No. 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF SPEECH FIRST AND SOUTHEASTERN LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Speech First is a membership association of students, parents, faculty, alumni, and concerned citizens. Launched in 2018, Speech First is committed to restoring the freedom of speech on college campuses through advocacy, education, and litigation. For example, Speech First has challenged speech-chilling policies at the University of Michigan, *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); the University of Texas, *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020); and the University of Illinois, *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020).

Southeastern Legal Foundation (SLF), founded in 1976, is a national, nonprofit legal organization that advocates to protect individual rights and the framework set forth to protect such rights in the Constitution, including the freedom of speech. This aspect of its advocacy is reflected in the regular representation of those challenging government overreach. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014), and *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court regarding freedom of speech and equal protection. *See*, *e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, Cert. Pet., No. 20-1199 (Nov. 11, 2021), and

1. All parties were timely notified of and have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amici or their members or counsel financed the brief's preparation or submission.

Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016) (*Fisher II*). Through its 1A Project, SLF equips college students with resources to share their ideas and defends students' free speech rights.

Amici have a vital interest in the outcome of this case. Whereas the "diversity" rationale was proposed in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) – and embraced by a majority of the Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003) – as a vehicle for *promoting* the "robust exchange of ideas" on college campuses, reality has disproved the theory: Freedom of speech has come under assault in recent decades. The Court should vindicate the cause of free speech on campus by abandoning the theory that racial discrimination is worth tolerating in higher education because it supposedly advances First Amendment goals.

SUMMARY OF ARGUMENT

In *Grutter*, a majority of the Court embraced, for the first time, the assumption of Justice Powell's opinion in *Bakke* that a university's racial preference program served a compelling interest because it would promote the First Amendment. Justice Powell accepted the argument that when a college enacts a racial preference program to achieve "diversity" in the name of its First Amendment "academic freedom" right, it "must be viewed as seeking to achieve a goal that is paramount importance in the fulfillment of its mission," since it is "select[ing] those students who will contribute the most to the 'robust exchange of ideas.'" *Bakke*, 438 U.S. at 313.

The theory that racial discrimination to achieve "diversity" actually promotes First Amendment values was wrong in 1978, and it remains incompatible with First Amendment principles today. Among other things:

1. The goals supposedly promoted by the diversity rationale – e.g., promoting "cross-racial understanding," helping to "break down racial stereotypes," and enabling students "to better understand persons of different races," *Grutter*, 539 U.S. at 330 – would violate the void-for-vagueness doctrine if, instead of being offered by universities to justify their admissions programs, they were affirmatively imposed by the government as conditions that universities were *required* to achieve. A university could never be confident that it can demonstrate compliance with such vague requirements. The same is true when it comes to litigation over preference programs: there is no reliable way to measure whether these goals are being met.

2. The *Grutter* majority wasn't bothered by these practical litigation considerations. Rather, it said courts should *defer* to university administrators who claim their discriminatory policies help achieve educational benefits. This is unthinkable in mainstream constitutional law. The Court would never defer to a university that claimed, for example, it needed to *compel* students to say things they didn't believe in order to promote the university's educational mission, and it should not defer here.

3. The diversity rationale violates the core First Amendment principle of neutrality. Decisions before and after *Bakke* demonstrate – correctly – that schools cannot

rely on First Amendment freedoms when it comes to *disadvantaging* minority students. Moreover, universities who exercise this supposed First Amendment "academic freedom" to select students by discriminating must follow the "plus-factor" and "critical mass" script. This is no recognizable First Amendment "freedom."

This case is an excellent vehicle for overruling *Grutter*. The district court applied *Grutter* and made extensive findings on its way to concluding that discriminating in the name of pursuing the First Amendment-based "educational benefits" of diversity was a compelling interest. The district court demonstrated, however, that the incoherent *Grutter* test invites courts to indulge a university's claims that these amorphous educational benefits will never be fully attained, so preferences will be necessary forever.

Amici are uniquely situated to confirm to the Court that, in fact, more than 40 years of racial preference programs have not ushered in an era of greater exchange of ideas – about race or any other topic – on college campuses. To the contrary, campus speech has come under assault in recent decades. Studies show that students routinely censor themselves on sensitive topics, lest they be accused of violating a speech code or being reported to a roving "bias response team." The campus climate is affirmatively hostile to controversial ideas that could be deemed "offensive" – the exact opposite of the diversity rationale's premise.

