FIRE
Foundation for Individual Rights in Education

August 20, 2018

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**URGENT**

*Sent via U.S. Mail and Electronic Mail (president@rutgers.edu; jhoffman@ogc.rutgers.edu)*

Dear President Barchi and Mr. Hoffman:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE represents Professor James Livingston. We write today to express our grave concern about Rutgers University's finding that Professor Livingston violated the institution's Policy Prohibiting Discrimination and Harassment. Issued by the Office of Employment Equity and upheld on appeal by Associate Vice President Harry Agnostak, this finding violates Professor Livingston's well-established First Amendment right to express himself as a private citizen on matters of public concern. Further, the decision's untenable rationale poses a serious threat to the academic freedom of Rutgers faculty and impermissibly hinders their ability to fulfill their essential role in our democracy.[1] By capitulating to anonymous outrage generated by an

[1] *See Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.").

internet mob rather than defending a faculty member's right to freedom of expression, Rutgers has shamefully betrayed its obligation to its faculty and the public, trivialized actual racial harassment, and signaled to would-be censors nationwide that its faculty may be silenced at will and without resistance.

The determination that Professor Livingston violated Rutgers' Policy Prohibiting Discrimination and Harassment must be reversed immediately.

## I. Facts

For purposes of this letter only, we accept as true the facts alleged in the July 31, 2018 findings memo (enclosed) authored by Carolyn Dellatore, Associate Director of Rutgers' Office of Employment Equity (OEE), for Lisa Grosskreutz, OEE's Director. A summary of those facts follows.

Professor Livingston is a tenured Professor of History in Rutgers' School of Arts and Sciences. Livingston resides in Harlem, a Manhattan neighborhood long seen as "the capital of black America" and now undergoing a marked demographic transition as new white residents drive gentrification.[2]

On May 31, 2018, following a visit to a Harlem restaurant, Livingston posted on his personal Facebook account:

> OK, officially, I now hate white people. I am a white people, for God's sake, but can we keep them--us--us out of my neighborhood? I just went to Harlem Shake on 124 and Lenox for a Classic burger to go, that would my dinner, and the place is overrun with little Caucasian assholes who know their parents will approve of anything they do. Slide around the floor, you little shithead, sing loudly, you unlikely moron. Do what you want, nobody here is gonna restrict your right to be white.

[2] Sam Roberts, *No Longer Majority Black, Harlem Is in Transition*, N.Y. TIMES, Jan. 5, 2010, https://www.nytimes.com/2010/01/06/nyregion/06harlem.html. *See also* Michael Henry Adams, *The End of Black Harlem*, N.Y. TIMES, May 27, 2016, https://www.nytimes.com/2016/05/29/opinion/sunday/the-end-of-black-harlem.html ("To us, our Harlem is being remade, upgraded and transformed, just for them, for wealthier white people."); Angela Helm, *On Whole Foods, Gentrification and the Erasure of Black Harlem*, THE ROOT, Aug. 3, 2017, https://www.theroot.com/on-whole-foods-gentrification-and-the-erasure-of-black-1797444513 ("Some of the new residents have seemingly carved out all-white spaces for themselves in certain restaurants and bars (it's still very racially segregated in many ways) where they can 'be comfortable' and perhaps 'feel safe.'").

> I hereby resign from my race. Fuck these people. Yeah, I know, it's about access to my dinner. Fuck you, too.

The following day, Facebook informed Livingston that his post was no longer publicly visible because it "goes against our Community Standards on hate speech." In response, Livingston posted to his Facebook account:

> I don't get the FB threat thing against me because as far as I can tell, my page is intact, including my earnest, angry, and ridiculous resignation from the white race. As if I could! Calling Noel Ignatiev. Who am I kidding? The FB algorithm conjoins the words "race" and "hate" and designates the origin, which would be me, as a problem. OK, God knows I am. But not in this regard. I just don't want little Caucasians overrunning my life, as they did last night. Please God, remand them to the suburbs, where they and their parents can colonize every restaurant, all the while pretending that the idiotic indulgence of their privilege signifies cosmopolitan--you know, as in sophisticated "European"--commitments.

On June 1, conservative news website *The Daily Caller* reported on Livingston's Facebook posts.[3] Similar coverage soon followed in both local[4] and national outlets.[5] The story also drew the attention of posters to the white supremacist website Stormfront.org.[6] As noted in his written statement to OEE, Livingston began receiving hate mail "[a]lmost immediately," including "a half-dozen death threats."[7]

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[3] Rob Shimshock, *RUTGERS PROF: 'OFFICIALLY, I NOW HATE WHITE PEOPLE,'* DAILY CALLER, June 1, 2018, http://dailycaller.com/2018/06/01/rutgers-prof-officially-hate-white-people.

[4] *See, e.g.*, Cheryl Makin, *Rutgers University professor James Livingston accused of racist rant against whites on social media*, MY CENTRAL JERSEY, June 6, 2018, https://www.mycentraljersey.com/story/news/education/college/rutgers/2018/06/06/rutgers-professor-racist-rant-james-livingston/676688002.

