FIRE
Foundation for Individual Rights in Education

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Sent via U.S. Mail and Electronic Mail (jhugh01@emory.edu)

Dear Dean Hughes:

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.

Emory University has established laudable policies committing itself to defending the rights of its faculty members and students to freedom of expression and academic freedom, making Emory one of the few institutions in the nation to have received FIRE's "green light" rating. However, FIRE is concerned that Emory has departed from these public commitments by suspending a law professor for discussing a racial epithet relevant to a class discussion and in discussing abuse he received from white supremacists. Admirable promises and policies mean little if they are abandoned in practice.

I. Statement of Facts

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, Emory University's actions are at odds with its published commitment to freedom of expression.

Exhibit 5

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Paul J. Zwier has been employed as a professor of law at Emory University School of Law since 2003. He has taught Torts, Evidence, and Advanced International Negotiations, among other courses.

In his August 23 Torts class, Zwier discussed *Fisher,* a case arising out of the Supreme Court of Texas in 1967, at the height of the civil rights movement.[1] *Fisher v. Carrousel Motor Hotel, Inc.,* 424 S.W.2d 627 (Tex. 1967). In *Fisher*, a black mathematician employed by NASA was invited to a meeting, held at a hotel, to discuss telemetry equipment. *Id.* at 628. The plaintiff was ejected from the hotel dining room by an employee who grabbed a dinner plate from the plaintiff's hand and shouted that the establishment could not serve him because he was "a Negro." *Id.* at 628–29. A jury awarded Fisher a paltry $900 for his humiliation, but the trial court entered judgment notwithstanding the verdict, and an intermediate appellate court upheld the ruling. *Id.* at 628. The Supreme Court of Texas reinstated the jury's verdict. *Id.* at 631.

In an August 27 letter to the Emory faculty, Zwier described his classroom discussion of *Fisher*:

> The student who I called on for the case is a black female student with the last name [redacted, beginning with an A]. I started the class calling on students with last names starting with the letter C. I had then decided to go to the front of the alphabet for the next group of students to call on. In asking Ms. [A] about more facts in the case some students reported to me later that I asked whether [the employee] called [the plaintiff] a n..... when he slapped the plate from his hand. To the best of my recollection she answered yes. She may have been too startled by the question to have been answering consciously. I'm not sure whether I used the "N word" because I don't remember consciously choosing to use the word. I do remember that there was a reaction from at least one black student to my question, so I may have misspoken. I wondered to myself after class when it was brought to my attention, whether I had mispronounced negro, or said something else. My intent was to eventually raise the racist slur as a possibility to set up the case we would read in the next week, where the "N word" was used again.[2]

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[1] Christina Yan & Richard Chess, *Law Professor Under Investigation After Saying Racial Slur in Class*, EMORY WHEEL, Aug. 27, 2018, https://emorywheel.com/law-professor-under-investigation-after-saying-racial-slur-in-class.

[2] Letter from Paul J. Zwier, Professor at Emory University School of Law, to the Emory Faculty, Aug. 27, 2018, *available at* https://images.law.com/contrib/content/uploads/documents/404/18767/Paul-Zwier-Statement-to-Emory-Faculty.pdf (incorrectly dated Aug. 17, 2018).

The case to be discussed during the next class period was *Caldor, Inc., v. Bowden*, 330 Md. 632 (1993). There, as the dissent explains, an employer subjected the plaintiff and his mother "to abusive racial epithets which implied" that the plaintiff "was being persecuted because of his skin color." *Id.* at 666 (Eldridge, J. dissenting). Specifically, the dissent quoted the defendant's manager as stating: "You people -- you nigger boys make me sick, but you're going to burn for this, you sucker." *Id.* Maryland's highest court held that this was insufficient to establish intentional infliction of emotional distress, and that the evidence "does not show the defendants were driven by an improper motive" in discharging the plaintiff. *Id.* at 644–47.

