Education represents the priorities of the U.S. government in its engagements with universities that benefit from the relationship. Institutions of higher education are free to develop models and values other than those below, **if the institution elects to forego [sic] federal benefits.**”*

Without clarification, UA thus could be ceding authority over internal operations and academic policies for no enforceable or concrete new benefits. The Administration could, for example, merely agree in advance to give early or preferential review of funding proposals from Compact signatories, not to make awards or otherwise provide a funding advantage to UA proposals.

There is no clear “quid” for the requested, institution-altering “quo.”

Yet if we do sign, and are deemed to be in default, the Compact suggests we not only would lose these ill-defined *new* benefits, but would sacrifice *the federal benefits that we already enjoy*.

Other Compact Terms are vague, overbroad, and potentially unconstitutional; some may not be easily squared with other laws and policies that already bind UA, including state laws. We detail them here, and raise specific questions about how each might be operationalized.

All implicate core institutional values and operational concerns:

- **Admissions** – Prohibitions on considering race, sex, political views, or nationality raise conflicts with existing legal precedent and could chill academic freedom and freedom of speech.
- **Academic Freedom and Civil Discourse** – Mandates to protect “conservative ideas” and abolish units deemed hostile to them risk political interference in scholarship and teaching are inconsistent with the ideological neutrality the Compact purports to respect.
- **Hiring and Institutional Neutrality** – Requirements to enforce neutrality and restrict faculty speech conflict with First Amendment protections and academic norms.
- **Student Equality** – The Compact’s biological definitions of gender may violate federal law (e.g., *Bostock v. Clayton County*) and also presuppose contested notions about immutability.
- **Finances and Tuition** – Mandated tuition freezes, tuition-free admission for selected courses of study, and restrictions on foreign enrollment could destabilize revenue and operations, undermining affordability and growth.
- **Foreign Programs** – Caps on international students and surveillance of foreign funding risk legal, ethical, and financial consequences.
- **Enforcement** – Oversight by the Department of Justice -- the terms of which are not defined here and would come with serious penalties, including repayment of federal funds and mandated donor refunds -- introduces unprecedented risks and uncertainties would be a dramatic federal intrusion into institutional self-governance.

The Compact also raises significant, related strategic concerns:

- **Institutional Academic Independence Harms** – UA risks compromising its academic self-governance principles
- **Premature Commitments** – UA would be making premature commitments. Many provisions of the Compact involve contested questions about law and federal power that are currently being litigated and await United States Supreme Court clarification. Signing now could expose UA to penalties and obligations that may be beyond the reach of law.
- **Long-Term Consequences** – Premature commitments made under the Compact could bind UA beyond the current federal Administration in ways that erode institutional

independence. It may be seen as a binding waiver of rights that institutions that do not sign will not have waived.

- **Financial Risks** –Some of the commitments, such as the five-year tuition freeze, may further erode UA’s ability to regain financial strength
- **Political and Reputational Risks** – Compliance will adversely impact UA’s academic reputation nationally and internationally; harm relationships with state partners, alumni, and donors; and reduce its ability to attract faculty and students. Signing could thereby alienate scholars, students, and the communities we serve, as well as our supporters, if it is perceived as yielding to political pressures rather than upholding academic integrity.
- **Statewide Leadership Responsibilities** – We may be shirking our statewide leadership duties. As Arizona’s flagship research institution, UA’s decisions affect ASU, NAU, and the broader perception of higher education in the state.

Finally, the Compact puts before us fundamental normative and institution-defining issues. Indeed, is difficult to imagine a more important decision for us and for higher education.

We are at an inflection point for the ages.

All modern universities now must articulate, defend, and model the abiding virtues of academic excellence, integrity, and respect for plural values in all they do, lest fiats and bromides substitute for genuine fidelity to open discourse, willingness to face critics, and to defend their mission and work with facts, compelling reasons and examples, expertise, openness to competing ways of improving ourselves and the world we exist to serve, humility, and humanity.

UA’s state, regional, national and international leadership role requires that we, in particular, act wisely, united around core principles, and in a manner that will command respect among all people of good faith who care about education. *E pluribus unum.* Out of many, one.

Assessment of the Compact for Academic Excellence in Higher Education

The undersigned are writing after learning of the recent letter that the University of Arizona, along with eight other major universities, received from the Trump Administration as an overture to entering into a “Compact for Academic Excellence in Higher Education.” The Compact ostensibly offers new federal benefits in exchange for broad compliance commitments.

The Trump Administration has indicated that although the Compact “is largely in its final form, ...*[the government] welcome[s] limited, targeted feedback to ensure mutual alignment...[and] would appreciate comments, in writing, no later than October 20, 2025.*”

Given the short turn-around time for making this profoundly important decision and responding to the request for “targeted feedback,” we respectfully offer the following comments about the proposed terms and the legal and practical questions they raise. Although this is a relatively lengthy analysis, we believe it may assist you in thinking through this complex suite of issues as you prepare your reply to the White House.

Bottom Line: We recommend that UA *not* sign this Compact for the reasons provided herein.