[5] *See, e.g.*, Benjamin Fearnow, *RUTGERS PROFESSOR 'RESIGNS' FROM WHITE RACE AFTER HARLEM RUN-IN WITH 'CAUCASIAN A**HOLES,'* NEWSWEEK, June 11, 2018, https://www.newsweek.com/rutgers-white-people-resign-harlem-caucasians-professor-james-livingston-971019.

[6] CoconutCake, *White professor wants to quit his Caucasian race*, STORMFRONT.ORG (June 5, 2018, 1:23 AM), https://www.stormfront.org/forum/t1249479/?s=87c320845fe6e20cb61ad55599939d36.

[7] Livingston's statement notes that he "understand[s]" the history department "has also been fielding complaints, and has received at least one death threat." However, the memorandum makes no further mention of this alleged threat, and does not address whether it in fact occurred; what, if any, actual or reasonably anticipated

The July 31 memorandum purports to cite two television news stories concerning the matter. One citation links to a June 13th PIX11 News segment that includes an interview with Livingston but does not contain any comment from Rutgers community members.[8] The other citation links to an NBC New York video unrelated to Livingston or Rutgers.

Dellatore avers that the news segment[9] the July 31 report apparently intended to cite "featured brief interviews with four university students, three of whom, Akansha Iyengar, Joseph Redling-Pace, and RJ Parla, said they were troubled by Professor Livingston's statements." The July 31 report does not indicate whether the university interviewed these students or any other members of the university community. Instead, the report relies solely on the "brief" statements contained in the news segment. Those statements neither indicate any disruption to the students' degree progress or the university's operations, nor do they support any reasonable prediction of such disruption. The one-sentence responses by the students contained in the video do not include the questions asked, with one exception, and the responses include one by a student who says that Livingston's opinion would not impact his teaching.[10]

Dellatore's July 31 memorandum alleges that Rutgers "also fielded complaints regarding Professor Livingston's social media statements, many of which were made anonymously through the Rutgers Compliance Hotline." However, the memorandum does not state or suggest that any known Rutgers community member has complained to Rutgers concerning the Facebook posts at issue. No student or colleague has ever—before or following Livingston's posts—filed a complaint with Rutgers asserting that Livingston has engaged in discriminatory conduct. Nonetheless, Dellatore concluded that Livingston's posts violated Rutgers' Policy Prohibiting Discrimination and Harassment. Grosskreutz accepted

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disruption to university operations it may have caused; or what, if any, institutional response it may have necessitated.

[8] PIX11 News, *Rutgers professor posts racist rant on Facebook*, YOUTUBE (June 13, 2018), https://www.youtube.com/watch?v=HhaiMXEQz4Y.

[9] Brian Thompson, *Rutgers Professor Goes on Hateful Rant*, NBC NEW YORK, June 7, 2018, https://www.nbcnewyork.com/on-air/as-seen-on/Rutgers-Professor-Goes-on-Hateful-Rant_New-York-484906971.html.

[10] Student RJ Parla is quoted as saying, "I would not want to take a course with him." Student Joe Pace is quoted as saying, "[T]hey're supposed to encourage different opinions and he's being a little closed-minded." Akansha Iyengar, who is not white, is asked whether she wants to take a course from him "and get straight As." She laughs and says, "[N]o, well, if someone hates their race so much, what's stopping them from saying they're gonna hate other races as much, too?" The fourth student, not identified on camera, supports Livingston: "I don't think his opinion on that really affects his teaching." The journalist shares that a Rutgers spokesman told him that an investigation was underway, and that "the key . . . to any discipline . . . is indeed whether any students of any race would feel uncomfortable taking a course from him."

Dellatore's findings and determined that Livingston violated university policy in a July 31 letter to Executive Dean Peter March.

Professor Livingston timely appealed Grosskreutz' determination on August 8. His appeal was denied in a letter from Agnostak dated August 10. We write to request your intervention to reverse Agnostak's decision and overturn the Office of Employment Equity's determination immediately, before any disciplinary measure is imposed on Livingston and the harm already done is compounded further. Both the Office of Employment Equity's and Agnostak's findings and conclusions are legally unsupportable on several grounds, as we explain below.

## II. Livingston's Remarks Are Protected by the First Amendment

Professor Livingston's Facebook posts are protected by the First Amendment. As a public institution, Rutgers is prohibited from taking adverse action against Livingston on the basis of his protected expression.

### A. The First Amendment and New Jersey's Constitution Bind Rutgers' Response to Faculty Expression

It has long been settled law that the First Amendment is binding on public colleges like Rutgers. *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); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, "free speech is of critical importance because it is the lifeblood of academic freedom").