Zwier explained in an email to *The Emory Wheel* that the "teaching point" in *Fisher* "was to say that the racial slur makes the nature of the contact less important, until it might merge into another tort we will study called intentional infliction of emotional distress."[3] He added that the "case is not about condoning racial speech, but the opposite, the potential injury that can be caused by racist language and how the court might address it in tort law," and that his "purpose was not to support such speech, but to teach about it and against it."

On August 24, you sent an open letter to the Emory Law community, which was later published on Emory University's website.[4] That letter condemned as "unacceptable" the "use of this . . . or any racial slur," noting that it "reflects a tradition of white supremacy that we actively reject at Emory." The letter urged that "[w]hen insulting conversation is normalized, it creates a hostile environment and it undermines our institutional values." The letter announced the initiation of an investigation of Zwier by the Office of Equity and Inclusion.

On September 18, Zwier sent a letter to the students of his Torts class, as well as the broader Emory Law community, acknowledging that he had "said a word that can and does cause harm," and taking "responsibility for the harm [he] caused."[5] Zwier said that he had made a "mistake" in using the word, and that he "fell short in discussion of matters that are important for us to understand about the response of the law to changes in evolving views of race in American society." Zwier said he was "committed to taking positive steps," including "altering [his] Torts materials and teacher's manual to better insure [*sic*] that what happened is less likely to happen again in future discussions of these cases."

On the same day, you sent a letter to the Emory Law community urging that Zwier had "admitted inappropriately using" the word and had "taken full responsibility for the harm its use has done to the immediately affected students, the Law School community, and the broader Emory community."[6] As a result, Zwier had "committed to engage in activities

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[3] Yan & Chess, *supra* note 1.
[4] Letter from James B. Hughes, Jr., Interim Dean of Emory University School of Law, to the Emory Law community, Aug. 24, 2018, *available at* http://news.emory.edu/stories/2018/08/law_community/campus.html.
[5] Letter from Paul J. Zwier, Professor at Emory University School of Law, to the Emory Law community, Sept. 18, 2018, *available at* http://news.emory.edu/stories/2018/09/upress_law_professor_zwier_letter/campus.html.
[6] Letter from James B. Hughes, Jr., Interim Dean of Emory University School of Law, to the Emory Law community, Sept. 18, 2018, *available at* https://news.emory.edu/stories/2018/09/upress_law_dean_hughes_letter/campus.html.

designed to repair his relationships," including participation in "dialogues focused on racial sensitivity." Your letter "prescribed" additional steps, including a prohibition against Zwier teaching mandatory first-year courses for two years, participation in bias training by the Office of Equity and Inclusion, and voluntary revision of his teacher's manual to "include suggestions of ways in which faculty who use his text might avoid offending students when covering racially sensitive materials."

According to an online petition seeking Zwier's removal from Emory, an African-American student approached Zwier in his office on October 31.[7] During that conversation, the student accused Zwier of having had a racist upbringing and being racist; Zwier responded by relating an anecdote in which a white racist angrily accused Zwier of being a "nigger-lover" because of his views on race. Zwier later characterized the interaction as "a private conversation between two people, as we talk[ed] about what our experiences are," and said that he did not believe "there was the same kind of harm that was to be caused, or the ability to be misunderstood."[8]

On November 12, you announced that Zwier had been placed on paid leave from the law school following multiple reports that he had used the "n-word," and you said that Emory University was continuing to "gather the facts" about the allegations.[9] It is FIRE's understanding that Zwier is barred from Emory's campus pending this investigation.

II. Zwier's Speech Is Protected by Emory's Published Commitments to Freedom of Expression and Academic Freedom

Zwier's use of the word, although deeply offensive to many members of Emory's community, was germane to the academic discussion, and does not amount to hostile environment harassment. Accordingly, the usage does not violate Emory's harassment policies and is protected under Emory's policies governing its community members' rights to freedom of expression and academic freedom.

A. Emory University maintains express commitments to freedom of expression and academic freedom

Emory University makes affirmative, robust commitments to provide its students and faculty members with the rights to freedom of expression and academic freedom. As a private institution, the university is not required to make these commitments by virtue of the First Amendment. However, Emory University has a legal and moral duty to adhere to the promises it makes.

