AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

1133 19th Street, NW, Suite 200, Washington, DC 20036
PHONE: 202.737.5900 • **FAX:** 202.737.5526 • **www.aaup.org**

OFFICE OF THE TEXAS ATTORNEY GENERAL

Request No. 0421-KP

INTERESTED PARTY BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Respectfully submitted by:

Counsel for AAUP:
Risa L. Lieberwitz
General Counsel
American Association of
University Professors
Professor of Labor and
Employment Law
School of Industrial and
Labor Relations
Cornell University
361 Ives Hall
Ithaca, NY 14853
(607) 255-3289

Counsel for AAUP:
Aaron M. Nisenson
Senior Counsel
Nancy A. Long
Associate Counsel
Edward D. Swidriski III*
Assistant Counsel
American Association of
University Professors
1133 19th Street N.W., Suite 200
Washington, D.C. 20036
(202) 737-5900
legal.dept@aaup.org
* Counsel of Record

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STATEMENT OF INTEREST AND EXPERTISE

The American Association of University Professors ("AAUP") is a non-profit organization of over 45,000 faculty, librarians, graduate students, and academic professionals. Founded in 1915, the mission of the AAUP is to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make its shared goals a reality; and to ensure the ability of higher education to contribute to the common good.

The vibrant higher education system that exists in the United States is built on the foundation of academic freedom, a principle that the AAUP has played an important role in establishing. The AAUP, both independently and in concert with other higher education organizations, issues statements and interpretations that have been recognized by the Supreme Court of the United States and other courts, and that are widely respected and followed in American colleges and universities. *See, e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681–82 (1971); *Gray v. Bd. of Higher Educ.*, 692 F.2d 901, 907 (2d Cir. 1982) (observing that "AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies"). Furthermore, in matters that implicate AAUP policies or otherwise raise legal issues important to higher education or faculty members, the AAUP frequently submits *amicus* briefs in the Supreme Court, federal and state appellate courts, and the National Labor Relations Board. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Demers v.*

Austin, 746 F.3d 402 (9th Cir. 2014); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000); *McAdams v. Marquette University*, 914 N.W.2d 708 (Wis. 2018); *Columbia University*, 364 NLRB No. 90 (2016); *Pacific Lutheran University*, 361 NLRB 1404 (2014).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The AAUP files this brief in response to a request for an opinion of the attorney general of Texas (the "Request") submitted by James White of the Texas House of Representatives. The Request asks whether the teaching of ideas about race, including critical race theory ("CRT"),[1] "violate[s] Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, [or] Article 1, Section 3 and Section 8 of the Texas Constitution." Request, at 1. Representative White effectively seeks to have critical race theory and other discussions of racial inequality banned from the classroom, all under the guise of constitutional interpretation.

The AAUP strongly opposes political efforts to ban ideas from the classroom. Whether they take the form of overt legislative attacks on academic freedom or, as in the case of Representative White's Request, insidious attempts to distort the Constitution from a charter of freedom into a license for politically motivated censorship, the unmistakable aim of such efforts is to impose thought control on American education and thereby on the American people. That aim stands in irreconcilable conflict with the principles of free inquiry, free thought, and free expression which the AAUP has championed for more than a century. The AAUP particularly

[1] It is well established that opinions of the Texas attorney general do not resolve questions of fact or mixed questions of fact and law. Tex. Att'y Gen. Op. No. GA-0867 (2011), at 2–3 (stating that the attorney general's office cannot answer questions of fact and therefore "cannot perform the legal analysis necessary" to analyze "mixed questions of law and fact"); Tex. Att'y Gen. Op. No. GA-0156 (2004), at 10 (stating that the attorney general's office "cannot resolve . . . fact questions in the opinion process"). Thus, whatever opinion the attorney general issues in response to the Request, he cannot settle what critical race theory is, nor can he definitively answer how the Equal Protection Clause, Title VI, of the Texas Constitution apply to classroom discussions of critical race theory.

opposes recent efforts—of which the Request at issue here is a part—to ban discussions of racism and its impact on American history and society.