The New Jersey Constitution provides even broader protection for speech than the First Amendment. New Jersey's Supreme Court has observed that the state constitution "guarantees a broad affirmative right to free speech" that "is one of the broadest [guarantees] in the nation." *Dublirer v. 2000 Linwood Avenue Owners, Inc.*, 220 N.J. 71, 78–79 (2014); *see also State v. Schmid*, 84 N.J. 535, 557 (1980) (noting "exceptional vitality in the New Jersey Constitution with respect to individual rights of speech and assembly" and finding Article I of the New Jersey Constitution to be "more sweeping in scope than the language of the First Amendment"). The state Supreme Court has observed that "[w]here political speech is involved, our tradition insists that government 'allow the widest room for discussion, the narrowest range for its restriction.'" *State v. Miller*, 83 N.J. 402, 412 (1980) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). Political speech "obviously includes any fair comment on any matter of public interest, whether or not the subject of an election campaign, whether or

not embarrassing to the local governing body, and whether or not irritating to one's neighbors." *State v. Miller*, 162 N.J. Super. 333, 338 (Super. Ct. App. Div. 1978). As the State University of New Jersey, Rutgers is a "local governing body" for purposes of Article I of the New Jersey Constitution. *Schmid*, 84 N.J. at 543 ("A public college or university, created or controlled by the state itself, is an arm of state government and, thus, by definition, implicates state action.").

### B. The First Amendment Protects Subjectively Offensive Expression

The First Amendment exists in significant part to protect speech that some may find controversial or offensive—speech like Professor Livingston's Facebook posts. In rulings spanning decades, the Supreme Court of the United States has explicitly and repeatedly held that speech cannot be restricted simply because it offends others. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). This is true both on and off campus; the Court has held that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973). The freedom to offend some is the same freedom to move or inspire others. As the Supreme Court observed in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), speech "may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." The Court reaffirmed this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."

In *Cohen v. California*, the Court aptly observed that although "the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance," encountering offensive expression is "in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve." 403 U.S. 15, 24–25 (1971). "That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength," the Court explained, because "governmental officials cannot make principled distinctions" regarding what speech is sufficiently inoffensive, and the "state has no right to cleanse public debate to the point where it is . . . palatable to the most squeamish among us." *Id.* at 25.

These same principles are directly applicable to Professor Livingston's speech and require that the finding against him be reversed.

Federal courts have consistently protected public university faculty expression targeted for censorship or punishment due to subjective offense. In *Levin v. Harleston*, for example, The City College of The City University of New York launched an investigation into a tenured faculty member's offensive writings on race and intelligence, announcing an *ad hoc* committee to review whether the professor's expression—which administrators stated "ha[d] no place at [the college]"—constituted "conduct unbecoming of a member of the faculty." 966 F.2d 85, 89 (2d Cir. 1992). The United States Court of Appeals for the Second Circuit upheld the district court's finding that the investigation constituted an implicit threat of discipline and that the resulting chilling effect constituted a cognizable First Amendment harm.

Likewise, the U.S. Court of Appeals for the Ninth Circuit has made clear that offense taken to a faculty member's expression does not constitute injury to government interests sufficient to override a professor's First Amendment rights:

> The desire to maintain a sedate academic environment, to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint, is not an interest sufficiently compelling, however, to justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms. Only where expressive behavior involves substantial disorder or invasion of the rights of others may it be regulated by the state. Self-restraint and respect for all shades of opinions, however desirable and necessary in strictly scholarly writing and discussion, cannot be demanded on pain of dismissal once the professor crosses the concededly fine line from academic instruction as a teacher to political agitation as a citizen—even on the campus itself.

*Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975) (internal citations and quotation marks omitted); *see also Peacock v. Duval*, 694 F.2d 644, 647 (9th Cir. 1982) ("Although we recognize the necessity for the efficient functioning of a public university, such efficiency cannot be purchased at the expense of stifling free and unhindered debate on fundamental educational issues. Merely because Peacock's speech may have had the effect of irritating or even harassing the University's administration does not mean that such speech is stripped of its first amendment protection.") (internal citations and quotation marks omitted).

Other federal courts have similarly rejected the argument that a public institution can discipline a faculty member because her expression caused anger, alarm, or concern. In a case involving the use of gendered and racial slurs as part of a classroom discussion on how language is used to marginalize minorities and other oppressed groups in society, the U.S. Court of Appeals for the Sixth Circuit adhered to the principles set forth in *Terminiello* and rejected a college's argument that intervention by a local civil rights activist posed an

actionable risk of disruption to the school's operations. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001). The Sixth Circuit wrote:

> Only after Reverend Coleman voiced his opposition to the classroom discussion did Green and Besser become interested in the subject matter of Hardy's lecture. Just like the school officials in *Tinker*, Green and Besser were concerned with "avoiding the discomfort and unpleasantness that always accompany" a controversial subject. On balance, Hardy's rights to free speech and academic freedom outweigh the College's interest in limiting that speech.

*Id.* at 682 (internal citation omitted).

Even in cases related to expression about campus administrators themselves, federal appellate courts have steadfastly protected faculty expression. In *Bauer v. Sampson*, a faculty member published in a campus newspaper several writings and illustrations sharply critical of Irvine Valley College's president and board of trustees, some of which contained "violent behavior overtones." 261 F.3d 775, 780 (9th Cir. 2001). Holding that the professor's First Amendment rights outweighed the interests of the college, the Ninth Circuit noted that there was no evidence that the expression interfered with the performance of his duties, that any disharmony caused by his expression was incidental, and:

> [G]iven the nature of academic life, especially at the college level, it was not necessary that Bauer and the administration enjoy a close working relationship requiring trust and respect — indeed anyone who has spent time on college campuses knows that the vigorous exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams.

*Id.* at 784.