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[7] Open letter from The Concerned Student Body to Dwight A. McBride, Provost and Executive Vice President for Academic Affairs, Emory University, et al., undated, *available at* https://docs.google.com/forms/d/e/1FAIpQLSeaBQVei6f4gqEjKQ58sRXzViiYQ-2EioRhdA5HMB5JPZQY0g/viewform?fbzx=1675240369405085400.

[8] *Id.*

[9] Christina Yan, *Law Professor on Leave After Allegedly Repeating Racial Slur*, EMORY WHEEL, Nov. 12, 2018, https://emorywheel.com/law-professor-on-leave-after-allegedly-repeating-racial-slur.

The brightest star in the constellation of promises made by Emory University is Policy 8.14, Emory's "Respect for Open Expression Policy."[10] That policy "reaffirms Emory's unwavering commitment to a community that inspires and supports courageous inquiry through open expression, dissent, and protest, while acknowledging the challenges of the creative tensions associated with courageous inquiry in an ever changing community."[11] While the policy recognizes that "[c]ivility and mutual respect are important values," and calls upon Emory's constituents to consider these values, it acknowledges that these values "do not limit the rights protected by this Policy."[12] The policy expressly extends these rights to students and faculty.[13]

Emory makes these commitments not only to its students and faculty, but also to its accreditors. For example, the American Bar Association requires its accredited law schools, such as Emory University School of Law, to "have an established and announced policy with respect to academic freedom."[14] The ABA offers as an example the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors.[15] Emory's trustees have adopted these principles.[16]

B. Freedom of expression and academic freedom, embraced by Emory University, are intertwined

While, again, Emory University is not bound by the First Amendment, court decisions interpreting and applying its guarantee of freedom of expression provide guidance as to what Emory's institutional promise of that freedom entails.

Academic freedom provides teachers and faculty members, tenured or not, protected expressive rights within their research, lectures, and discussions. *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (in upholding students' rights to non-disruptive demonstrations during class, noting "the unmistakable holding of this Court for almost 50 years" that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students"); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to

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[10] EMORY UNIVERSITY, Policy 8.14, Respect for Open Expression Policy (rev. Sept. 21, 2018), *available at* https://emory.ellucid.com/documents/view/19648/?security=c6f36f9de43a2cd25fc99614d09384f649a313cf.
[11] Respect for Open Expression Policy, § 8.14.1.
[12] *Id.*
[13] Respect for Open Expression Policy, § 8.14.2(1)–(2).
[14] AMERICAN BAR ASSOCIATION, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016–2017, Standard 405(b), *available at* https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf.
[15] *Id.*
[16] EMORY UNIVERSITY, STATEMENT OF PRINCIPLES GOVERNING FACULTY RELATIONSHIPS ("THE GRAY BOOK") (May 2017), *available at* https://provost.emory.edu/_includes/documents/sections/faculty/tenure-and-promotions/Emory-Gray-Book.pdf.

inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our society will stagnate and die."). As our Supreme Court held decades ago:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.

Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (internal citations and quotation marks omitted).

C. Expressive freedom extends to expression others find deeply, even objectively, offensive

The principles enshrined in Emory's policies and more than a half-century of precedential decisions do not exist to protect only non-controversial expression. Rather, they exist precisely to protect speech that some or even most members of a community may find controversial or offensive. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends others, on or off campus. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (the "bedrock principle" behind the First Amendment is that officials "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[T]he 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.'"). The freedom to offend some listeners is the same freedom to move or excite 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 reiterated 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 Supreme Court confronted the question of whether authorities could "excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse, either upon the theory . . . that its use is inherently likely to cause violent reaction or upon a more general assertion that [authorities], acting as guardians of public morality, may properly remove this offensive word from the public vocabulary." 403 U.S. 15, 22–23 (1971). There, the offending language was emblazoned on a jacket worn in a courthouse: "Fuck the Draft," using a word that was then so offensive that Chief Justice Warren Burger indicated

to the counsel before him that there was no need to repeat it in open court, as the justices were "thoroughly familiar" with the facts.[17]