Education plays a vital role in cultivating and preserving a free, just, and prosperous society. America's schools are "the nurseries of democracy." *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021). In America's colleges and universities, students further advance their preparation for participation in a democratic society and bring to full development the skills and attitudes they will use as active citizens. If colleges and universities are to fulfill their public purpose and retain the public's confidence, they must remain places where ideas—even ones deemed controversial by politicians—are freely and robustly exchanged. This includes ideas about race and racism in the United States, which are of undeniable relevance to anyone seeking to understand American society. Politicians should not dictate how ideas about race are addressed in the classroom, nor should they ban or otherwise restrict the use of legitimate methodologies for studying race, such as critical race theory.

Academic freedom is the chief cornerstone of higher education. Unless academic activity is protected from government intrusion, the integrity of the educational system as a whole is imperiled. In higher education, the principle of academic freedom is closely linked to the function of the university as an institution charged with the attainment of the common good through the discovery and transmission of knowledge. In the absence of academic freedom, colleges and universities are prone to becoming instruments for the advancement of narrow partisan interests, mouthpieces for the propagation of specific doctrines, and factories of indoctrination rather than places of legitimate education. A government ban on classroom discussions of ideas and analysis concerning historical context and current issues of race and racism in the United States would violate academic freedom and undermine the higher education system.

To ensure academic freedom, it is necessary to protect teachers' freedom to determine what they teach and how they teach it, without the state intruding on those decisions. Teachers must be allowed to teach. Teachers possess the expertise and experience, and the professional commitment to the pursuit of truth, that puts them in the best position to make decisions about teaching. Thus, when it comes to teaching about issues of race, racial inequality, and the potential for achieving racial equality, teachers—not politicians—should determine whether and how to incorporate those ideas into their classes, including the pedagogical use of insights from critical race theory.

ARGUMENT

I. Education plays a vital role in our democratic society, and the free exchange of ideas about race in American history and contemporary society is crucial to the ability of universities to fulfill their proper function.

Education "is the very foundation of good citizenship." *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)); *accord Brown*, 347 U.S. at 493 (recognizing "the importance of education to our democratic society"). It is a necessary component in "prepar[ing] citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *accord Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (describing schools as "a most vital civic institution for the preservation of a democratic system of government"). Education is "pivotal to 'sustaining our political and cultural heritage,'" *id.* (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)), and is "a bulwark of a free people against tyranny," *Yoder*, 406 U.S. at 225. More broadly, education plays "a fundamental role in maintaining the fabric of society," *Grutter*, 539 U.S. at 331, for it "prepares individuals to be self-reliant and self-sufficient participants in society," *Yoder*, 406 U.S. at 221, and is "a principal instrument in awakening the [student] to cultural values, in preparing him for later professional

training, and in helping him to adjust normally to his environment," *Brown*, 483 U.S. at 493. Education helps individuals to more effectively exercise their most basic constitutional rights, including the right of free expression. *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (stressing "the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment").

This crucial role of education in a democratic society continues through higher education. The Supreme Court has "long recognized" that "universities occupy a special niche in our constitutional tradition" on account of "the expansive freedoms of speech and thought associated with the university environment." *Grutter*, 539 U.S. at 329 (collecting cases). The university is the ultimate "marketplace of ideas," *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), where that "[c]ompetition in ideas and governmental policies [which] is at the core of our electoral process and of the First Amendment freedoms," *Williams v. Rhodes*, 393 U. S. 23, 32 (1968), takes place. It is the quintessential locus of that "robust exchange of ideas," *id.*, and of that "free play of the spirit," *Wieman*, 344 U.S. at 195 (Frankfurter, J., concurring), which are central to the maintenance of our democratic traditions and institutions. Colleges and universities also "represent the training ground for a large number of our Nation's leaders" and professionals, *Grutter*, 539 U.S. at 332, for whose pursuits the exposure to diverse thought is particularly critical, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978) (noting the importance of diverse "experiences, outlooks, and ideas" to professional training in law and medicine). Such is the importance of the free intellectual activity that occurs in higher education that the Supreme Court has on more than one occasion said that national survival depends upon it. *E.g.*, *Keyishian v. Bd. of Regents*, 385 U.S. at 603 (stating that "[t]he Nation's future depends upon leaders trained through wide exposure to th[e] robust exchange of ideas" that takes place in higher education); *Sweezy v. New Hampshire*,

354 U.S. 234, 250 (1957) (to infringe upon the "freedom in the community of American universities . . . would imperil the future of our Nation" and ultimately cause "our civilization [to] stagnate and die"); *id.* at 262 (Frankfurter, J., concurring) (recognizing "the dependence of a free society on free universities").