We do so mindful of three compelling concerns:

- The severe **financial constraints** that the University continues to face, and the importance of a robust federal partnership in assuring that we can continue to engage in the cutting-edge research, superb teaching, and outstanding community engagement for which we are known both nationally and internationally. As to this last, we also recognize that we are a land grant University that takes its commitment to serving wider communities in Arizona and beyond very seriously.
- The **political environment** in which we are operating, and the multiple ways in which compliance or noncompliance with this compact will have profound practical and “optics” implications in terms of our national and international academic reputation, our relationship with our state partners, alumni, and friends, our ability to recruit and retain top teachers/scholars, and above all, our most profound relationship: as teachers of our students.
- Our **leadership role** among the three public universities in Arizona, and recognition that whither Arizona’s research flagship University goes, they go too. Beyond our borders and the sports rivalries, Arizona higher education is typically seen as a whole, rather than as separate units. In-state students chose among us, and when any of us is degraded, all Arizonans suffer. We rise or fall together when it comes to our higher mission and our reputation. This is not merely a “UA dilemma,” but a shared one for our state. And of course, the entire nation and world are watching what we -- along with other American leading institutions of higher education -- now do.

We hope you have reached out to ASU and NAU leadership, as well as the other institutions named in this call for participants, to explore a common path and to consider a diversity of viewpoints from other corridors. We also hope others can add to the preliminary analysis we offer here. Finally, we hope you will engage faculty, students, and other members of the UA community, given that the consequences will be felt most directly by them. Transparency, procedures that respect and encourage genuine campus engagement, and above all openness to disagreements about the vexing law, policy, and ethics that govern our academic work are indispensable, democratic baselines for a public university.

We underscore what you already know: All modern universities must model these virtues lest fiat or bromides substitute for fidelity to open discourse and genuine willingness to face our critics and defend our mission and work with facts, compelling reasons, relevant expertise, openness to competing visions of how best to advance our goals, humility, and humanity.

You also know it is not an overstatement to say that we are at an inflection point “for the ages.”

Our state, regional, national and international leadership role and our institutional and individual academic ethics require us all to act wisely and courageously. Indeed, it is difficult to imagine a more important decision facing us, and especially our leaders and partners.

This task is not for the faint of heart. But one thing is clear: we cannot succeed if we ignore the call to defend our higher values and mission, or pursue a path that fails to respect the needs, strengths, and plural values of our diverse, and complex world.

May UA lead wisely, united around core principles, and in a manner that will command respect among all people of good faith who care about education.

E pluribus unum. Out of many, one.

I. Legal Questions and Compliance Concerns

Law and compliance details matter to assessments of the potential consequences of signing this Compact.

Taken together, we think the key legal and operational compliance questions add up to these:

What exactly, would the UA be agreeing to do, should it sign this compact?

What would enforcement of its terms look like in operation, and what steps would the University need to take to assure full and good faith compliance?

What are the likely or possible institutional costs?

Below, we note in detail where answers to these basic questions are unclear, and where the Terms could commit us to unlawful acts and/or acts that compromise core academic values.

Specifically, we highlight Terms that:

- 1) are extremely vague, and may chill protected expression and expressive conduct on campus and off;
- 2) raise due process and other enforcement concerns;
- 3) cross the line from assuring a worthy intellectual "neutrality" as a campus value and mandate, to demanding content-specific, even viewpoint-specific compliance with its terms;
- 4) may place the University in a position that would require it to violate nondiscrimination, academic freedom and freedom of speech mandates or to prematurely take a side on currently contested issues that are wending their way through the courts, awaiting ultimate resolution by the US Supreme Court;
- 5) impose conditions that may significantly affect our ability to meet our financial challenges in a time of nationally declining enrollment of undergraduates (the “cliff” problem); and
- 6) raise other concerns that relate to our institutional integrity and that may undermine respect for legal rights of faculty, staff, students.

A. The New Federal Benefits We Gain Are Unclear; The Standard Federal Benefits We Currently Enjoy Might Be Lost

Our threshold concern is that the promised new benefits of the Compact are unclear, and the penalties for noncompliance may include sacrifice of benefits UA already enjoys.

The letter accompanying the Compact says the new federal benefits could include “allowance for increased overhead payments where feasible, substantial and meaningful federal grants, and other federal partnerships.”

But the Compact itself merely says:

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The Compact continues:

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Without clarification, UA thus could be ceding authority over internal operations and academic policies for no enforceable, concrete new benefits. The Administration could, for example, merely agree in advance to give early or preferential review of funding proposals from Compact signatories, not to make awards or otherwise provide a funding advantage to UA proposals. Yet if it does sign, and is deemed to be in default, the Compact suggests UA not only would lose these ambiguous *new* benefits, but would sacrifice *all of the federal benefits that UA already enjoy*.

There is no clear new “quid” for the requested, institution-altering “quo.”

B. Numerous Compliance Terms are Ambiguous

The pervasive ambiguity of the Compact terms puts University leaders in an impossible compliance bind: ***how will we know what is being forbidden?***

For example, they expressly require us to assure respect for “conservative” views. But “conservative” views are not explicitly defined, nor can they be, given the wide range of views on many public issues held by people who define themselves as conservatives.