The *Cohen* Court asked, rhetorically, how one would "distinguish this from any other offensive word," observed that authorities had "no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us," and held that the lack of a "readily ascertainable general principle" to distinguish the word from other offensive words indicated that "officials cannot make principled distinctions in this area[.]" 403 U.S. at 25. Moreover, the Court concluded, the power to forbid "particular words" would also run "a substantial risk of suppressing ideas in the process." *Id.* at 26. The *Cohen* Court's concerns—particularly its deep apprehension about suppressing the free and open discussion of ideas—must guide Emory's consideration of Zwier's reference to a racial slur, particularly given that it was used in an academic context without animus.

D. Academic freedom includes a right to confront, use, and discuss offensive language in teaching and scholarship

Academic discussions require that faculty members and students alike have the freedom to discuss, touch upon, and view materials that may shock or offend others—including the "n-word." Princeton University, for example, defended a professor who used the word in an Anthropology course to discuss cultural and linguistic taboos.[18] Law professors use it to teach the "fighting words" doctrine;[19] journalism professors discuss how to tell stories that involve it;[20] sociology professors study the impact of the term in defining who is welcomed in various spaces.[21] Faculty and students cannot identify and productively study American racism without confronting manifestations of that racism.

Those in the legal field must also sometimes confront manifestations of racism, and studying legal opinions may sometimes expose students to difficult or offensive material, just as they are likely to encounter such material in practice. The full word, or some derivative of it, appears in at least 29 opinions of the Supreme Court of the United States, including three

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[17] Adam Liptak, *A Word Heard Often, Except at the Supreme Court*, N.Y. TIMES, Apr. 30, 2012, https://www.nytimes.com/2012/05/01/us/a-word-heard-everywhere-except-the-supreme-court.html. The law professor representing Cohen defied Chief Justice Burger's hint. Christopher M. Fairman, *FUCK*, 28 CARDOZO L. REV. 1711, 1735 (2007).

[18] Colleen Flaherty, *The N-Word in the Classroom*, INSIDE HIGHER ED, Feb. 12, 2018, https://www.insidehighered.com/news/2018/02/12/two-professors-different-campuses-used-n-word-last-week-one-was-suspended-and-one.

[19] Frank Yan, *Free Speech Professor Takes Heat for Using Racial Epithets in Lecture at Brown*, CHICAGO MAROON, Feb. 9, 2017, https://www.chicagomaroon.com/article/2017/2/10/free-speech-professor-takes-heat-using-racial-epit/.

[20] Frank Harris III, *Without Context, N-Word Goes Best Unsaid*, HARTFORD COURANT, Feb. 13, 2018, https://www.courant.com/opinion/hc-op-harris-ct-teacher-uses-n-word-20180209-story.html.

[21] *See, e.g.*, Elijah Anderson, *The White Space*, SOCIOLOGY OF RACE & ETHNICITY, 2015 Vol. I pp. 10–21, *available at* https://sociology.yale.edu/sites/default/files/pages_from_sre-11_rev5_printer_files.pdf.

opinions issued last year.[22] It likewise appears in 15 opinions handed down last year by federal courts of appeal, including the circuit in which Emory University sits.[23] Publications by Emory Law have used the word in scholarly research, including in a comment authored by an Emory Law student,[24] and it appears in conference materials posted on Emory Law's website.[25] Notably, former U.S. President Jimmy Carter, University Distinguished Professor at Emory, said in a 2008 interview with National Public Radio that his son "was pretty well beat-up by his fellow boys who thought he was a – if you'll excuse the expression, a nigger-lover, because he was for [Lyndon B.] Johnson in those days."[26] Presumably, Emory Law recognizes some limiting principle distinguishing scholarly uses of offensive language from punishable harassing conduct; we cannot imagine Emory Law has sought to punish those responsible for these usages as it has Zwier. That same limiting principle must be applied here.