The "robust exchange of ideas" necessarily entails the freedom to express and examine ideas that some may view as unfamiliar, controversial, or even offensive. It is precisely the fact that higher education enables encounters with such ideas that makes it especially important in developing values indispensable to democratic self-government. When trained to think critically, to challenge their own assumptions, and to engage thoughtfully and civilly with those who hold opposing points of view, individuals become empowered to solve problems, to participate courageously and productively in civil society, and to adhere to core democratic norms such as tolerance, the rule of law, and the peaceful settlement of disputes. Thus, higher education helps to ensure that as students engage with the world, they do so as citizens well-integrated into a culture where "the deliberative forces . . . prevail over the arbitrary," *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The AAUP has long emphasized the vital role that higher education plays in the democratic life of the country. As explained in the foundational *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, the university operates as a public trust, the chief purposes of which are "to promote inquiry and advance the sum of human knowledge," "to provide general instruction to the students," and "to develop experts for various branches of the public service." *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AAUP POLICY DOCUMENTS AND REPORTS 5, 7 (11th ed. 2015) (hereinafter, the "*1915 Declaration*"). "Institutions of higher education are conducted for the common good," which "depends upon the

free search for truth and its free expression." *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments,* AAUP POLICY DOCUMENTS AND REPORTS 14 (11th ed. 2015) (hereinafter, the "*1940 Statement*").[2]

"One of [the university's] most characteristic functions in a democratic society is to help make public opinion more self-critical and more circumspect, to check the more hasty and unconsidered impulses of popular feeling, to train the democracy to the habit of looking before and after." *1915 Declaration* at 9. Furthermore, it is a duty of "[t]he university teacher, in giving instruction upon controversial matters" to "set forth justly, without suppression or innuendo, the divergent opinions of other[s]," to "train [students] to think for themselves, and to provide them access to those materials which they need if they are to think intelligently." *Id.* The maintenance of public confidence in institutions of higher education requires that they be places of open and frank discussion. *See 1915 Declaration*, at 9 (the public "is little likely to respect or heed [the counsels of university faculty] if it has reason to believe that they are expression of the interests, or the timidities" of those with power over the university); *Wieman,* 344 U.S. at 196–97 (Frankfurter, J., concurring) (noting that "our democracy ultimately rests upon public opinion" and that teachers cannot carry out their role in a democratic society "if the conditions for the practice of a responsible and critical mind are denied to them").

These principles are directly applicable to the issue of government censorship of ideas concerning race. It is an understatement to say that race has had a major impact on the history of

[2] The AAUP's *1940 Statement* was jointly issued by the Association of American Colleges and Universities and, over subsequent decades, has been endorsed by more than 250 academic professional organizations and institutions. Courts have recognized the *1940 Statement* and other AAUP standards and principles. *E.g.*, *Roth,* 408 U.S. at 579 n.17; *Tilton,* 403 U.S. at 681–82; *Adamian v. Jacobsen,* 523 F.2d 929, 934 (9th Cir. 1975); *McAdams,* 914 N.W.2d at 730; *id.* at 746 n.10 (Bradley, J., concurring).

the United States and that it continues to be an important aspect of American society. Understanding race is therefore essential to meaningful participation in the public affairs of the republic. Similarly, ideas promoting racial diversity, tolerance, sensitivity, and awareness form a legitimate part of the educational process. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2210 (2016) (noting the educational importance of "promot[ing] cross-racial understanding," "breaking down racial stereotypes," and "enabl[ing] students to better understand persons of different races" (internal quotation marks omitted)). That some of these ideas may be contested makes them all the more worthy of attention and discussion. *Bakke*, 438 U.S. at 312–13 (recognizing that the achievement of an "atmosphere of speculation, experiment and creation" and of "wide exposure" to diverse "ideas and mores" is "of paramount importance in the fulfillment of [a university's] mission" (internal quotation marks omitted)); *see also Sweezy*, 354 U.S. at 250 ("No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes.").