In other words, "the desire to maintain a sedate academic environment . . . [does not] justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms." *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2010) (internal citation omitted). "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy*, 354 U.S. at 250.

### C. The First Amendment Protects Livingston's Right to Speak as a Private Citizen About Matters of Public Concern

Employees of government institutions like Rutgers do not lose their First Amendment right to speak as private citizens on matters of public concern due to their employment. Recognizing that "a citizen who works for the government is nonetheless a citizen," the Supreme Court has made clear that "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

Public employees like Professor Livingston may not face discipline or retaliation for constitutionally protected expression unless the government employer demonstrates that the expression hindered "the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 150 (1983). "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are *necessary* for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419 (emphasis added). Disapproval of the speech at issue is insufficient grounds for punishment. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").

In accordance with Supreme Court precedent, the U.S. Court of Appeals for the Third Circuit—the decisions of which are fully binding on Rutgers, as a New Jersey state institution—conducts a three-pronged analysis to determine whether the First Amendment protects a public employee's speech. "[F]irst, the employee must speak as a citizen, not as an employee . . . ; second, the speech must involve a matter of public concern . . . ; and third, the government must lack an 'adequate justification' for treating the employee differently than the general public based on its needs as an employer under the *Pickering* balancing test." *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 987 (3d Cir. 2014)

### 1. Livingston Spoke as a Private Citizen

Livingston's Facebook posts are indisputably the commentary of a private citizen. Dellatore's July 31 memorandum explicitly concedes this fact: "Professor Livingston made the statements at issue on his private social media account and did not suggest that he spoke on behalf of the university. As such, the university does not exercise unilateral control over his words."

This is correct. Livingston published his commentary on his personal Facebook account without any mention of his employment or employer. He was not speaking pursuant to his official duties or employment responsibilities, nor would any reasonable person conclude that he spoke in his professional capacity or on behalf of Rutgers. *See Garcetti,* 547 U.S. at 421.

**2. Livingston Addressed a Matter of Public Concern**

It is likewise beyond question that Livingston's Facebook posts constitute commentary on a matter of public concern. Again, the July 31 memorandum concedes this fact, noting that "[g]entrification is a common and controversial topic in politics and as such, discourse on this issue, however unartfully or offensively phrased, is protected speech."

This is also correct. "A public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community." *Brennan v. Norton*, 350 F.3d 399, 412 (3d Cir. 2003) (internal quotations and citation omitted). As Dellatore properly acknowledges, Livingston's commentary on gentrification and race in Harlem plainly involves matters of public concern. That Rutgers University, three students, and anonymous members of the public may believe the statements to be of an "inappropriate or controversial character . . . is irrelevant to the question of whether it deals with a matter of public concern." *Rankin*, 483 U.S. at 387 (holding that the expression of hope that President Ronald Reagan might be assassinated was protected against retaliation). In reviewing public employee speech, the Third Circuit "do[es] not consider whether a statement is inappropriate or controversial, because humor, satire, and even personal invective can make a point about a matter of public concern." *De Ritis v. McGarrigle*, 861 F.3d 444, 455 (3d Cir. 2017) (internal quotations and citation omitted).

**3. Livingston's Speech Was Not and Is Not Likely to Be Disruptive**

**i. Livingston's Speech Did Not Cause Actual Disruption**

To determine whether a public employee's speech as a private citizen on a matter of public concern is protected by the First Amendment, courts must finally "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). In weighing this balance, courts "consider the nature of the relationship between the employee and the employer as well as any disruption the employee's speech may cause, including the impact of the speech on the employer's ability to maintain discipline and relationships in the work place." *Brennan*, 350 F.3d at 413.

The public employer must demonstrate that the speech "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388. Importantly, the Third Circuit has held that "the test for disruption varies depending

upon the nature of the speech," and "[t]he more tightly the First Amendment embraces the employee's speech, the more vigorous a showing of disruption must be made by the employer." *Dougherty*, 772 F.3d at 991.

Rutgers cannot make this showing. The alleged "disruption" described by the July 31 memorandum is woefully insufficient to deny Livingston his First Amendment right to engage in political speech as a private citizen on a matter of public concern.

By its silence, the July 31 memorandum tacitly admits that Rutgers cannot demonstrate that Livingston's commentary caused any actual disruption to its regular operations. Dellatore makes no mention of Livingston's private Facebook posts resulting in any demonstrated impairment of discipline by superiors, harm to workplace harmony, detrimental impact to Livingston's relationships with colleagues, or other impediment of his performance.

Without evidence of any actual disruption, Dellatore attempts to lower the bar. Because Rutgers has allegedly "received numerous complaints about Professor Livingston's 'racism,'" and because his "views" have "been publicized and criticized by the mainstream media," Dellatore contends that "the disruption has already been felt."

This definition of disruption is shamefully weak and entirely untenable in practice. If mere public criticism of tenured faculty constitutes "disruption" at Rutgers, the university has abdicated its responsibility as a public institution of higher education to protect the academic freedom and expressive rights of its faculty and has no business educating students. "Scholarship cannot flourish in an atmosphere of suspicion and distrust." *Sweezy*, 354 U.S. at 250. Is Rutgers' commitment to defending the First Amendment rights of its faculty really so depressingly shallow that the institution will abandon a tenured professor simply due to public criticism and disagreement with his viewpoint?