It is long past time to acknowledge that *Grutter*'s "diversity" rationale does not vindicate the First Amendment.

ARGUMENT

I. *Grutter* Should Be Overruled Because Its Diversity Rationale Does Not Vindicate First Amendment Principles As Presumed – Rather, It Violates Them.

Grutter's fundamental errors may be traced to *Bakke,* which marked a sea change in this Court's Equal Protection analysis. Justice Powell's controlling opinion in *Bakke* acknowledged that the Court had "never approved preferential [racial] classifications in the absence of proven constitutional or statutory violations." 438 U.S. at 302. But the University of California at Davis had never discriminated. *Id.* at 305-09. So another solution was needed to allow colleges to continue using preference programs.

A. Justice Powell Adopted Harvard's Argument That A Diverse Student Body Promoted A "Robust Exchange Of Ideas."

Justice Powell found the solution by adopting a rationale that Harvard University offered in its amicus briefs in *Bakke* and its predecessor case, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).[2] Oppenheimer, *Archibald Cox*

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[2] In *Bakke*, Harvard joined Columbia University, Stanford University, and the University of Pennsylvania as amici in support of the University of California, but we refer to it as the "Harvard brief" here. Br. of Columbia Univ., et al. as Amici Curiae, *Regents of Univ. of Cal. v. Bakke*, No. 76-811 (June 7, 1977).

and the Diversity Rationale for Affirmative Action, 25 Va. J. Soc. Pol'y & Law 157, 168-73 (2018) (chronicling Justice Powell's reliance on Harvard's briefs in the two cases).

Harvard's amicus brief cited Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), for a claim to sweeping First Amendment protection of "academic freedom": "The guiding principle of freedom under which American colleges and universities have grown to greatness is that these institutions are expected to assume and exercise responsibility for the shaping of academic policy without extramural intervention. A subordinate corollary principle – critical for this case – is that deciding who shall be selected for admission to degree candidacy is an integral aspect of academic policymaking." Harvard Am. Br. in *Bakke*, 24-25.

Justice Powell adopted this argument almost verbatim, *see* 438 U.S. at 311–12, including Harvard's reliance on this passage from the *Sweezy* concurrence: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 312 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)); *see* Harvard Am. Br. in *Bakke* at 25.

Justice Powell emphasized the connection between academic freedom and the First Amendment values of exchanging ideas among different speakers, ultimately en-

hancing the search for truth: "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 . . . . The 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.'" 438 U.S. at 312 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (ellipsis and alteration in *Bakke*)); *see also* Harvard Am. Br. in *Bakke* 12-13 ("A primary value of liberal education should be exposure to new and provocative points of view, at a time in the student's life when he or she has recently left home and is eager for new intellectual experiences. Minority students add such points of view, both in the classroom and in the larger university community.").

By the time he concluded that the First Amendment academic freedom interest was compelling, Justice Powell was convinced that the University of California was "arguing that [it] must be accorded the right to select those students *who will contribute the most* to the 'robust exchange of ideas.'" 438 U.S. at 313 (emphasis added). No other Justice signed on to Justice Powell's theory that promoting a university's First Amendment interests through racial preferences is a compelling interest. The

remaining opinions didn't even bother to examine the theory.[3]

B. Five Justices In *Grutter* Accepted Justice Powell's First Amendment Academic Freedom Rationale.

When the validity of racial preferences in higher education returned to the Court in *Grutter*, the five-Member majority adopted Justice Powell's First Amendment rationale:

> In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, *supra*, at 312. From this premise, Justice Powell reasoned that by claiming "the right to select those students

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[3] The four Justices favoring the University of California concluded that racial preferences were permitted "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." 438 U.S. at 326 n.1 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Two prominent scholars presciently observed that perhaps "[t]he Brennan Four's hesitation about diversity, insofar as it existed, may have stemmed from a worry that the theory could be used to exclude 'overrepresented' but historically victimized minorities (caps on Jews or Asians, for example) – and to make clear that the Court's standard could be applied differently in contexts where diversity served to limit the admission of such minorities." Amar & Katyal, Bakke*'s Fate*, 43 UCLA L. Rev. 1745, 1754 (1996).