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[22] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1747 (2018) (Thomas, J., concurring in part and quoting *Brandenburg v. Ohio*, 395 U.S. 444, 446 n. 1 (1969)); *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting and quoting *Brandenburg*); *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018); *see also, e.g., Andrews v. Shulsen*, 485 U.S. 919, 920 (1988); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 936–38 (1982); *McDonald v. City of Chicago*, 561 U.S. 742, 828 (2010) (Thomas, J., concurring in part); *Virginia v. Black*, 538 U.S. 343, 355 (2003); *Miller v. Johnson*, 515 U.S. 900, 938 (1995) (Ginsburg, J., dissenting); *Bd. of Educ. v. Pico*, 457 U.S. 853, 902 (1982) (Powell, J., dissenting).

[23] *Smelter v. S. Home Care Servs.*, 904 F.3d 1276, 1979–87 (11th Cir. 2018); *Tharpe v. Warden*, 898 F.3d 1342, 1348 n.3 (11th Cir. 2018) (Wilson, J., dissenting); *see also, e.g., Lang v. City of Kalamazoo*, No. 17-2199, 2018 U.S. App. LEXIS 21695, at *2 (6th Cir. Aug. 6, 2018); *Savage v. State*, 896 F.3d 260, 266 (4th Cir. 2018); *Hardy v. Cmty. Mental Health*, No. 17-2181, 2018 U.S. App. LEXIS 18781, at *3 (6th Cir. July 10, 2018); *Robinson v. Perales*, 894 F.3d 818, 824 (7th Cir. 2018); *Ellis v. Harrison*, 891 F.3d 1160, 1163 (9th Cir. 2018).

[24] *See, e.g.,* Richard Delgado & Jean Stefancic, *Southern Dreams and a New Theory of First Amendment Legal Realism*, 65 EMORY L.J. 303, 308 (2015); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Wither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1913 n.111 (2004) (quoting manager's statement about the plaintiff in *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1208 (10th Cir. 1999)); Jennifer N. Ide, Comment, *The Case of Exzavious Lee Gibson: A Georgia Court's (Constitutional?) Denial of a Federal Right*, 47 EMORY L.J. 1079, 1081 n.16 (1998) (quoting defense counsel's statement in *Goodwin v. Balkom*, 684 F.2d 794, 805 n.13 (11th Cir. 1982)); Abigail Thernstrom, *More Notes From a Political Thicket,* 44 EMORY L.J. 911, 934 (1995) (citing the racist practice of "regularly" assailing "[w]hite civil rights sympathizers in the South" as "nigger-lovers"); Selwyn Carter, *African-American Voting Rights: An Historical Struggle*, 44 EMORY L.J. 859, 866 (1995) (quoting white supremacists attacking Rep. George White, the only African-American in Congress in 1896); Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1, 30 nn.101 & 103 (1994) (describing a professor's refusal to redact the word from Mark Twain's *Huckleberry Finn* before reading it aloud, and describing the first time a white person used the word to address the author).

[25] Emory Public Interest Committee (EPIC) 2018 Conference, Miscarriage of Justice: Examining Factors That Lead to Wrongful Convictions, *available at* http://law.emory.edu/_includes/documents/sections/careers/CLE%20materials.pdf (repeatedly quoting, at pages 14, 19 and 29 of the PDF file, law enforcement officers' use of the words to argue that in "some cases, it's easy to spot racism in the investigations or the prosecutions that led to the false convictions").

[26] *Tell Me More: Jimmy Carter: Proud Son* (NPR radio broadcast May 1, 2008) (transcript and audio recording *available at* https://www.npr.org/templates/story/story.php?storyId=90093960.)

Particularly informative to the matter at hand is *Hardy v. Jefferson Community College*. There, the United States Court of Appeals for the Sixth Circuit denied qualified immunity to administrators who terminated a Caucasian adjunct instructor who led a "classroom discussion examining the impact of such oppressive and disparaging words as 'nigger' and 'bitch.'" *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 674 (6th Cir. 2001) (cleaned up). The Sixth Circuit upheld the district court's finding that "the use of the racial and gender epithets in an academic context, designed to analyze the impact of these words upon societal relations, touched upon a matter of public concern and thus fell within the First Amendment's protection." *Id.* at 678. In denying qualified immunity, the Sixth Circuit held that "reasonable school officials should have known that such speech, when it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment." *Id.* at 683.