This feeble conception of "disruption" is especially galling given the disturbing recent trend of public university faculty facing targeted harassment at campuses nationwide for their protected expression. In a January 2017 report titled "Targeted Online Harassment of Faculty," the American Association of University Professors (AAUP) expressed deep concern about the threat to academic freedom posed by precisely the type of harassment that Professor Livingston reports receiving following media coverage of his private expression:

> Individual faculty members who have been included on [a website called "Professor Watchlist"] or singled out elsewhere have been subject to threats of physical violence, including sexual assault, through hundreds of e-mails, calls, and social media postings. Such threatening messages are likely to stifle the free expression of the targeted faculty member; further, the publicity that such cases

> attract[] can cause others to self-censor so as to avoid being subjected to similar treatment. Thus, targeted online harassment is a threat to academic freedom.[11]

The AAUP concludes its report by urging "administrations, governing boards, and faculties, individually and collectively, to speak out clearly and forcefully to defend academic freedom and to condemn targeted harassment and intimidation of faculty members." Rutgers has thus far failed to do so. Instead, and to its shame, it has chosen to "feed the trolls" by sacrificing the First Amendment rights of a faculty member to an outrage mob. (Again, Rutgers has not identified any of the individuals who submitted complaints about Livingston's private speech as Rutgers community members, and Livingston reports that none of the individuals who sent him hateful and threatening mail identified themselves as a current or former Rutgers community member.) By equating mere criticism with "disruption," Rutgers has sent vigilante censors nationwide a dangerous signal: Attempts to silence Rutgers faculty for protected speech will be successful, abetted by the Rutgers administration.

Dellatore's understanding of actionable "disruption" may well come as a surprise to Rutgers' leadership, for it cannot be reconciled with the robust promises of freedom of expression and academic freedom you and Rutgers have made to faculty both in policy and in public statements. Rutgers' Policy on Academic Freedom explicitly states that "faculty members, as private citizens, enjoy the same freedoms of speech and expression as any private citizen and shall be free from institutional discipline in the exercise of these rights."[12] The policy contains no exception for faculty speech that offends some members of the public.

To the contrary, you, President Barchi, have written eloquently about the importance of protecting freedom of expression and academic freedom from censorship in the face of controversy and subjective offense:

> Having said that, all of the members of our community—our faculty members, students, alumni, and staff—are free to express their viewpoints in public forums as private citizens, including viewpoints that the University itself or I

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[11] AM. ASS'N OF UNIV. PROFESSORS, TARGETED ONLINE HARASSMENT OF FACULTY (Jan. 31, 2017), https://www.aaup.org/news/targeted-online-harassment-faculty. *See also* Laura Pappano, *Professors as Targets of Internet Outrage*, N.Y. TIMES, Aug. 4, 2017, https://www.nytimes.com/2017/08/04/education/edlife/internet-trolls-social-media-professors.html ("Many professors who have expressed their views about race and politics this year have found themselves targets of both the left and right."); Beth McMurtrie, *What Colleges Can Do When the Internet Outrage Machine Comes to Campus,* CHRON. OF HIGHER ED., June 26, 2017, https://www.chronicle.com/article/What-Colleges-Can-Do-When-the/240445 ("Faculty members nationwide have been harassed and threatened with death for statements that were sometimes twisted or taken out of context.").

[12] RUTGERS UNIV., UNIVERSITY POLICY ON ACADEMIC FREEDOM (2015), https://policies.rutgers.edu/sites/default/files/60.5.1-current.pdf.

> personally may not share. And we do not restrict the activities of recognized university organizations, including the speakers they invite to campus, as long as these organizations obey the law and follow University policy and guidelines regarding these events.
>
> Furthermore, academic freedom—the right of our faculty in the discharge of their duties to express their ideas and to challenge the ideas of others without fear of retribution—is a cornerstone of American higher education. Our University is a community of diverse ideas; we value academic freedom's protections that enable our faculty to state their views and engage in lively discourse. At Rutgers we encourage our faculty to explore new and sometimes controversial ideas and to subject assumptions to scrutiny, all within the boundaries of civil and respectful discourse, which academic freedom requires.
>
> Both academic freedom and our First Amendment rights are at the core of what we do. Our University policy on speech is clear. All members of our community enjoy the rights of free expression guaranteed by the First Amendment. Faculty members, as private citizens, enjoy the same freedoms of speech and expression as any private citizen and shall be free from institutional discipline in the exercise of these rights. In addition, they also enjoy academic freedom of expression when functioning in their roles as faculty members. In all cases, however, the conduct of a faculty member must be in accordance with standards dictated by law.
>
> While I will not defend the content of every opinion expressed by every member of our academic community, or of speakers who we invite to our campus, I will defend their right to speak freely. That freedom is fundamental to our University, our society, and our nation.[13]

It is frankly impossible to square this admirable and accurate articulation of the necessity of academic and expressive freedom with the finding against Professor Livingston.