C. Signing Would Be Premature

Signing the Compact now could prematurely commit us to practices and principles that raise many unresolved legal issues before we have greater clarity about them. All universities are waiting for guidance from the United States Supreme Court on legal principles that relate directly to this Compact, and are working feverishly to make sense of multiple lawsuits that are wending their way through the lower courts. It will be months, even years, before these issues are resolved.

Some of the unresolved legal questions are foundational.

For example, the Trump Administration has asserted an expansive view of presidential power that is contested. Whether the President unilaterally can set funding policies and enforce them through the terms of this Compact thus remains unclear.

Signing now could disable UA from benefitting from these pending clarifications about the scope of presidential power, and it could commit us to substantial penalties for noncompliance with conditions that non-signing universities may not be obligated to respect.

It also could compromise current grant-seeking efforts. As we continue to compete in the grant-making process, experts must score proposals on their scientific merits. These measurements could, we suppose, incorporate the Compact's provisions. But other grant programs and direct student loans and Pell Grants currently have eligibility standards that are set in law. It is far from clear that this Compact could be enforced in a way that avoids conflicting with these valid congressional rules or requirements.

Finally, signing now almost certainly would cause UA to immediately stand out in a harsh light for many, though not all observers, as we seek to recruit and retain leading scholars, attract the best and most worthy students to UA over other institutions vying for them in an increasingly competitive environment, and compete for support from private donors. This could send a lamentable signal about the role of money and politics here in defining and applying our legal and academic principles.

D. Several Terms Raise Serious Legal, Compliance, and Normative Questions

The Compact terms raise multiple legal, operational, and normative questions. We begin with basic principles that govern conditions on federal funding, then turn to specific passages

1. General Legal Principles Applicable to Federal Funding That Must be Addressed:

The following general legal principles pertain to all federal funding of the University, including the proposed Compact:

- Agreeing to conditions under a grant program is legally distinct from being bound by law to follow direct government mandates. The notion is that one can “just turn down the money” in the former situation, but not the latter. As the Compact correctly notes, “Institutions of higher education are free to develop models and values other than those below, if the institution elects to forego [sic] federal benefits.”
- Signing the compact thus may *waive legal rights to object to its terms* that the University could raise if the conditions were imposed on it directly, apart from any funding incentives.
- Government has significant control of its funding under long-standing caselaw, even when it is choosing to fund one set of ideas over another. It need not be ideologically or even viewpoint neutral in setting terms of grants or designing government programs. For example, it could offer universities federal grants aimed at promotion of “civics education that stresses constitutional values and understanding of the Bill of Rights,” or that “promote student understanding of competing theories of equality with an emphasis on views that informed the adoption of the Reconstruction Amendments” or that explore “competing political theories with respect to gender identity and expression”

However:

- Higher education is a special zone, where freedom of expression and academic freedom impose a suite of limits on government attempts to enforce orthodoxy, and are given close judicial scrutiny. Full analysis of these limits is beyond the scope of this letter, but you are aware that speech rights on a public campus like ours are context specific, depend upon the time, manner and place of the expression, and vary with the role of the speaker.
- Under the doctrine of "unconstitutional conditions," government's ability to impose conditions on access to its funding may not be unduly coercive, impose conditions that go beyond the parameters of a funded activity or program, or otherwise violate constitutional rights, including but not limited to freedom of expression, equal protection and due process.
- Government spending power may violate the Constitution where the funds are massive, and conditions on access to these funds are what Chief Justice Roberts has described in a case involving the Affordable Care Act as a "gun to the head." The contours of this particular limit on federal power, though, are not well mapped.
- When funding programs and their conditions/mandates emerge from the federal government, they also must respect constitutional structural principles regarding separation of powers and limits on the authority of each branch, and federalism concerns. E.g. Congress generally has power over appropriations; All powers not granted by the Constitution are reserved to the states and respectively to the people; No branch of the government, including the Executive Branch, may violate the First Amendment.

2. Issues Raised by Specific Terms of the Compact

The following specific Terms raise a suite of issues:

Equality in Admissions Terms

Text: *"Discriminatory admissions processes reflect a fundamental misunderstanding not only of Civil Rights law and the U.S. Constitution, but of the damaging impacts such practices have on individuals and our Nation as a whole. Treating certain groups as categorically incapable of performing — and therefore in need of preferential treatment — perpetuates a dangerous badge of inferiority, destroys confidence, and does nothing to identify or solve the most pressing challenges for aspiring young people. Therefore, no factor such as sex, ethnicity, race, nationality, political views, sexual orientation, gender identity, religious associations, or proxies for any of those factors shall be considered, explicitly or implicitly, in any decision related to undergraduate or graduate student admissions or financial support, with due exceptions for institutions that are solely or primarily comprised of students of a specific sex or religious denomination."*

Questions: How will this be operationalized and enforced?