Critical race theory is a well-established methodology for studying the importance of race and racism in history, law, and various other facets of society. CRT, which first arose among legal scholars as early as the 1970s, provides an analytical framework for understanding the systemic nature of racial inequality, which is deeply embedded in social, economic, legal, and institutional structures. CRT also explores the potential to address these structural inequalities, including through legal reforms. Numerous disciplines, including law, history, sociology, literature, and philosophy, have incorporated the analytical framework that CRT employs as a valid and useful part of their curriculum. Ideas associated with critical race theory can therefore form a vital part of pedagogical approaches to the discussion of race. Indeed, even federal courts rely on the insights

offered by critical race theory. *E.g.*, *Boatner v. Berryhill*, No. 3:16-CV-243-CWR-RHW, 2018 U.S. Dist. LEXIS 82570, at *26 n.166 (S.D. Miss. May 11, 2018) (citing law review article on "Critical Race Theory, Feminism, and Disability"); *Locurto v. Giuliani*, 269 F. Supp. 2d 368, 387 n.10 (S.D.N.Y. 2003) (citing article included in a book entitled *Critical Race Theory*).

II. Academic freedom is essential to education; the censorship of ideas, including ideas associated with critical race theory, is antithetical to that freedom.

The values promoted by education, outlined in Part I, are not self-realizing; for their achievement they require adherence to the principle of academic freedom. Academic freedom means that individuals engaged in activities related to the academic endeavor must be free to engage in those activities without interference from the state or others. The Supreme Court has affirmed that "[o]ur 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." *Keyishian*, 385 U.S. at 603.

The Supreme Court has long recognized that academic freedom for individual faculty members is a right with constitutional stature, protecting academic activity from intrusion by the state. Since its initial recognition of academic freedom as a liberty tied to the First Amendment and other constitutional provisions in *Sweezy* and *Keyishian*, the Court has repeatedly identified the university as "a traditional sphere of free expression so fundamental to the functioning of society" that First Amendment concerns apply there with special force, *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

In *Sweezy*, for example, where the Court was called upon to assess the constitutionality of a state government's inquiry into the content of a scholar's lecture at a university, the Court ruled that the government's interference with the subject matter of the lecture "unquestionably was an

invasion of [the lecturer's] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." 354 U.S. at 250. In so holding, the Court cautioned that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Id.* The Court characterized the stakes of academic freedom in terms of national life and death: "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." *Id.* The Court also warned of the dangers of infringing upon "such highly sensitive areas as freedom of speech . . . and freedom of communication of ideas, particularly in the academic community." *Id.* at 245.

The concerns about academic freedom voiced in *Sweezy* were reaffirmed by the Court in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). In that case, the Court invalidated a state loyalty oath imposed on all public school teachers and public university professors in the state of New York, holding that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* at 603. Again, the Court conveyed the stakes in the starkest of terms, declaring that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

In keeping with the Supreme Court's foundational decisions in *Sweezy* and *Keyishian*, federal courts of appeals and state courts continue to recognize the importance of freedom in the classroom, as numerous recent decisions demonstrate. *E.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021) ("The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings. And a professor's in-class speech to his students is anything

but speech by an ordinary government employee."); *McAdams*, 914 N.W.2d at 730; *Demers v. Austin*, 746 F.3d 402, 412–13 (9th Cir. 2014) (recognizing that instructors should have freedom "in choosing what and how to teach" and that the First Amendment applies to "teaching and academic writing").

While always an imperative, academic freedom is most needed where controversial ideas are at issue, particularly when those ideas are opposed by those with the power to suppress them. *See Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 547 (3d Cir. 1980).[3] As the Supreme Court recently explained:

> Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection.