### ii. The July 31 Memorandum's Prediction of Future Disruption Is Unreasonable

Undeterred by the absence of actual disruption, the July 31 memorandum presses on to argue that a likelihood of future disruption justifies its finding. Dellatore states that a public employer "may take action against an employee for speaking on a matter of public concern if

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[13] Robert Barchi, *Rutgers President on Free Speech and Academic Freedom*, RUTGERS UNIV., https://president.rutgers.edu/public-remarks/speeches-and-writings/rutgers-president-free-speech-and-academic-freedom.

the employer's mere *prediction* of disruption to its operations is reasonable," citing *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1994).

Dellatore misstates and misapplies *Jeffries*' holding. In *Jeffries*, the Second Circuit held that a public employer may take action against an employee for speaking about a matter of public concern only if "(1) the employer's prediction of disruption is reasonable;" *and* "(2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech." *Id.* at 13.

Dellatore's prediction of disruption fails on each count. She writes:

> Professor Livingston's inflammatory social media activity has generated widespread media attention, with headlines that describe his words as "racist," a "racist rant," "profanity laced," and an example of "white privilege." These reports have inflicted reputational damage on the university, and the Department of History and SAS in particular, which could realistically impact recruitment and fundraising in the future. It is reasonable, therefore, to predict a disruption to university operations, rendering Professor Livingston's speech subject to university Policy.

This prediction is unreasonable. Dellatore's conclusory assertion that media coverage of Livingston's posts has "inflicted reputational damage on the university, and the Department of History and SAS in particular" is unsupported by evidence and thus fails as a basis for predicting that the coverage "could realistically impact recruitment and fundraising in the future." Indeed, the lack of any actual disruption to university operations in either the immediate aftermath of press coverage of Livingston's comments or the two months following strongly suggests that no future "disruption" is likely. (To FIRE's knowledge, no media outlets have reported on Livingston's posts since June 13.) Rutgers employs more than 8,000 faculty members.[14] It stretches credulity to suggest that a brief, months-old controversy involving the protected private speech of a single professor resulted in meaningful, ongoing "disruption" to the university's efforts to attract faculty and raise money.

The stark improbability of future disruption cannot reasonably be found to outweigh Livingston's strong interest in speaking as a private citizen on a matter of public concern. "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick*, 461 U.S. at 145 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). Further, given the lack of actual disruption

[14] RUTGERS UNIV., *Facts & Figures*, https://www.rutgers.edu/about/facts-figures.

and the unlikelihood of future disruption, Rutgers will be unable to argue that it has taken action against Livingston on the basis of disruption and not in retaliation for the speech at issue.

Future harm to university recruitment and fundraising is all but certain, however, if Rutgers does not immediately reverse its determination the Livingston's posts violated university policy. *See Czurlanis v. Albanese*, 721 F.2d 98, 107 (3d Cir. 1983) ("[D]isruption, if any, was primarily the result, not of the plaintiff's exercise of speech, but of his superiors' attempts to suppress it."). Given the profound national interest in campus speech, harassment of faculty, race, gentrification, and Facebook, punishing Livingston will likely result in media coverage dwarfing that given to his initial posts. The ensuing controversy and the possibility of litigation will make clear to students, faculty, alumni, and the general public that free speech and academic freedom are under siege at Rutgers. (Be advised that "[d]isruption caused by actions independent of the speech at issue cannot be equated with disruption caused by the speech itself." *Watters v. City of Phila.*, 55 F.3d 886, 897 (3d Cir. 1995).) If Rutgers punishes Livingston, faculty recruitment will undoubtedly suffer. What faculty member would feel secure in their employment, knowing that Rutgers has empowered anonymous internet commenters to police their private expression?

The past experience of other universities is instructive and suggests that contrary to Dellatore's prediction, Livingston's private Facebook posts will not affect the university's reputation, fundraising, or recruitment. For example, Noel Ignatiev, the professor identified in Livingston's second post, published an article in the September–October 2002 issue of *Harvard Magazine* titled "Abolish the White Race," in which he wrote that "[t]he goal of abolishing the white race is on its face so desirable that some may find it hard to believe that it could incur any opposition other than from committed white supremacists."[15] While noting that he and his co-authors for the journal *Race Traitor* "frequently get letters accusing [them] of being 'racists,' just like the KKK, and [they] have even been called a 'hate group,'" Ignatiev wrote that they nevertheless "intend to keep bashing the dead white males, and the live ones, and the females too, until the social construct known as 'the white race' is destroyed—not 'deconstructed' but destroyed."[16] At the time of publication, Ignatiev was a lecturer at Harvard University. Predictably, his article generated heated criticism and accusations of racism in the press.[17] But instead of launching an investigation and erroneously finding that Ignatiev had committed racial harassment, Harvard instead declined to comment on its scholar's

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[15] Noel Ignatiev, *Abolish the White Race*, HARVARD MAG., Sept.–Oct. 2002, https://www.harvardmagazine.com/2002/09/abolish-the-white-race.html.
[16] *Id.*
[17] *See, e.g., Harvard professor argues for 'abolishing' white race*, WASH. TIMES, Sept. 4, 2002, https://www.washingtontimes.com/news/2002/sep/4/20020904-084657-6385r.

controversial views. Perhaps Harvard trusted the public to recognize that faculty do not speak for the university as a whole, and to understand that it is the role of an institution of higher learning "not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it."[18] The controversy resolved itself, and Harvard suffered no discernible negative impact.