- "Discriminatory" remains vague, and hard to square even with language in the Court's recent decision restricting race-conscious admissions policies in higher education. The majority and concurrences in *SFFA v. Harvard*, 600 U.S. 181, 214 (2023) carefully distinguished between the legally suspect racial means Harvard and UNC employed (i.e., the racial classification) and the legally permissible—if not compelling—racial ends the defendants pursued (i.e., racial diversity). Writing for the majority, Chief Justice Roberts characterized the defendants' diversity-related interests as 'worthy' and 'commendable.'" Justice Kavanaugh reinforced this distinction. Citing opinions from Justices Scalia and O'Connor, Kavanaugh noted that "governments and universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.'"

- *SFFA* said nothing about *sex* and admissions, or other impermissible classifications listed by this Compact. Race, sex, gender, ethnicity, religion, nationality, and *political status* are governed by *different legal standards*. Some classifications trigger strict scrutiny (e.g. race, national origin); some trigger a form of intermediate scrutiny (e.g. sex, LGBTQ status); some also entail political status and treaty obligations that trigger distinctive federal responsibilities and duties (i.e. tribes).
- What are these impermissible “proxies?” Consider the criteria of socio-economic status, for example. It that may coincide with race or ethnicity but is race- and ethnicity-neutral under law. – Further, it is used by many academic institutions, and used by this very Compact insofar as it expressly notes that tuition waivers may be income sensitive insofar as wealth might be considered in determining whether tuition might be waived for students pursuing “hard sciences.”
- What does “implicitly” mean in the context of evaluating candidates for admission to the University, including for its graduate and postgraduate programs?
- How are admissions committees to respect a rule of not considering “political views” in an application for a political science program or in attempts to seat a class of diverse viewpoints or even statements by applicants about prior political engagement or volunteer work?
- How does the refusal to permit consideration of “nationality” relate to other parts of the Compact that expressly permit distinctions based on national citizenship or that impose nationality-based limits on enrollment?
- Vagueness and overbreadth may chill protected speech. The Compact leaves unclear what expressive activities under this provision may violate its terms and sweeps broader than current law allows. Think, for example, about the ways in which institutions, *including ours*, already has “pre-complied” with regulations and even executive orders that have no legal force unless acted upon by the executive branch, despite serious and still unresolved doubts about their legality.
- Consider the devastating impact of grant “freezes” during the past eight months, and suspension or modifications of work based on mere fear of defunding, even as some of these occurred due to mindless algorithmic searches for words that allegedly violated triggered anti-discrimination laws. An example of a targeted grant at a sister institution was devoted to “breast cancer” research. Breast cancer, of course, afflicts males and females, and in any event the funded project in no way reasonably could have violated any law prohibiting gender discrimination. A grant devoted to “plant diversity” also was swept up in the algorithmic dragnet. *Voluntarily* agreeing to heed any Administration’s unrefined and in some cases utterly baseless notions about what constitutes “illegal discrimination” in admissions, or any other aspect of our work, thus should give us pause.

Text: *“University admissions decisions shall be based upon and evaluated against objective criteria published on the University’s website and available to all prospective applicants and members of the public. Institutions shall have all undergraduate applicants take a widely-used standardized test (i.e. SAT, ACT, or CLT) or program-specific measures of accomplishment in the case of music, art, and other specialized programs of study. Universities shall publicly report anonymized data for admitted and rejected students, including GPA, standardized test score, or other program-specific measures of accomplishments, by race, national origin, and sex.”*

Questions: How will this be operationalized and enforced?

- How are we to understand “*objective*” criteria beyond standardized tests and program-specific measures of accomplishment in specialized programs of study? Subjective factors often are included in holistic assessments of candidates for admission in undergraduate and graduate and post-graduate programs. For example, would admissions decisions be monitored for impermissible consideration of student work ethic, or other difficult to quantify characteristics that may bear on readiness for the rigors of academic work?

- What are “*program specific measures of accomplishment*” that the Administration considers permissible?
- What are “*specialized programs of study*?” More to the point, what are *not*?
- How can anonymity be guaranteed, in cases in which the numbers of students are small enough that reporting could compromise anonymity?

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“Marketplace of Ideas” and “Civil” Discourse Terms

Text: “[S]ignatories to this compact commit themselves to fostering a vibrant marketplace of ideas on campus. A vibrant marketplace of ideas requires an intellectually open campus environment, with a broad spectrum of ideological viewpoints present and no single ideology dominant, both along political and other relevant lines. Signatories commit themselves to revising governance structures as necessary to create such an environment, including but not limited to transforming or **abolishing** institutional units that purposefully punish, **belittle**, and even spark violence against **conservative** ideas.

Given the importance of academic freedom to the marketplace of ideas, signatories shall adopt a policy protecting academic freedom in classrooms, teaching, research, and scholarship. Such policies also shall recognize that academic freedom is not absolute, and universities shall adopt policies that prevent discriminatory, threatening, harassing, or other behaviors that abridge the rights of other members of the university community.”

Questions: How will this be operationalized and enforced?

