MEMORANDUM
Initial Legal Analysis of Department of Education's Proposed "Compact for Higher Education" as Applied to the University of Virginia

The University of Virginia is one of nine universities that have been targeted by the Trump administration's Department of Education with the "Compact for Academic Excellence in Higher Education." The Compact threatens the withdrawal of federal government benefits, including research funding, access to student loans and grant programs, non-profit tax status, and approval of student and other visas if the targeted institutions do not agree to its terms. The compact is clear about this: it specifically states that "[i]nstitutions of higher education are free to develop models and values other than those below, if the institutions elect to forego federal benefits." The Compact is a threat, requiring universities to accede to the government's demands, even though courts have already held that the administration cannot arbitrarily cancel federal grants or revoke visas on the basis of political speech.

When asked at a recent meeting of the University's faculty senate whether the Compact violated state or federal law, Interim President Mahoney was noncommittal. This is surprising. Even on a cursory reading of the Compact, its constitutional defects are obvious and self-evident. This memorandum outlines the most obvious deficiencies.

1. *Coercive Spending Clause Doctrine and Separation of Powers.* UVA is a state institution, chartered and governed by the Commonwealth of Virginia. Numerous constitutional doctrines are designed to protect states, their agencies and institutions from undue interference from the federal government. These are meant to ensure the appropriate distribution of power in a federal system. One of the most important of these doctrines is the principle that the federal government may not use its spending power to "coerce" the state's obedience.

   According to the U.S. Supreme Court, Congress can place conditions on government funding, but those conditions must be clearly stated, must be related to the funding program, must not be unconstitutional, and must be non-coercive. The president cannot unliterally withdraw or threaten withdraw of federal funds from state government recipients, cannot condition receipt of federal funds on criteria unrelated to the federal funding, and cannot coerce recipients by threatening withdrawal of funds out of proportion to the related criteria. Thus, the president cannot threaten to cut off, reduce, or make unavailable all or a significant portion of the university's research funding if the university fails to abide by the various items in the Compact. That would be coercive and beyond his statutory and constitutional power. The president also cannot impose unrelated, non-statutory criteria on the withdrawal of funding. For example, he may not condition receipt of cancer research funds on changes in the university's grading system – a demand of the Compact.

2. *Unconstitutional Conditions Doctrine*. The government cannot condition the receipt of federal grants or provide special beneficial treatment to a recipient of federal monies on condition that the recipient relinquish or waive their constitutional rights. The university enjoys First Amendment rights, including rights to academic freedom, speech, and association, as do individual faculty, staff, and students. A number of the Compact's provisions violate these rights or require the university to violate them.

   Provision 1. Provision 1 requires that a university use certain admissions criteria (standardized tests) and report data on admissions, which violates the university's right of association and the university's academic freedom right to determine admission standards and protocols.

   Provision 2. Provision 2 requires the university to maintain a "vibrant marketplace of ideas" with "no single ideology dominant." While some universities might agree that their mission should include creating such a marketplace, the government cannot order a university to maintain any particular speech environment without violating the associational and speech rights of the university and its members.

   As a state institution, UVA is also governed by the First Amendment. It cannot enforce a speech or ideology code on its students, faculty or staff; it cannot select students, faculty, or staff based on their political ideology or viewpoints; it cannot favor or disfavor certain viewpoints, and it cannot protect certain ideological or political views from criticism. Collecting information on the ideological viewpoints, the political parties, or the political donations of faculty, students and staff, as Provision 2 appears to require, violates the First Amendment and would require UVA to violate constitutional law.

   Provision 2 further requires that the university abolish institutional units that "belittle" "conservative ideas." While the university community may agree that "belittling" any idea is contrary to the spirit of free inquiry, the government is not permitted to specially protect "conservative ideas" and seek to insulate them from critical speech; "belittling" speech is constitutionally protected and may not be infringed by the university under the First Amendment. So, too, the First Amendment contains no exception for "harassing" political speech, which the Compact appears to regulate. Offensive, unpleasant, denigrating, disturbing, and misleading speech is protected under the First Amendment. Like all viewpoints, any political ideas or ideologies, whether conservative, liberal, or otherwise, are afforded the same constitutional protection. The federal government and the university may not favor one or another with special protection.

   Provision 2 also requires the regulation of "threatening" speech. The university may not forbid threatening speech unless it is either (1) directed to inciting or producing imminent lawless action and is likely to incite or produce such action, a constitutional standard

established by the U.S. Supreme Court in *Brandenburg v. Ohio*, or (2) where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Provision 2 further requires universities to create "conditions of civility" – which a state university cannot do if such regulations violate the First Amendment. Again, the First Amendment does not permit the government to regulate "uncivil" speech. Finally, Provision 2 violates the First Amendment by mandating that universities bar speech in support of certain organizations or groups that advocate certain policies. Again, though such speech is in many cases abhorrent to the university community, under the First Amendment, the university may not regulate such speech except through neutral time, place, and manner restrictions that apply to all speech evenhandedly. The imminent lawless action standard still applies.

Provision 4. Provision 4 mandates "institutional neutrality," requiring that all university employees "abstain from actions or speech relating to societal or political events except in cases in which external events have a direct impact upon the university." The condition that universities adopt a posture of "institutional neutrality" is a regulation of the university's and its students' and employees' speech. A university may voluntarily adopt such a posture of neutrality, but the demand to do so conditioned on receipt of government benefits is unconstitutional. Requiring all employees to adopt a posture of institutional neutrality also violates their individual First Amendment rights.

Provision 5. Provision 5 requires that universities adopt certain grading standards, a condition unrelated to the federal funds being threatened, and a violation of academic freedom.

Provision 6. Provision 6 requires that institutions adopt certain definitions of male and female, which violates the associational and speech rights of the university and individual faculty, staff, and students. Provision 6 also arguably violates Title VII under *Bostock v. Clayton County*, Title IX, and the Virginia Human Rights Act.

Provision 8. Provision 8, which mandates reporting on the status of foreign students, likely violates FERPA. The requirement that foreign students be screened for their ideological views when they are present in the country to make certain that they are consistent with "western values" also violates the First Amendment.

3. *State Law.* UVA is a state institution and as such is governed by Virginia law. The Compact's demand that UVA alter its grading requirements, order a tuition freeze or provide for free tuition, or reduce and monitor foreign student populations all conflict with Virginia's constitution, state laws, and regulations. Those laws require that state universities are governed by the Virginia General Assembly. While the University must comply with federal statutes, such as Title VI and Title IX, it may not adopt conditions

that violate state law simply because the Department of Education asks them to do so. Indeed, the university may not enter into a “voluntary" agreement with any federal office or official that contravenes state law.

The Compact for Academic Excellence represents an effort by the Trump administration to coerce compliance with conditions it is constitutionally forbidden from imposing directly. The Compact is itself an unconstitutional exercise of executive power, barred by the coercive spending clause doctrine and the First Amendment. The university has ample legal grounds for challenging the imposition of any penalties imposed for not agreeing to its terms. Those penalty terms are unconstitutional.

Additionally, as a state actor, UVA is forbidden from enforcing the Compact’s terms, which violate the First Amendment, Due Process, and Equal Protection rights of students, faculty and staff, and likely contravene their rights under state and federal statutes. UVA’s acceptance of the Compact would expose it to liability under all these theories.

Additional research is needed to determine other potential violations of state or federal law. Even a cursory review of the Compact, however, reveals its significant legal deficiencies, its unconstitutionality as applied to the university, and its vulnerability to legal challenges by multiple aggrieved parties.