> who will contribute the most to the 'robust exchange of ideas,'" a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S. at 313 (quoting *Keyishian*, [385 U.S. at] 603).

539 U.S. at 329.

Grutter's full embrace of the diversity rationale doubtless came as a surprise to supporters of racial preferences, who recognized the diversity rationale for what it was. Indeed, University of Michigan's President Lee Bollinger, the defendant in *Grutter*, stated that one of the "problems" facing the university in *Grutter* was that Justice Powell had "specifically precluded any justification of using race and ethnicity as factors in admissions as a 'remedy' for past societal discrimination," and instead relied on the "fragile reed" of the diversity rationale. Bollinger, *A Comment on* Grutter *and* Gratz v. Bollinger, 103 Colum. L. Rev. 1589, 1590-91 (2003).[4]

Yet the *Grutter* majority emphasized the University of Michigan's assurances about the academic benefits of its policy, which dutifully followed Justice Powell's cues. For instance, with a "critical mass" of minority students admitted through racial preferences, the "admissions policy promotes 'cross-racial understanding,' helps to break

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[4] *Cf.* Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 34 (2002) (noting in the runup to *Grutter* that "the diversity rationale should be seen as little more than a rhetorical Hail Mary pass, an argument made in desperation when all other arguments for preferences have failed"); *see id.* at 34–46 (discussing the diversity rationale).

down racial stereotypes, and 'enables [students] to better understand persons of different races.' These benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'" *Id.* at 330 (citations omitted).

C. The Diversity Rationale Conflicts With Basic First Amendment Doctrine In Multiple Respects.

Neither Justice Powell nor the *Grutter* majority addressed the several ways in which the diversity rationale violates – rather than vindicates – fundamental First Amendment principles.

1. Imagine that the First Amendment interests allegedly served by the diversity rationale – e.g., promoting "cross-racial understanding," helping to "break down racial stereotypes," and enabling students "to better understand persons of different races," *Grutter*, 539 U.S. at 330 – were affirmatively imposed by the government as *requirements* that a university must achieve. Any such requirements would surely violate the void-for-vagueness doctrine because they are so inherently subjective and unmeasurable.[5] How would a university ever be able to show it was actually meeting these requirements?

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[5] "The void-for-vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

Remarkably, Justice Powell himself appeared to acknowledge that it's not really possible to determine whether the diversity rationale actually delivers the First Amendment benefits underlying the theory. As support for the assertion that "[t]he atmosphere of 'speculation, experiment and creation' . . . is widely believed to be promoted by a diverse student body," *Bakke*, 438 U.S. at 312, Justice Powell curiously cited an article by Princeton University's President William Bowen, who wrote that "a great deal of learning occurs informally[,] . . . through interactions among students [with various differences] and who are able, directly or indirectly, to learn from their differences . . . ." *Id.* at 312 n.48 (quoting Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)). But this endorsement included a glaring qualifier: "In the nature of things, *it is hard to know how, and when,* ***and even if,*** *this informal 'learning through diversity' actually occurs*. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth." *Id.* (emphasis added).

This recognition about the inherent immeasurability of the diversity rationale's goals, however, was abandoned in *Grutter*, and the mistake was repeated in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016) (*Fisher II*). *Fisher II* confused matters even further by considering whether the university's "decision to pursue these

goals" was *itself* concrete and "measurable," when the correct judicial "measurement" is whether the preference program allows the university to *actually achieve* the asserted goals. *Id.* at 2211 ("the University articulated concrete and precise goals" and "the University explains that it strives to provide an 'academic environment' that offers a 'robust exchange of ideas [and] exposure to differing cultures'").

Justice Alito's dissent in *Fisher II* identified this inherent problem:

> These are laudable goals, but they are not concrete or precise, and they offer no limiting principle for the use of racial preferences. For instance, how will a court ever be able to determine whether stereotypes have been adequately destroyed? Or whether cross-racial understanding has been adequately achieved? If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals, . . . then the narrow tailoring inquiry is meaningless.