- It explicitly says we must respect academic freedom and commit to the First Amendment’s metaphorical “marketplace of ideas” but it contradicts itself.
- Word “belittle” is a red flag
- Requiring faculty neutrality — as it seems to — also raises red flags for academic freedom and freedom of speech
- The core of the First Amendment is that the government cannot use its power to discriminate on the basis of the viewpoint expressed. But this provision would do just that in treating conservative ideas differently from liberal ones. And any restriction on belittling an idea is obviously unconstitutional; there always is a right to disagree with an idea, even in strong language. (As with “belittle,” the meaning of “conservative” is vague, leaving the definition up to the whims of members of the administration.)

Conservative views are not explicitly defined, despite a wide range of views on many public issues held by people who define themselves as conservatives. The Compact requires that institutions of higher education abolish “institutional units that . . . belittle . . . conservative ideas.” It thus imagines that intellectual excellence is to be determined by political criteria, not by scholarly competence. The consequences of the Compact could be academically disastrous.

Should university scholarship be determined by the vague criterion of “political neutrality” or instead by the criterion of “academic excellence?” The Compact makes this ambiguous and thus could be difficult to operationalize in a manner that preserves research and teaching freedom and integrity.

- Does agreement to observe the conditions of the Compact create a conflict with ABOR / Arizona adopted guidelines on academic freedom / political activity?

Text: “Signatories commit to rigorous, good faith, empirical assessment of a broad spectrum of viewpoints among faculty, students, and staff at all levels and to sharing the results of such assessments

with the public; and to seek such a broad spectrum of viewpoints not just in the university as a whole, but within every field, department, school, and teaching unit.”

Questions: How will this be operationalized and enforced?

Text: *“Signatories acknowledge that the freedom to debate requires conditions of civility. Civility includes protections against institutional punishment or individual harassment for one’s views. Universities shall neither support nor permit a heckler’s veto through, for example, disruptions, violence, intimidation, or vandalism.”*

Questions: How will this be operationalized and enforced?

- “Civility” is not a self-defining term, and although the University has an expressive right to commend it, the campus ranges from zones like the classroom and dorms that might allow imposition of such a standard, to the mall, where First Amendment law requires room for vigorous, even vulgar or demeaning speech that can be very offensive to many. The common remedy for such speech offered in the caselaw is to “avert one’s eyes” or “engage in counter speech, if there be time.” Speakers whose views are deeply offensive to students, or are an assault on their dignity, must be tolerated.

Text: *“Universities shall be responsible for ensuring that they do not knowingly: (1) permit actions by the university, university employees, university students, or individuals external to the university community to delay or disrupt class instruction or disrupt libraries or other traditional study locations; (2) allow demonstrators to heckle or accost individual students or groups of students; or (3) allow obstruction of access to parts of campus based on students’ race, ethnicity, nationality, or religion.”*

Questions: How will this be operationalized and enforced?

See above, on freedom of speech as it relates to the word “heckle.” Would jeering someone speaking on the mall count as “heckling?” The caselaw refers to a heckler’s veto, not to heckling per se. Likewise, we might ask how the Administration defines “accost.”

Text: *“Signatories commit to using lawful force if necessary to prevent these violations and to swift, serious, and consistent sanctions for those who commit them. While universities should protect debate and academic freedom, harassment falls outside permissible bounds. Signatories shall adopt policies prohibiting incitement to violence, including calls for murder or genocide or support for entities designated by the U.S. government as terrorist organizations. All signatories shall adopt policies consistent with all legal requirements, including those of the Department of Education’s Office for Civil Rights.”*

Questions: How will this be operationalized and enforced?

- It defines “incitement” in a way that does not comport with doctrine, including the *Brandenburg* test. What does that mean for enforcement in public forums on campus?
- What does “support” for entities designated by the United States as “terrorist organizations” mean? Does support embrace providing free speech access? If so, it may run afoul of the Constitution. Do “terrorist organizations” include domestic organizations –eg the KKK? If so, denying access to speakers from the organization likewise would violate the Constitution.

Text: *“The university shall impartially and vigorously enforce all rights and restrictions it adopts with respect to free speech and expression.”*

Questions: How will this be operationalized and enforced?

- Again, how will the conditions of this Compact interact with existing rules and regulations?
- “Vigorous” is vague and not defined, yet apparently would be up to the Administration to assess

Nondiscrimination in Faculty and Administrative Hiring Terms

Text: “A steadfast commitment to **rigorous and meritocratic** selection based on objective and measurable criteria in the appointment process is pivotal for the University’s sustained excellence. Consistent with the requirements of Title VII of the Civil Rights Acts and other federal employment discrimination statutes, no factor such as sex, ethnicity, race, national origin, disability, or religion shall be considered in any decision related to the appointment, advancement, or reappointment of academic, administrative, or support staff at any level, except as described in section 9 or otherwise provided by Title VII or other federal employment discrimination statutes.”

Questions: How will this be operationalized and enforced?

Institutional Neutrality Terms

Text: “Signatories shall maintain **institutional neutrality** at all levels of their administration. This requires policies that **all university employees, in their capacity as university representatives, will abstain from actions or speech relating to societal and political events except in cases in which external events have a direct impact upon the university.**”

*Policies requiring institutional neutrality must apply with equal force to all of the university’s academic units, including all colleges, **faculties**, schools, departments, **programs, centers, and institutes.**”*

Questions: How will this be operationalized and enforced?