Similarly, the Ninth Circuit has explained that faculty members' expression of offensive viewpoints, as they pertain to matters of public concern, will rarely amount to actionable workplace harassment. *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2009). In ruling on a hostile environment claim prompted by a math professor's "racially-charged" emails, which were sent to a listserv that reached every employee in his community college district, the Ninth Circuit distinguished between protected expression and targeted harassment:

> Harassment law generally targets conduct, and it sweeps in speech as harassment only when consistent with the First Amendment. For instance, racial insults or sexual advances directed at particular individuals in the workplace may be prohibited on the basis of their non-expressive qualities, as they do not 'seek to disseminate a message to the general public, but to intrude upon the targeted [listener], and to do so in an especially offensive way[.]'

Id. (cleaned up). The Ninth Circuit was particularly concerned that limitations on faculty members' expression would cast a chilling effect on higher education, which has "historically fostered" the exchange of views. *Id.* at 708. "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." *Id.* at 708–09 (quoting *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975)) (cleaned up).

E. Zwier's lecture touched upon matters of public concern and did not violate Emory's written policies

Emory's policies recognize these same fault lines between protected expression and actionable harassment. Emory's Respect for Open Expression Policy, for example, recognizes

that not all speech is protected, and that the policy does not extend to violations of university policies, including conduct that amounts to "harassment, as defined by state law."[27] But Emory's Equal Opportunity and Discriminatory Harassment Policy likewise commits the university to "the centrality of academic freedom" and a "determination to protect the full and frank discussion of ideas," invoking the Respect for Open Expression Policy.[28] The harassment policy proceeds to exclude from its scope "the use of materials for scholarly purposes appropriate to the academic context," specifically including "class discussions."[29] This firewall bars a finding that classroom discussions of offensive speech amount to discriminatory harassment unless they "serve no scholarly purpose appropriate to the academic context[.]"[30]

Zwier's discussions of the judicial consequences of white supremacy did serve a scholarly purpose. In discussing *Fisher*, Zwier raised the question of whether Texas' legal system had whitewashed the epithet from its transcripts, minimizing the abusive conduct toward the plaintiff and shielding a racist club employee in the process. *Caldor* presented a similar example of injustice, wherein Maryland's highest court all but ignored the defendant's use of the epithet while reasoning that the employee had no ulterior motive in his treatment of the plaintiff. The court then faulted the plaintiff—a teenager working in an entry-level retail position—for not providing expert testimony or seeking help from a professional psychologist after being handcuffed in front of his coworkers and called a racial epithet in front of his mother. The plaintiff's testimony about the impact of this experience was insufficient to establish, in the eyes of the court, that the abuse of the plaintiff caused him emotional distress. *Caldor*, 330 Md. at 643–44. A law professor discussing cases in which the legal system was systemically deferential to white racists must be free to identify, analyze, and critique the language used in those cases.

F. Zwier's use of a derivative of the word during office hours was either academic speech protected by academic freedom or extramural speech

Nor does Zwier's solitary use of a derivative version of the word—used not to target another, but to describe *his own experience of the slur being directed against him*—amount to actionable harassment. Instead, it must be considered either a continuation of his classroom discussion, and thus protected by academic freedom, or an extramural utterance protected by both Emory's commitments to freedom of expression and the AAUP's standards governing such remarks.

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[27] Respect for Open Expression Policy, § 8.14.5.5(h).
[28] EMORY UNIVERSITY, Policy 1.3, Equal Opportunity and Discriminatory Harassment Policy (rev. Aug. 27, 2018), § 1.3.2 ("Discriminatory Harassment Policy"), *available at* https://emory.ellucid.com/documents/view/16834/?security=d3b7518a869d72e6d5b0c965c987b3c9053079b3.
[29] *Id.*
[30] *Id.*

Emory's policies recognize that academic discussions are not confined to the classroom, committing Emory to broadly "full and frank discussion," whether it occurs in "class discussions . . . or [in] meetings."[31] Accordingly, Zwier's October 31 meeting with a student, who approached Zwier during his scheduled office hours to engage Zwier in conversation concerning his classroom discussion, is an outgrowth of that classroom discussion.[32] Because this conversation, borne of Zwier's in-class discussion, pertains to Zwier's teaching role, it remains within the "academic context" and outside the scope of Emory's discriminatory harassment policy.