Mahanoy Area Sch. Dist., 141 S. Ct. at 2046. To censor controversial ideas would inhibit the cultivation of well-informed citizens and would actively promote the development of anti-democratic values and character traits. "For good or for ill, [the government] teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). By suppressing ideas it does not like rather than allowing them to be openly considered and debated, government censorship breeds an atmosphere of intolerance and closemindedness among the populace. It teaches the people to close their ears and minds to unfamiliar notions and

[3] The court in *Kunda* explained: "Only when students and faculty are free to examine all options, no matter how unpopular or unorthodox, without concern that their careers will be indelibly marred by daring to think along nonconformist pathways, can we hope to insure an atmosphere in which intellectual pioneers will develop. . . . From unconventional contemplation we have derived, among others, current theories of the solar system, gravitational force, relativity, and the origin of the species. Therefore, academic freedom, the wellspring of education, is entitled to maximum protection." 621 F.2d at 547.

to use threat, and ultimately force, to prevent others from expressing new, unfamiliar, and unpopular ideas.

Numerous AAUP policy statements express the importance of academic freedom to higher education. "Academic freedom is essential" to the university's purpose of promoting the "common good," which "depends upon the free search for truth and its free exposition." *1940 Statement* at 14; *accord Joint Statement on Rights and Freedom of Students,* AAUP POLICY DOCUMENTS AND REPORTS 381 (11th ed. 2015) ("Academic institutions exist for the transmission of knowledge, the pursuit of truth, the development of students, and the general well-being of society. Free inquiry and free expression are indispensable to the attainment of these goals."). As the *1915 Declaration* explains, academic freedom is necessary for universities to fulfill their role as a public trust; whenever restrictions are laid "upon the intellectual freedoms of its professors," a university becomes a mere "proprietary institution" whose "purpose is not to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators," but rather to promote the "particular opinion[s]" of those who control it. *1915 Declaration* at 5; *Wieman*, 344 U.S. at 196 (Frankfurter, J., concurring) ("Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry.").

Efforts to censor the teaching of ideas about race in American history and society, including critical race theory, contravene the principle of academic freedom, recognized by the Supreme Court's admonitions in *Sweezy* and *Keyishian*, and by AAUP policies that have been widely accepted. The clear purpose and even clearer effect of such efforts is to enact a state-approved ideology regarding race, history, and social life—to force the nation's students and teachers into the "strait jacket" that *Sweezy* condemned and to smother diverse points of view and critical inquiry

with the "pall of orthodoxy" that *Keyishian* warned against. Censoring discussions about race and ideas associated with critical race theory will severely inhibit the ability of universities to fulfill their mission of advancing knowledge and truth and of preparing students for a world in which issues concerning race are immensely important.

III. The freedom to teach is an essential component of academic freedom and is incompatible with attempts by politicians to indoctrinate students with a government-approved ideology concerning race.

Academic freedom includes the right of the teacher to teach and the right of the student to learn, free from outside interference, especially from the state. *1915 Declaration*, at 4; *Joint Statement on Rights and Freedoms of Students*, at 381 ("Freedom to teach and freedom to learn are inseparable facets of academic freedom."); *Sweezy*, 354 U.S. at 250 ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding[.]"). Thus, as the AAUP and the courts have agreed, a special concern of academic freedom is the protection of freedom *in the classroom*, in particular, the right of the teacher to decide *what* and *how* to teach:

- "The freedom to teach includes the right of the faculty to select the materials, determine the approach to the subject, make the assignments, and assess student academic performance in teaching activities for which faculty members are individually responsible, without having their decisions subject to the veto of a department chair, dean, or other administrative officer." *The Freedom to Teach*, AAUP POLICY DOCUMENTS AND REPORTS 28 (11th ed. 2015) (hereinafter, *Freedom to Teach*).
- The Constitution "does not tolerate laws that cast a pall of orthodoxy over *the classroom*," and "[*t*]*he classroom* is peculiarly the 'marketplace of ideas.'" *Keyishian*, 385 U.S. at 603 (emphasis added).

- The "essential freedoms" of a university include the freedom to determine "what may be taught" and "how it shall be taught." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (internal quotation marks and citation omitted); *Meriwether*, 992 F.3d at 507 (explaining why "robust speech protection" is necessary "in the college classroom"); *Bhattacharya v. SUNY Rockland Cmty. College*, 719 F. App'x 26, 27–28, (2d Cir. 2017) (unpublished decision) ("We have recognized an academic freedom claim where a restriction on speech implicates the content of a teacher's lessons or restricts a school's ability to determine its curriculum."); *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (holding that "classroom discussion is protected activity" in a case involving a teacher's use of a "controversial" technique for teaching American history which "evoked strong student feelings on racial issues").