- This requires universities to have policies prohibiting “all university employees, *in their capacity as university representatives,*” to abstain from “actions or speech relating to societal and political events except in cases in which external events have a direct impact upon the university. This misapprehends the nature of employee freedom of speech rights, may be in direct tension with academic freedom in teaching and writing, and fails to address the profound ambiguity about when “speech relating to societal and political events”—core speech under the First Amendment -- is allowed. Professors of government, law, history, political science, agriculture, engineering, environmental science, American Indian Studies, economics, religion, mining, anthropology, or philosophy --to list but a few examples – would be remiss to the point of educational malpractice were they not to contextualize subject matter in a way that would involve “social and political events.” Presumably, the term “in their capacity as university representatives” is intended to limit the reach of the policy here. It is imperative, though, that this phrase be clarified.
- It invokes the Chicago Statement of “institutional neutrality,” but as many commentators have pointed out, this begs the big question included in that Statement caveat that universities are not required to be neutral when “societal and political events have a direct impact” upon them. What are these impacts? Thus, even if the White House narrows the definition of who acts in a capacity as “university representatives” to exclude faculty as such, this provision is vague in ways that may chill protected institutional expression.

Text: In a footnote, the Compact states: “As the President of Dartmouth recently explained:

Consider a student interested in majoring in a certain subject. Upon going to the department homepage to discover course offerings, the student is slapped in the face with an official statement excoriating his own political ideology. How comfortable would that student feel taking a class in that department? Our Principles of Institutional Restraint permit departments to issue public statements only on limited issues directly related to their academic expertise. Rather than publishing these proclamations on their homepages, departments must create new webpages specifically dedicated to public statements and endorsements. This ensures that departments promote their academic missions, not their social or political beliefs.

Sian Leah Beilock, "Dartmouth's Bottom-Up Approach to Institutional Neutrality," *WALL STREET JOURNAL* (Dec. 20, 2024), available at <https://www.wsj.com/opinion/dartmouths-bottom-up-approach-to-institutional-neutrality-college-higher-education-politics-59a03d19>.

All university members, including students, faculty, and staff, are encouraged to comment on current events in their individual capacities, provided they do not purport to do so on behalf of the university or any of its sub-divisions."

Questions: How will this be operationalized and enforced?

- With respect, the Dartmouth President's attempt to implement institutional neutrality while preserving room for speech uttered in "individual capacities" restricts *department speech*, and relates to *course offerings* (teacher speech). It thus hardly clears up the vexing questions of reach, academic freedom, or individual speech line-drawing the Compact raises. As a faculty member, what would the consequences be if the Political Science Department webpage stated: "we restrict instruction to statements that do not promote individual social or political beliefs?" and she intended to assign materials and teach about the Civil Rights movement in a manner that praised or condemned its goals, leaders, regulatory objectives, historical and structural concerns, or legal consequences? One could say that this would "directly relate" to the teacher's academic expertise, and thus is protected, but a wary professor (especially if untenured) might not be so sure.
- We also note the recent public statement by President Beilock: "As many of you know, Dartmouth was one of the nine universities asked by the White House to give feedback by October 20 on a draft of its "Compact for Academic Excellence in Higher Education." I am deeply committed to Dartmouth's academic mission and values and will always defend our fierce independence. You have often heard me say that higher education is not perfect and that we can do better. At the same time, we will never compromise our academic freedom and our ability to govern ourselves." It is not yet clear what stance Dartmouth will take on the Compact, as it struggles to square its commitment to these abiding values with the Compact Terms.

Student Learning Terms

Text: "Signatories commit to grade integrity and the use of defensible standards for whether students are achieving their goals, with each grade reflecting the quality, breadth, and depth of the student's achievement. Signatories acknowledge that a grade must not be inflated, or deflated, for any non-academic reason, but only rigorously reflect the demonstrated mastery of a subject that the grade purports to represent."

Questions: How will this be operationalized and enforced?

- We agree wholeheartedly about the importance of grade integrity. Nevertheless, giving assessments of these fundamental matters of professional judgment and expertise to federal agencies or officials, upon pain of losing significant grant resources, is a serious incursion into institutional autonomy with respect to core matters of governance.

Student Equality Terms

Text: “Students shall be treated as individuals and not on the basis of their **immutable** characteristics, with due exceptions for sex-based privacy, safety, and fairness. Women’s equality requires single-sex spaces, such as bathrooms and locker rooms, and fair competition, such as in sports. Institutions commit to defining and otherwise interpreting “male,” “female,” “woman,” and “man” according to reproductive function and biological processes. Otherwise, immutable characteristics, particularly race, do not permit unequal treatment, including in grading as well as access to buildings, spaces, scholarships, programming, and other university resources.”

Questions: How will this be operationalized and enforced?