Had Harvard sought to censor Ignatiev, however, the story would likely have been different. In this respect, the recent experience of the University of Missouri is instructive. Following a widely-publicized instance of censorship in which a professor requested that a student photographer be physically prevented from covering a public protest, the university's failure to decisively and unequivocally protect the photographer's First Amendment rights has been cited as a contributing factor to declining enrollment.[19] Simply put, censorship is unpopular in the United States.[20] Rutgers will discover as much if it chooses to punish Livingston for his protected speech.

## III. Livingston's Posts Do Not Violate Rutgers' Policy Prohibiting Discrimination and Harassment

Even if Rutgers were to incorrectly conclude that Professor Livingston's Facebook posts do not enjoy First Amendment protection as the commentary of a private citizen on a matter of public concern, the posts do not constitute actionable racial harassment under either Rutgers' own policy or federal anti-discrimination law.

Rutgers' Policy Prohibiting Discrimination and Harassment ("Policy") provides, in pertinent part:

> **A. Discrimination** is defined as an intentional or unintentional act which adversely affects employment or educational opportunities on the basis of membership in one or more protected classes. Rutgers provides equal employment opportunity to all its employees and applicants for employment regardless of their race, religion, color, national origin, ancestry, age, sex, sexual orientation, pregnancy, gender identity and expression, disability, genetic information, atypical hereditary cellular or blood trait, marital status, civil

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[18] UNIV. OF CHICAGO, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (Jan. 2015), https://freeexpression.uchicago.edu/sites/freeexpression.uchicago.edu/files/FOECommitteeReport.pdf.

[19] *See, e.g.*, Anemona Hartocollis, *Long After Protests, Students Shun the University of Missouri*, N.Y. TIMES, July 9, 2017, https://www.nytimes.com/2017/07/09/us/university-of-missouri-enrollment-protests-fallout.html.

[20] Katie Simmons & Richard Wike, *Global Support for Principle of Free Expression, but Opposition to Some Forms of Speech*, PEW RESEARCH CTR. (Nov. 18, 2015), http://www.pewglobal.org/2015/11/18/global-support-for-principle-of-free-expression-but-opposition-to-some-forms-of-speech.

> union status, domestic partnership status, military service, veteran status, and any other category protected by law. Rutgers considers as a basis for selection in employment only those characteristics which are demonstrably related to job performance or requirements.
>
> **B. Harassment** is conduct directed toward an individual or group based on membership in one or more protected classes. Such conduct must be sufficiently severe or pervasive to alter an individual's employment conditions, or a student's educational opportunities which, in turn, creates an unreasonably intimidating, offensive, or hostile environment for employment, education, or participation in University activities.
>
> A person does not have to be the direct and immediate target of harassment to complain about it. Harassing behavior toward others may be so offensive, demeaning, or disruptive as to constitute a hostile work or academic environment, though not specifically directed at the observer or individual lodging the complaint. Conduct alleged to constitute harassment will be evaluated according to the objective standard of a reasonable person.[21]

### A. Rutgers Cannot Identify Any "Victim" of Livingston's Posts

We begin by noting a troubling procedural defect: Rutgers has found Professor Livingston to have committed discriminatory harassment despite being unable to identify even a single known member of the Rutgers community who has accused him of such. Because no known student, faculty, or staff member has accused Livingston of discriminatory harassment or complained about his allegedly discriminatory conduct, it is difficult to understand how Rutgers may reasonably conclude that the posts at issue were "sufficiently severe or pervasive to alter an individual's employment conditions, or a student's educational opportunities."

Defending Rutgers' reliance on anonymous complaints, Dellatore argues that "[m]any of the communications received came through an internal complaint system (i.e. the Rutgers Compliance Hotline), which arguably suggests that the individuals expressing those views may very well have some connection with the university." But this defense is insufficient. It does not matter that the method of submission "arguably" "suggests" that some subjectively offended critics of Livingston's protected speech "may very well have some connection" with the university. (The Compliance Hotline is publicly accessible, and it accepts anonymous

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[21] RUTGERS UNIV., POLICY PROHIBITING DISCRIMINATION AND HARASSMENT (2016), https://policies.rutgers.edu/sites/default/files/00004529.PDF.

online complaints.[22]) Rutgers' policy requires the university to prove the existence of "an unreasonably intimidating, offensive, or hostile environment for employment, education, or participation in University activities." Without any identifiable victim within the Rutgers community, it cannot do so.

Dellatore contends that even in the absence of a complaint from a Rutgers community member, or evidence that Livingston's posts affected any community member, the finding against Livingston is justified because the institution cannot "sit by even when it is on notice of discriminatory conduct until an employee affirmatively comes forward to express concern." This reading is at odds the terms of Rutgers' policy, which requires a showing that the conduct "alter[ed] an individual's employment conditions, or a student's educational opportunities," or "adversely affect[ed] employment or educational opportunities on the basis of membership in one or more protected classes." Without a victim, no such showing can be made.