136 S. Ct. at 2223 (Alito, J., dissenting).

2. *Grutter* introduced another First Amendment doctrinal casualty by concluding that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*." 539 U.S. at 328. In light of the necessarily anecdotal and subjective nature of the benefits allegedly

flowing from racial preferences, not to mention the reality of speech on campus in recent decades (see Section II below), these assertions could *only* be accepted as "facts" in litigation by deferring to the university's claims.

Setting aside that the Court has long refused to defer to government arguments that it needs to discriminate on the basis of race, *cf. id.* at 362-63 (Thomas, J., concurring in part and dissenting in part) (discussing "unprecedented deference" that is "antithetical to strict scrutiny"), this sort of deference is unthinkable in any other First Amendment context. Suppose, for example, that a university claimed it needed to *compel* students to say things they didn't believe in class in order to promote the university's educational mission. Would the Court overlook that liberty incursion in the name of deferring to the assertion of a superior academic-freedom right? Certainly not, and no such deference should continue to prop up racial preferences in the name of the First Amendment.

3. One of the basic premises of First Amendment doctrine is that government regulation affecting protected activity must be neutral. This concept has long buttressed, for instance, the Court's decisions in Free Exercise cases, *see, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972) (recognizing that the clause imports a "constitutional requirement of governmental neutrality"), Establishment Clause cases, *see, e.g.*, *Gillette v. United States*, 401 U.S. 437, 449-50 (1971) (the "central purpose" of that clause is "ensuring governmental neutrality in matters of religion"), and free speech cases, *see, e.g.*, *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95-99 (1972) (the

Constitution prohibits content-based regulations of a public forum; "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard").

But the diversity rationale is obviously not neutral when it comes to race. Decisions before and after *Bakke* demonstrate that schools cannot rely on First Amendment freedoms when it comes to *disadvantaging* minority students. For example, the Court has rightly rejected claims that a private high school had a freedom-of-association right to exclude minorities, *see*, *e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976) (private high school subject to state anti-discrimination law), and that a private religious university could maintain its tax-exempt status based on an asserted Free Exercise Clause right to exclude certain black applicants and maintain policies against inter-racial dating. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) ("the Government has a fundamental, overriding interest in eradicating racial discrimination in education"). Indeed, the academic freedom "justification would be considered ludicrous if advanced as a basis for preferring members of the white majority." McCormack, *Race & Politics in the Supreme Court:* Bakke *to Basics*, 1979 Utah L. Rev. 491, 530 (1979).

Moreover, universities hoping to exercise the supposed "freedom" served by the diversity rationale must follow this Court's prescribed "plus factor" script for how racial preferences may be implemented. "[I]t is a very strange sort of freedom that wins first amendment protection yet must be exercised precisely in a manner prescribed by the Court, as Justice Powell attempted to do in

prescribing the Harvard College model for admissions." McCormack, 1979 Utah L. Rev. at 530; *see also* Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. Pa. L. Rev. 907, 924 (1983) (noting that Justice Powell's rationale arose from the "principle that academic freedom, protected by the first amendment, encompasses selection of students," yet the opinion "advances an interest in diversity of students as *the* acceptable 'compelling' academic interest required by strict scrutiny standards") (emphasis in original).

In short, despite being offered as a vindicator of First Amendment freedoms, the diversity rationale is utterly incompatible with First Amendment principles.

D. The District Court Here Followed *Grutter*'s Script, Found That Minority Students Felt Pressure To "Represent" Their Race In Class, And Invited Discrimination To Continue Until The School Someday Says It's No Longer Needed, All Of Which Make This Case An Ideal Vehicle.

This case is an excellent vehicle for overruling *Grutter* because the district court and the parties developed an extensive record on whether the diversity rational provided UNC with a compelling interest to discriminate.

The district court spent many pages reciting the *Grutter* and *Fisher II* formula. Pet. App. 8-22, 158-65. It found that UNC "has offered a principled, reasoned explanation" for its decision to pursue the "educational benefits of diversity," based mainly on a collection of reports from a diversity task force and administrators that recount and

paraphrase the *Grutter* buzzwords. *Id.* at 10-14. The court stressed that, under *Fisher II*, this decision is entitled to judicial deference. *Id.* at 164.