- Requiring adherence to the administration’s definition may stigmatize some students and may violate federal law. The Court has held that employment discrimination statutes forbid discrimination based on gender identity. *Bostock v. Clayton County*, 590 U.S. 644 (2020)(holding that gender identity discrimination is prohibited by Title VII of the Civil Rights Act).
- The Compact requires institutions to commit to defining and otherwise interpreting “male,” “female,” “woman,” and “man” according to reproductive function and biological processes, and implies these are “immutable.” These remain matters that continue to be debated among scholars, and ones that bear directly on the lives and well-being of individual members of our community.
- The status of government efforts to require respect for gender classifications beyond ones that distinguish based on binary conceptions of sex already are the subject of extensive state and federal court litigation. A full discussion of that litigation, the range of defenses that parties subject to nondiscrimination mandates based on LGBTQ status have asserted, the challenges to measures that seek to deny protection based on such status, and their treatment by courts, is beyond the scope of this brief analysis of the Compact. Suffice it to say that conditions on grants that attempt to eradicate higher education policies and practices that depart from this view of gender may constitute government action aimed at promoting discrimination based on sexual orientation and gender identity, may implicate free speech and equal protection issues, and may conflict with statutory measures and settled doctrine.

Financial Responsibility Terms

Text: “Too many young adults have become saddled with life-altering debt that has affected, among other things, their ability to have a family or purchase a home. Universities have a duty to control their costs, including by eliminating unnecessary administrative staff, reducing tuition burdens, engaging in transparent accounting and regular auditing for misuse of funds, and cutting unnecessary costs. Signatories acknowledge that universities that receive federal funds have a duty to reduce administrative costs as far as reasonably possible and streamline or eliminate academic programs that fail to serve students. Towards this end, signatories to this compact commit to **freezing the effective tuition rates charged to American students for the next five years.**”

Questions: How will this be operationalized and enforced?

- Nobody disagrees with these concerns about debt, and its impact on students. Worth noting here, however, especially given the contrast between UA and the other eight institutions targeted here, is that few “purchases,” have greater long-term returns for students than higher education. This is particularly true at leading public institutions like ours, which continue to offer first-class education at

prices significantly lower than private elite institutions. We should be concerned about being swept up in this generalized statement without asserting a defense that distinguishes us from other institutions while admitting we share the Administration's views about cost containment and putting affordability at the fore of our concerns

- *Freezing* the tuition for *five years* is in effect a significant cut to UA, insofar as it fails to consider inflation among other valid reasons to consider increases, and may hobble our ability to reinstate fiscal stability. All three state universities have suffered significant cuts in public funding for basic functions over the years. And where some have relied significantly on growing campus enrollment dramatically and expanding on-line education to generate tuition, the strategy has built in limits. Private donations play an important role in bridging gaps (e.g., providing private funding for capital improvements even though the state holds the title to buildings), but in economic downturns, these donations slow. Moreover, private gifts typically are directed to specific ends, not general operations, and thus are not flexible funds for deployment. Gift agreements must be honored. When added to new constraints imposed on enrollment of foreign students, and suspension of overseas programs that generate significant income, all three universities may be headed for funding "walls" that may require upward adjustments in tuition.

Text: *"Further, universities poorly equip students when they fail to inform them about likely life earnings for students' chosen majors or admit students without the skills or support needed to succeed. Universities shall publicly post statistics about average earnings from graduates in each academic program and **shall refund tuition to students who drop out during the first academic term of their undergraduate studies.**"*

Questions: How will this be operationalized and enforced?

- UA already has a quite generous acceptance rate. ASU even more generous. How would this "refund" mandate play out? Might "waiting list" students be admitted but charged a lower tuition? Are there legal or other implications of such a tiered admission fee program?
- Might the University respond by raising admission standards prophylactically, which would further reduce tuition dollars and elevate concerns about institutionally elitism or failure to serve all students who are or may be capable of the work?
- If we institute new programs to assist at risk undergraduates students to succeed, how will we identify such students, and how will we pay for new support programs?

Text: *"Signatories shall responsibly deploy their endowments to the public good. Any university with an endowment exceeding \$2 million per undergraduate student will not charge tuition for admitted students pursuing **hard science** programs (with exceptions, as desired, for families of substantial means)."*

Questions: How will this be operationalized and enforced?

- See above, and further: UA leads the nation in many "hard sciences." Moreover, these degrees often are ones that are in greatest demand by private industry and other employers, and they may make our students especially attractive to other graduate institutions. If we fall within this endowment cutoff point, might we become less competitive and attractive to these students? We would risk, to quote former Dean Gene Sanders, "eating our seed corn."
- What are the "hard sciences" today? How does this commitment match up to our major research objectives as the ORP has identified them? If imposed on all three state universities, what would be the impact on Arizona as a technology or AI innovator?
- What are the financial, reputational and other implications for UA programs that are not devoted to the "hard sciences," several of which are nationally recognized and widely considered premiere UA

programs (e.g. Philosophy, Indigenous Law and Policy, Anthropology), and many of which support transdisciplinary research, education and outreach initiatives and grants.