The freedom to teach demands that teachers be able to develop curricula and pedagogy that draw from multiple approaches to their subjects and disciplines, including history, law, and sociology. Critical race theory is one of the legitimate approaches to the study of the historical and current role of race and racism in the United States and of the ways that American society can move toward racial equality. Drawing from a broad scope of pedagogical approaches enables teachers to fulfill the public mission of education and to fully and honestly educate students about historical and current issues, including those related to race. To prohibit teachers from presenting this material and employing these methods when they deem it appropriate would undermine the educational process and allow politicians to dictate how Americans should understand race and history. Recently, the AAUP and other organizations explained in detail why efforts to stifle education about racism and American history are so harmful:

> [T]he ideal of informed citizenship necessitates an educated public. Educators must provide an accurate view of the past in order to better prepare students for

> community participation and robust civic engagement. Suppressing or watering down discussion of "divisive concepts" in educational institutions deprives students of opportunities to discuss and foster solutions to social division and injustice. Legislation cannot erase "concepts" or history; it can, however, diminish educators' ability to help students address facts in an honest and open environment capable of nourishing intellectual exploration. Educators owe students a clear-eyed, nuanced, and frank delivery of history so that they can learn, grow, and confront the issues of the day, not hew to some state-ordered ideology.

Joint Statement on Efforts to Restrict Education about Racism and American History (June 16, 2021), available at https://www.aaup.org/news/joint-statement-efforts-restrict-education-about-racism.

The freedom to teach derives, in part, from the fact that no one is better situated than teachers are to determine what to teach and how to teach it. Teachers possess subject-matter expertise, gained over many years of study and scholarly work, and are thus the most competent in making judgments regarding the content of the classes they teach. *E.g., On the Relationship of Faculty Governance to Academic Freedom,* AAUP POLICY DOCUMENTS AND REPORTS 124 (11th ed. 2015) (hereinafter, "*Faculty Governance*").[4] This is especially true where potentially controversial material is at issue. Because they are the most well-versed in a given discipline, teachers can best decide what to teach based on what is educationally appropriate. *Ensuring Academic Freedom in Politically Controversial Academic Personnel Decisions*, AAUP POLICY DOCUMENTS AND REPORTS 33 (11th ed. 2015) (hereinafter, "*Ensuring Academic Freedom*").[5]

[4] "[S]cholars in a discipline are acquainted with the discipline from within; their views on what students should learn in it . . . are therefore more likely to produce better teaching and research in the discipline than are the views of [others.]" *Faculty Governance*, at 124. In short, teachers are professionally trained to develop pedagogically sound curricula, as judged by established educational and disciplinary standards.

[5] "The selection and interpretation of course material should be assessed solely on the basis of educationally appropriate criteria," while "the exclusion of controversial material on other than professional grounds stifles academic freedom and the opportunity for student learning." *Ensuring Academic Freedom,* at 33. "[A]cademic professionals are best prepared to distinguish professional

Teachers also possess extensive experience in teaching their subject matter. That practical experience enables them to know better than anyone what material it is best to teach and what pedagogical techniques it is best to use so as to attain the best educational outcomes for their students. *Faculty Governance*, at 124 (recognizing that faculty "must be free to bring to bear on the issues at hand not merely their disciplinary competencies, but also their first-hand understanding of what constitutes good teaching and research generally, and of the climate in which those endeavors can best be conducted"); *see also id.* at 123 ("[S]ince the faculty has primary responsibility for the teaching and research done in the institution, the faculty's voice on matters having to do with teaching and research should be given the greatest weight.").