The district court concluded that the educational benefits of diversity are measurable. *Id.* at 15-17. And it likewise found that UNC is, in fact, experiencing the benefits it seeks, based largely on the testimony of students and alumnae. *Id.* at 17-18.

Yet the court concluded that, despite progress, UNC has not yet fully achieved the educational benefits of diversity. *Id.* at 19-22. In particular, minority students at UNC feel "unfair pressure to represent their race or ethnicity." *Id.* at 20. Large percentages of minority students agreed that they "feel pressured in the classroom to represent the views of all people from my racial and ethnic background." *Id.* at 20-21. This evidence underscores the hollowness of *Grutter*'s claim that minority students should not be expected to "express some characteristic minority viewpoint on any issue." 539 U.S. at 333. But the seeds of this stereotyping were sown in *Bakke*'s tokenistic prediction that, in fact, minority students should be expected to "contribute *the most* to the 'robust exchange of ideas.'" *Bakke*, 438 U.S. at 313 (Powell, J.) (emphasis added).

The district court's cure for the problem? Even more racial discrimination. "Student-intervenors credibly testified that there were far fewer students of color on campus than they expected and that they experienced low levels of representation." *Id.* at 20. "This underrepresentation

causes minority students to experience loneliness and tokenism." *Id.* "[T]hese experiences are in part due to a lack of 'meaningful demographic representation' at the University." *Id.* at 21; *see also id.* (noting that intervenors' expert testified that UNC's student population "reflect[s] much less diversity than North Carolina as a whole").

As the district court stressed, this conclusion flows directly from *Grutter* and *Fisher II*. *Id.* at 162 (noting that the university in *Grutter* sought "meaningful representation" of minority students); *id.* at 163 (citing *Fisher II*'s statement that the university "cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits will be obtained," 136 S. Ct. at 2210).

This case thus illustrates perfectly the dilemma posed by the dissent in *Fisher II*: So long as courts must defer to universities' claims that they haven't fully realized the "educational benefits" they desire from racial preferences in admissions, the racial tinkering will never end. *Cf. Fisher II*, 136 S. Ct. at 2223 (Alito, J., dissenting). But perpetual racial engineering – rather than advancing the "robust exchange of ideas" – is and always has been the real project, notwithstanding *Grutter*'s forlorn "expect[ation]" that discrimination wouldn't be necessary 25 years after the opinion was issued. 539 U.S. at 343.

* * *

Bakke's compelling interest analysis was fatally flawed, and *Grutter* only compounded its errors. *Cf. Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2479 (2018) ("An important factor in determining whether a precedent

should be overruled is the quality of its reasoning.") (citing multiple cases). The Court should overrule *Grutter* and confirm that the First Amendment provides no basis for racial discrimination by universities.

II. In The Real World, Racial Preferences Have At Least Coincided With – If Not Contributed To – A Drastic Reduction In Free Speech On College Campuses.

More than 40 years of racial preferences have not led to the expansion of speech in universities that Justice Powell envisioned. To the contrary, the opposite has occurred. In *Janus*, the Court stressed that "factual and legal" developments since *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977), had "eroded the decision's underpinnings and left it an outlier among [the Court's] First Amendment cases." *Janus*, 138 S. Ct. at 2482. The same goes for *Bakke*: its "unsupported empirical assumption" that racial preferences would promote the "robust exchange of ideas" – indeed, that it would stimulate so much speech that it provided a "compelling interest" to discriminate – has turned out to be quite wrong. *Cf. Janus*, 138 S. Ct. at 2483 (noting *Abood*'s "unsupported empirical assumption").

Freedom of speech on college campuses has been systematically declining in the years since *Bakke*. The same college administrations fighting for racial preferences allow suppression of student speech; in many cases their policies actively *promote* that suppression. Amicus

Speech First exists to fight this abhorrent trend, and amicus SLF has observed this firsthand through its 1A Project.

A. Far From Promoting A Robust Exchange Of Ideas, Universities Cultivate Campus Environments That Pressure Students To Conform To Governing Orthodoxy.