Foreign Programs Terms

Text: *“Federal permission for foreign student visas is intended to further America’s national interest to the extent the selected foreign students exhibit extraordinary talent that promises to make America stronger and more economically productive, and the selected students are introduced to, and **supportive of, American and Western values**, ultimately increasing global understanding and appreciation for the United States and our way of life. Universities that rely on foreign students to fund their institutions risk, among other things, potentially reducing spots available to deserving American students, and if not properly vetted, saturating the campus with noxious values such as anti-Semitism and other anti-American values, creating serious national security risks. Therefore, no more than **15 percent of a university’s undergraduate student population shall be participants in the Student Visa Exchange Program, and no more than 5 percent shall be from any one country.** For schools presently over the 15 percent population, incoming matriculating classes should meet the 15 percent cap. Signatories pledge to select those foreign students on the basis of demonstrably extraordinary talent, rather than on the basis of financial advantage to the university; to screen out students who demonstrate hostility to the United States, its allies, or its values; and to provide instruction in American civics to all foreign students. Universities shall share all known information about foreign students, including discipline records, upon request and as relevant, with the Department of Homeland Security and the Department of State. As a recipient of significant funding and other benefits from the U.S. government, all universities shall promptly and fully disclose all funding from any foreign institutions and individuals. No foreign funding may in any way encourage or restrict the hiring of any persons or the teaching of any particular perspective or the admission of any foreign student or group of students. Failure to fully disclose all direct and indirect foreign funding shall be a violation of this compact.”*

Questions: How will this be operationalized and enforced?

- Cost? Restricting the population to 15 percent international students — might these terms cost some colleges and departments more than the funding we might gain?
- National origin discrimination? How can these conditions be squared with other parts of the Compact?
- Speech/Viewpoint discrimination? Is the emphasis on –and expected policing of –support for American and Western values a violation of the First Amendment? Freedom of speech protects “persons” not only citizens per se.
- Vague, and subject to problematic and contested interpretations of values that again would invite intrusive government oversight into matters of academic freedom

Exceptions

Text: *“Notwithstanding the forgoing [sic], a religious institution may maintain preferences for religious affiliation or belief in hiring and admissions, a single-sex institution may maintain sex-based preferences, and any institution may maintain preferences in admissions for American citizens. Nothing in this*

agreement limits or displaces the limited exemptions for bona fide occupational qualifications based on religion, national origin, or sex provided by Title VII; the protections or exemptions provided by Title VII for religious employers and religious organizations; or the ministerial exemption recognized by the Supreme Court.”

Questions: How will this be operationalized and enforced?

- Has counsel considered constitutional limits on state discrimination against noncitizens, where they do not hold policy roles?

Enforcement Terms

Text: *“The university annually shall conduct, or hire an external party to conduct, an independent, good faith, empirically rigorous, and anonymous poll of its faculty, students, and staff, providing them the opportunity to evaluate the university’s performance against this compact. The results of such surveys shall be made public and available on the university’s website.*

Adherence to this agreement shall be subject to review by the Department of Justice. Universities found to have willfully or negligently violated this agreement shall lose access to the benefits of this agreement for a period of no less than 1 year. Subsequent violations of this agreement shall result in a loss of access to the benefits of this agreement for no less than 2 years. Further, upon determination of any violations, all monies advanced by the U.S. government during the year of any violation shall be returned to the U.S. government. Finally, any private contributions to the university during the year(s) in which such violation occurred shall be returned to the grantor upon the request of the grantor.”

Questions: How will this be operationalized and enforced?

- The oversight by the Department of Justice raises serious questions about how this oversight will be conducted, and according to what regulations and policies. This is of particular interest and concern given the significant financial penalties that are anticipated by failure to comply with the Compact, including loss of access to funding for two years, an obligation to return spent/allocated funds, and the right of donors to have gifts repaid to them.

II. Conclusions Based on this Analysis

Again, we recommend that UA **not sign this Compact.**

At a minimum, we ask that the University and Board first consider all of the foregoing questions and concerns seriously; reach out to other schools directly affected by this statement and seek a common strategy that will best defend higher education and our shared values and mission; engage in particular with our colleagues at ASU and NAU; reach out to other important stakeholders, allies and critics, and the public in ways that may elevate public discourse and responses to these concerns; and pursue thoughtful conversations with the White House about these matters of public concern.

Like judicial independence and the American expectation that our judges will apply neutral legal principles rather than bend law to match ideological commitments or current officeholders’ policy preferences, our institutional intellectual independence requires that we remain steadfastly committed to academic principles and policies that do *not* blow with external, political winds.

More is expected of us, and we must rise to these higher expectations and the duties they entail.

We of course welcome an opportunity to talk further about the contents of this memorandum, to learn more about the issues as events unfold, and to benefit from the insights of others about the issues we raise here. As is true in all academic contexts, we believe that dialogue is critical to better thinking, as is listening.

The undersigned Regents Professors support this recommendation, its reasoning, and its caveats. They sign only in their individual capacities, and with the important caveats that they sign based on the information they have at this point in time, that they do so operating under significant time pressures, and that the complex issues before them deserve further discussion even as they require prompt assessments of their implications.

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Anonymous 2