No other actors—certainly not politicians—have the expertise and experience necessary to make important decisions about teaching or are committed to the pursuit of the truth above all else, as teachers are. *Statement on Professional Ethics*, AAUP POLICY DOCUMENTS AND REPORTS 145 (11th ed. 2015) (identifying as professors' "primary responsibility to their subject" the duty "to seek and to state the truth as they see it," to "practice intellectual honesty," and "to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge"). That these responsibilities are properly allocated to teachers becomes all the more obvious when one realizes that government intrusion into particular teaching decisions would put politicians and other state functionaries, who do not have the expertise, experience, or professional commitments that teachers possess, in charge of the classroom. Even the Supreme Court, recognizing that academic decision-making "requires an expert evaluation of cumulative information," has declined to intrude upon "the historic judgment of educators" in academic matters. *Bd. of Curators v.*

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from political or other extraneous concerns" in the creation and implementation of course objectives and materials. *Id.*

Horowitz, 435 U.S. 78, 90 (1978). There is no more fundamental academic matter than the selection of what is to be taught in the classroom and how it is to be taught.

When the government censors what can be taught in the classroom, legitimate education ends and indoctrination begins. Prohibiting teachers from presenting certain perspectives on the role of race in society—even when those perspectives are recognized as valid and legitimate approaches within the discipline, such as is the case with critical race theory—deprives students of the ability to learn about alternative interpretations of a given subject and thereby prevents them from developing and expressing any understanding that does not align with the state's preferred ideology. What is more, prohibitions on the expression of ideas create a precedent that has no obvious limiting principle. If the state is permitted to proscribe certain ideas from being presented in the classroom today, the state may prohibit the teaching of still other ideas tomorrow. "This kind of evil grows by what it is allowed to feed on." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring). "[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Id.* at 264 (internal quotation marks omitted) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

Government censorship of ideas also creates an educational environment permeated by fear, intimidation, and ignorance. A teacher's "freedom of utterance" is of paramount importance, for teachers cannot be successful without the respect and confidence of their students. *1915 Declaration*, at 7. "It is clear, however, that this confidence will be impaired if there is suspicion on the part of the student that the teacher's" expression of ideas is not "full[] or frank[]," or that "college and university teachers in general are a repressed and intimidated class who dare not speak with . . . candor and courage." *Id.* "There must be in the mind of the teacher no mental reservation," otherwise "the virtue of the instruction as an educative force is incalculably

diminished." *Id.* "[A]ny restriction upon the freedom of the instructor is bound to react injuriously upon the efficiency and the morale of the institution, and therefore ultimately upon the interests of the community" which the university serves. *Id.* at 8; *accord Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring) (explaining that "governmental intervention in the intellectual life of a university" must not be permitted, for any such intervention "inevitably tends to check the ardor and fearlessness of scholars"). Thus, while Representative White's Request alludes to the concept of a "hostile learning environment," it is in fact his proposal for a regime of classroom censorship that would create a classroom learning environment inimical to learning.

In sum, ideas about race, including ideas related to critical race theory, are important to education, and the freedom to teach demands that teachers be allowed to discuss these ideas in class with their students if they deem it appropriate to do so. Neither the Equal Protection Clause, nor Title VI, nor the Texas Constitution prohibits teachers from making legitimate educational decisions to teach ideas about race. What the Constitution condemns are efforts to limit that freedom.

CONCLUSION

Representative White's Request seeks to use the Constitution itself to censor ideas that promote racial awareness and sensitivity, and would do so via a provision—the Equal Protection Clause of the Fourteenth Amendment—that was specifically written to overturn systems of legalized racial hierarchy. The teaching of ideas—including ideas relating to the role of race in American history and contemporary society—does not violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, or any provision of the Texas Constitution. Rather, it is the suppression of ideas, speech, and thought in the classroom that is repugnant to the Constitution and antithetical to American traditions of liberty.

Dated: September 3, 2021

Respectfully submitted,

/s/ *Edward D. Swidriski III*
Edward D. Swidriski III
Texas Bar No. 24083929

Counsel for AAUP:
Risa L. Lieberwitz
General Counsel
American Association of
University Professors
Professor of Labor and
Employment Law
School of Industrial and
Labor Relations
Cornell University
361 Ives Hall
Ithaca, NY 14853
(607) 255-3289

Counsel for AAUP:
Aaron M. Nisenson
Senior Counsel
Nancy A. Long
Associate Counsel
Edward D. Swidriski III*
Assistant Counsel
American Association of
University Professors
1133 19th Street N.W., Suite 200
Washington, D.C. 20036
(202) 737-5900
legal.dept@aaup.org