The *Grutter* majority wrote that universities have a "special niche in our constitutional tradition" in light of "the expansive freedoms of speech and thought associated with the university environment." 539 U.S. at 329. The reality is that America's college students have not been allowed to discuss race or other sensitive subjects candidly for many years. The overriding goal of the decades-long project to suppress speech is conformity of thought. While students may come from diverse backgrounds and have diverse colors of skin, diversity of thought is considered too dangerous to be allowed. *See*, *e.g.*, Sacks & Thiel, The Diversity Myth, 163-91 (1995).

A 2019 Knight Foundation study found that 68% of college students "say their campus climate precludes students from expressing their true opinions because their classmates might find them offensive." *See* Knight Foundation, *College Students Support the First Amendment, but Some Favor Diversity and Inclusion Over Protecting the Extremes of Free Speech* (May 13, 2019), kng.ht/31Qsz8w. "Each year, college students, professors, and lecturers gather in classrooms across America . . . to examine the most pressing issues facing society, such as the state of race relations in America or the freedoms of

religion and association. Yet free and open discussion of these issues is not always possible. Administrators and student governments routinely punish dissenting students . . . ." College Pulse, et al., *2020 College Free Speech Rankings: What's the Climate for Free Speech on America's College Campuses?* 1, https://bit.ly/3m0H5ps.

A 2021 survey of more than 37,000 undergraduate students at 159 undergraduate schools revealed a number of "ominous" findings. College Pulse, et al., *2021 College Free Speech Rankings: What's the Climate for Free Speech on America's College Campuses?* 1, 16, https://reports.collegepulse.com/college-free-speech-rankings-2021 ("College Pulse Rankings"). In particular:

- More than 80% of students "reported some amount of self-censorship" such that "they could not express their opinion on campus because of how students, a professor, or the administration would respond." College Pulse Rankings 10. More than 20% self-censored "very often" or "fairly often." *Id.*

- When it comes to students' tactics for responding to campus speakers with whom they disagree, a shocking 23% said that "using violence" was acceptable to some degree. *Id.* 21. "Shouting down" the offending speaker was considered acceptable to some degree by a remarkable 66% of respondents. *Id.*

- "Racial inequality" led all other topics as the most difficult subject to discuss on campus, with more than 50% of respondents reporting it was difficult to "to have an open and honest conversation" in this environment. *Id.* 12.

Revealing the troubling extent to which students have internalized the connection between race and limits on free speech, another recent survey reveals that many students view "diversity" and free speech as *conflicting* goals: "Twenty-seven percent believe diversity and inclusion 'frequently' come into conflict with free speech rights. Forty-nine percent say such conflict happens 'occasionally.'" Knight Foundation, *The First Amendment on Campus 2020 Report: College Students' Views of Free Expression* 16, https://kng.ht/3slaigj. Reality does not fit the theory underlying *Bakke* and *Grutter*.

B. Many University Administrators Enforce Conformity Of Thought Through Formal Policies.

University administrators enforce the governing orthodoxy through various formal speech restrictions:

Speech Codes. "Speech codes – university regulations prohibiting expression that would be constitutionally protected in society at large – gained popularity with college administrators in the 1980s and 1990s." Foundation for Individual Rights in Education (FIRE), *Spotlight on Speech Codes 2019* 10, bit.ly/2GAyfKJ. By adopting vague bans on "harassment" that cover protected speech, universities shield students from the robust exchange of ideas on the ostensible premise that some ideas make them too uncomfortable to hear. *See*, *e.g.*, Sacks & Thiel at 167 (noting that the Stanford speech code's "real purpose was not to protect students from racial fights, but rather to seal the door, once and for all, on any disruptive voices").

While many speech codes have been struck down as unlawful, *e.g.*, *Doe v. Univ. of Michigan*, 721 F. Supp. 852

(E.D. Mich. 1989); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 870–73 (N.D. Tex. 2004), universities persist.

Speech First recently sued the University of Texas at Austin over the university's speech codes. *See Speech First, Inc., v. Fenves*, 979 F.3d 319 (5th Cir. 2020). The university maintained multiple speech codes, including: (1) it broadly banned "verbal harassment" which extended to "offensive" speech, including "insults, epithets, ridicule, [and] personal attacks" "based on the victim's … personal characteristics, or group membership, including … ideology, political views, or political affiliation"; and (2) it maintained a residence hall manual that proscribed yet another version of "harassment," which it defined as including "racism, sexism, heterosexism, cissexism, ageism, ableism, and any other force that seeks to suppress another individual or group of individuals." 979 F.3d at 323, 324. These policies all encompassed protected speech and provided no clear guidance about how to comply, yet the University threatened to investigate and discipline students who violated them.