Dellatore further argues that "proposed [U.S. Equal Employment Opportunity Commission] guidance . . . states that employers should take proactive and 'reasonable care to prevent and correct' harassment." But Dellatore significantly overstates what the proposed guidance actually suggests. With regard to being "proactive," the guidance says only that "adopting proactive measures may prevent harassment from occurring." There is nothing reasonable about "proactively" interpreting discriminatory harassment to be an offense without a victim. Rutgers may not lawfully do so—and particularly not at the expense of Professor Livingston's First Amendment rights.

### B. Livingston's Speech Does Not Rise to the Standard of Actionable Discriminatory Harassment

While Rutgers is legally bound to take action to address discriminatory harassment, it must ensure that such disciplinary action targets only speech or conduct that meets the legal definition of harassment. Even assuming that Rutgers *had* been able to identify a Rutgers community complainant, Livingston's speech would still not constitute actionable discriminatory harassment.

Guidance from the Department of Education's Office for Civil Rights (OCR), the federal agency responsible for implementing and enforcing federal anti-discrimination laws on our nation's campuses, is instructive here. OCR's guidance makes clear that mere offense taken to expression is not a sufficient basis for concluding that discriminatory harassment has taken place.

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[22] RUTGERS UNIV., *University Ethics and Compliance: Compliance Hotline*, https://uec.rutgers.edu/compliance-hotline.

In a July 28, 2003 "Dear Colleague" letter sent to the presidents of public and private universities nationwide, former Assistant Secretary for Civil Rights Gerald A. Reynolds informed college administrators that "in addressing harassment allegations, OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR."[23] Reynolds cautioned:

> Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program. [24]

A 2010 "Dear Colleague" letter regarding bullying from former OCR Assistant Secretary Russlynn H. Ali reaffirmed the 2003 "Dear Colleague" letter's understanding of the relationship between the First Amendment and harassment.[25] On April 29, 2014, former OCR Assistant Secretary Catherine E. Lhamon again clarified that "the laws and regulations [OCR] enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution," and stated that "when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers."[26]

Put simply, it does not matter if, as Dellatore contends, Livingston's posts "could easily be interpreted as racist." Livingston's two posts to his personal Facebook account could not reasonably have prevented any member of the Rutgers community from full participation in campus life. They amount to words alone, and cannot constitute actionable discriminatory harassment.

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[23] U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights (July 28, 2003), https://www2.ed.gov/about/offices/list/ocr/firstamend.html.
[24] *Id.*
[25] U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civil Rights (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.
[26] U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 43–44 (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

In concluding her memorandum, Dellatore writes: "Professor Livingston clearly was on notice that his words were offensive, yet instead of clarifying that he meant to comment on gentrification, he chose to make another belligerent barb against whites." Offensiveness is insufficient to support a finding of discriminatory harassment and cannot overcome Professor Livingston's First Amendment right to speak his mind. As a unanimous Supreme Court held last year, the perception that expression is "hateful" or that it "demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground" does not remove it from the protection of the First Amendment. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

## IV. The Denial of Livingston's Appeal Reaffirms the Office of Employment Equity's Errors

Agnostak's letter dated August 10, 2018 (enclosed) denying Livington's appeal merely repeats and affirms the Office of Employment Equity's flawed findings and analysis. Though Agnostak acknowledged "the proper time for argument about the conclusions that are drawn by an investigator is during the appellate stage of the process[,]" he nonetheless rejects Livingston's arguments and states that the "conclusions of the investigator are properly drawn." Because Livingston provided no "evidence" to alter the facts considered by the investigator—specifically, the content of Livingston's posts, the media reaction, and the complaints allegedly received by Rutgers—Agnostak found no reason to disturb Dellatore's conclusions that the posts were not entitled to First Amendment protection and violated Rutgers' Policy Prohibiting Discrimination and Harassment.

The denial of Livingston's appeal suffers from the same legal errors discussed above.

## V. Conclusion

If Rutgers' commitment to freedom of expression and academic freedom is to be meaningful, and its legal obligation to honor and protect faculty First Amendment rights is to be kept, the determination that Professor Livingston violated university policy must be reversed and no discipline may be imposed on him because of his Facebook posts.

Rutgers must stand firmly behind its faculty member's constitutional right to speak as a private citizen about a matter of public concern and resist the impulse to capitulate to anonymous outrage mobs. If Rutgers permits public criticism to dictate university decision-making and allows subjective offense to determine the contours of expressive rights, it will have abandoned its binding legal obligation under the First Amendment and the New Jersey Constitution and betrayed its purpose as a public institution of higher learning. We trust you will not let that happen.

Be advised that FIRE is committed to using all of the resources at our disposal, including legal recourse, to see this matter through to a just conclusion. We request a response to this letter no later than the close of business on September 4, 2018.

Sincerely,

Marieke Tuthill Beck-Coon
Director of Litigation

Encls.

Cc:
Vivian Fernández, Senior Vice President for Human Resources and Organizational Effectiveness
Harry M. Agnostak, Associate Vice President for Labor Relations
Peter March, Executive Dean of the School of Arts and Sciences
Lisa Grosskreutz, Director, Office of Employment Equity
Carolyn Dellatore, Associate Director, Office of Employment Equity