If, instead, Emory views this meeting not as a continuation of a classroom discussion, but instead an extramural discussion, Zwier's October 31 use of the word cannot justify punitive sanctions for at least two reasons.

First, Emory's Respect for Open Expression Policy does not cabin the rights thereunder to academic or in-class discussion, but instead encompasses both expression directed at Emory as an institution and expression concerning "some broader issue beyond" Emory.[33] That expression may occur not only in classrooms, but also in private offices, auditoriums, outdoor spaces, and so on.[34] Thus, Emory protects a broad range of speech by faculty members and students, irrespective of subject matter or location, and the First Amendment principles described above control and protect Zwier.

Second, the "controlling principle" of the AAUP's standards is that expression as a citizen, and not that of an academic, "cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness to serve," and such "[e]xtramural utterances rarely bear upon the faculty member's fitness for continuing service."[35] As John K. Wilson observed in reviewing the history of the AAUP's approach to extramural utterances, unless a remark "is part of one's teaching or research, an utterance cannot be evaluated as such, and it falls, instead, under the rubric of extramural utterances."[36] Accordingly, if Zwier's remark was that of a private citizen, he can be punished only if his remark demonstrates an unfitness to serve as judged against "the faculty member's entire record as a teacher and scholar." Given Zwier's long record as an accomplished professor of law, it would be a significant threat to freedom of expression and academic freedom if a professor's use of one word, offered as an example of his own experience, amounted to the "rare" instance of a professor's total "unfitness to serve."

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[31] Discriminatory Harassment Policy.
[32] Indeed, Emory University encouraged Zwier to engage in "dialogues focused on racial sensitivity." Sept. 18, 2018 letter from James B. Hughes, Jr., *supra* note 6.
[33] Respect for Open Expression Policy, § 8.14.2.
[34] Respect for Open Expression Policy, § 8.14.5.6.
[35] AAUP, "Committee A Statement on Extramural Utterances," in *Policy Documents and Reports* (Baltimore: Johns Hopkins University Press, 2006), 32.
[36] John K. Wilson, *Academic Freedom and Extramural Utterances: The Leo Koch and Steven Salaita Cases at the University of Illinois*, 6 AAUP J. ACADEMIC FREEDOM 1, 13 (2015), *available at* https://www.aaup.org/sites/default/files/Wilson.pdf.

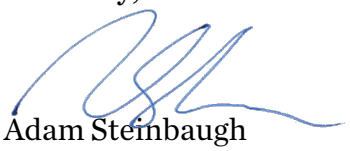
III. Conclusion

Faculty members' academic freedom includes the choice to deploy material or language germane to their teaching that might offend, shock, or anger their students. That freedom does not render its exercise wise in every instance, nor immunize the faculty member from criticism, whether from the university's leadership, from students, from colleagues, or from the general public. Criticism, no matter how vociferous, is not censorship; it is the polar opposite of censorship, but Emory's suspension of Zwier is action, not more speech.

Emory University is free to criticize Zwier's choice, but it has renounced any authority to penalize expression on the basis that it causes even grave offense, and its commitment to academic freedom obligates it to abstain from punishing unpopular or offensive speech falling short of actionable harassment. In accordance with its written policies and promises, Emory must immediately rescind any coercive sanctions imposed upon Zwier, explain what circumstances required his removal from campus, and clarify that Emory will not penalize speech, research, or discussions on the basis that they offend others.

FIRE respectfully requests receipt of a response to this letter by January 31, 2019.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc:
Stephen D. Sencer, Senior Vice President and General Counsel
Amy Adelman, Esq., Senior Managing Attorney