The university's policies chilled the speech of Speech First's student members, who "plan[ned] to engage the University community in debate encompassing a broad array of controversial political topics." *Id.* at 331-32. The Fifth Circuit concluded that, while the University "purport[ed] to invoke free speech, [its rules] qualify protected speech and fail to cabin the terms 'harassment,' 'intimidation,' 'rude[eness],' 'incivility,' and 'bias.' It is likely that

the University's policies arguably proscribe speech of the sort that Speech First's members intend to make." *Id.* at 333, 334.

Bias Response Teams. In more recent years, colleges and universities across the country have suppressed speech through the use of "bias response teams" charged with documenting, investigating, and punishing students who engage in "bias." Speech First has been on the forefront of challenging these programs through litigation, bringing six lawsuits in the last three years against the bias response teams used by the University of Michigan, University of Texas at Austin, University of Illinois at Urbana-Champaign, Iowa State University, University of Central Florida, and Virginia Tech.

Bias response teams typically claim that their goal is to foster "'a safe and inclusive environment' by providing 'advocacy and support to anyone on campus who has experienced, or been a witness of, an incident of bias or discrimination.'" Jeffrey Snyder & Amna Khalid, *The Rise of "Bias Response Teams" on Campus*, The New Republic (Mar. 30, 2016), bit.ly/1SaAiDB. But in reality, as one study found, these teams frequently lead to "a surveillance state on campus where students and faculty must guard their every utterance for fear of being reported to and investigated by the administration." FIRE, *Bias Response Team Report 2017*28, bit.ly/2UPmibW (FIRE Report). Speech on issues of public policy, social issues, and politics dealing with, among other things, race, gender, immigration, and sexual orientation are often deemed "biased" and then reported to the bias response team. *Id.* at 15-19.

Universities cast a wide net when defining "bias," with most borrowing categories like race, sex, sexual orientation, etc., from discrimination statutes. FIRE Report at 4. "Bias" is almost always in the eyes of the beholder. As one university's bias response team put it, "the most important indication of bias is your own feelings." Grace Kay, *University Sued Over Constitutionality of Bias Response Team*, Michigan Daily (May 8, 2018), bit.ly/2WCFE5i. *See also Fenves*, 979 F.3d at 325-26, 338.

Speech First sued the University of Michigan over its bias response team in 2016. *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019). The University's bias response team encouraged offended students to submit complaints of "bias" and "bias incidents" against their fellow students. *Id.* at 762. The bias response team would collect these complaints, investigate the "bias incidents," summon investigated students for meetings to discuss the complaints, and refer the alleged offenders to the University for punishment. *Id.* at 762, 765. The Sixth Circuit recognized that the bias response team's authority "objectively chill[s] speech." *Id.* at 764. After the Sixth Circuit decision, the University of Michigan entered into a settlement agreement with Speech First, abolishing its bias response team.

Free Speech Zones. Some colleges impose severe restrictions on speech by corralling certain students into "free speech zones" – designated areas for expressive activity. *See* Foundation for Individual Rights in Education (FIRE), *Free Speech Zones*, https://www.thefire.org/issues/free-speech-zones/. In conjunction with these policies, campuses often limit expressive activity to certain

times of the day and may require students to obtain a permit before exercising their First Amendment rights. *See id.*

The Court recently considered a case arising out of such a free speech zone, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *see also Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012) (enjoining enforcement of unconstitutional "free speech zone" policy).

Fortunately, litigation may be inducing administrators to reduce these obnoxious "free speech zone" policies, and some states have restricted the practice. Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2020* 23-24, https://bit.ly/2QCQk2m. Yet the fact that "free speech zones" could exist on any campus without universal condemnation by academics reflects a mindset completely at odds with *Grutter*'s assumptions.

CONCLUSION

The Court should grant the petition for a writ of certiorari and overrule *Grutter*.

Respectfully submitted.

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December 15, 2021