Nos. 20-1199 & 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIRST AND FOURTH CIRCUITS

BRIEF OF SPEECH FIRST AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS 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 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); the University of Illinois, *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020); and the University of Central Florida, *Speech First, Inc. v. Cartwright*, __ F.4th __, 2022 WL 1301853 (11th Cir. 2022).

Speech First has a vital interest in the outcome here. 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 campus, the theory has not matched reality: Campus speech has come under assault in recent decades. The Court should abandon the theory that racial discrimination is worth tolerating in higher education because it supposedly advances First Amendment goals.

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1. All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus or its members or counsel financed the brief's preparation or submission.

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 of 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" would promote First Amendment values was wrong in 1978, and it remains incompatible with First Amendment principles today:

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 – are inherently immeasurable in litigation. Indeed, if the government imposed these goals as conditions universities were *required* to achieve in classrooms, it would violate the void-for-vagueness doctrine. How could a university objectively demonstrate compliance with such amorphous goals? 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; it said courts should *defer* to university administrators who claim their discriminatory policies yield educational benefits. This is far outside the mainstream of 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 its educational mission.

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.

4. 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 "freedom."

These anomalies should no longer be indulged to facilitate discrimination.

Worse still, the theory underlying the diversity rationale bears no relationship to reality: 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, and that trend is accelerating at an alarming rate. Speech First is uniquely situated to confirm these trends: It exists to fight for students' rights to speak freely in higher education.

Campus administrators have fostered environments of extreme intolerance for ideological diversity in the name of promoting "diversity." Studies show that students routinely censor themselves on sensitive topics. Campus climates are affirmatively hostile to non-conformist ideas that could be deemed offensive, even while schools point to empty policies promoting free speech.

Many schools maintain official speech-restricting policies aimed at protecting various groups from hearing speech they might deem offensive. Such policies lead to even more self-censorship, as students naturally don't want to be accused of violating a speech code or get anonymously reported to a roving "bias response team."

In short, experience shows that universities' implementation of the diversity rationale has massively undermined, rather than vindicated, the First Amendment goals of free speech on campus.

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 the 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 since the University of California at Davis had never

discriminated, *id.* at 305–09, another solution was needed justify racial preferences in higher-education admissions.

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 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).

The Harvard 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 policy-making." Harvard Am. Br. in *Bakke*, 24–25.

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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).

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." *Id.* at 312 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)); Harvard Am. Br. in *Bakke* at 25.

Justice Powell emphasized the connection between academic freedom and the First Amendment value of exchanging ideas in 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 . . . . 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 this theory; the remaining opinions didn't even bother to examine it.

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 for racial preferences:

> 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." From this premise, Justice Powell reasoned that by claiming "the right to select those students 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."

539 U.S. at 329 (citations omitted).

Grutter's full embrace of the diversity rationale seemed to come as a surprise to the University of Michigan's President Lee Bollinger, the defendant in *Grutter*. He wrote that one of the "problems" facing the university in the case 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).[3]

Yet the *Grutter* majority accepted the University of Michigan's assurances about the academic benefits of its policy. With a "critical mass" of minority students admitted through racial preferences, the majority wrote that such discrimination "promotes 'cross-racial understanding,' helps to break 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

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[3] *Cf.* Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 34 (2002) ("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").

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.[4] How would a university ever be able to show it was actually meeting these requirements?

Remarkably, Justice Powell himself appeared to acknowledge that it's not really possible to determine whether the diversity rationale actually delivers First Amendment benefits. 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*

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[4] "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)).

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).

Any question 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*, 579 U.S. 365 (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 381–82 (emphasis added); *see id.* ("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 the central problem with this regime:

> 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.

579 U.S. at 403 (Alito, J., dissenting).

2. *Grutter* introduced another First Amendment 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 (emphasis added). 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 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), 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 its educational mission. Would the Court overlook that liberty incursion in the name of deferring to the assertion of an allegedly 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).

4. Universities hoping to exercise the supposed "freedom" served by the diversity rationale must follow the Court's "plus factor" script for implementing racial preferences. But "it 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) (Justice Powell's rationale arose from "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, the diversity rationale is incompatible with First Amendment principles. *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).

D. These Cases Offer An Ideal Opportunity To Overrule *Grutter* On The Diversity Rationale.

The district courts here developed extensive records that followed *Grutter*'s flawed script.

UNC. The district court spent many pages reciting the *Grutter* and *Fisher II* formula. No. 21-707 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 this decision is entitled to deference, *id.* at 164, and concluded 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 UNC has not 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.[5]

The cure for the problem? Even more 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."

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[5] 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. 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.).

Id. at 20. "This underrepresentation causes minority students to experience loneliness and tokenism." *Id.* This is "in part due to a lack of 'meaningful demographic representation' at the University." *Id.* at 21; *see also id.* (UNC's student population "reflect[s] much less diversity than North Carolina as a whole").[6]

Harvard. After reviewing this Court's cases on race-conscious admissions, No. 20-1199 Pet. App. 223–33, the district court in *Harvard* accepted that "[r]acial categorizations are necessary" to achieve the "educational benefits of diversity," which included educating students "of all races and background [to] prepare them to assume leadership roles in [an] increasingly pluralistic society" and "teaching [students] to engage across differences through immersion in a diverse community." *Id.* at 240.

The court deferred to testimony from Harvard's administrators. *Id.* at 239, 107–109. It likewise deferred to a Harvard diversity task force that (1) concluded the "benefits of diversity at Harvard are 'real and profound'" and (2) "emphatically embraced and reaffirmed the University's long-held view that student body diversity – including racial diversity – is essential to [its] pedagogical objectives and institutional mission." *Id.* at 109, 110.

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[6] This conclusion flows directly from *Grutter* and *Fisher II*. UNC Pet. App. 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," 579 U.S. at 381).

These cases illustrate 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, the racial tinkering will never end. *Fisher II*, 579 U.S. at 403 (Alito, J., dissenting). But perpetual racial engineering – rather than advancing the "robust exchange of ideas" – is the real project, notwithstanding *Grutter*'s "expect[ation]" that discrimination wouldn't be necessary 25 years down the road. 539 U.S. at 343.

The Court should overrule *Grutter* and confirm that the First Amendment provides no basis for racial discrimination by universities.

II. Contrary To The Theory Of *Bakke* And *Grutter*, College Campuses Have Systematically Suppressed Freedom Of Thought And Speech In The Name Of "Diversity."

In 1978, just 14 years after Title VI made it unlawful to discriminate on the basis of race in education, Justice Powell's theory that racial preferences would promote a more robust exchange of ideas in universities may have sounded plausible. But the reality has been quite different. More than 40 years of racial preferences have not led to the expansion of campus speech.

To the contrary, college campuses have grown steadily more hostile to freedom of speech in the years since *Bakke*. The same college administrations fighting for racial preferences routinely allow suppression of student speech; in many cases their policies actively *promote* that

suppression. Amicus Speech First exists to fight this abhorrent trend.

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* and *Grutter*. Their "unsupported empirical assumption" that racial preferences would promote a more robust exchange of ideas has turned out to be tragically wrong. *Cf. Janus*, 138 S. Ct. at 2483. This provides ample basis for overruling *Grutter*.

A. Far From Promoting A Robust Exchange Of Ideas, Universities Cultivate Campus Environments That Pressure Students And Faculty To Conform To Governing Orthodoxy, Particularly On Matters Of Race.

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); Wood, Diversity, The Invention of a Concept 228 (2003) ("In the new campus

ecology, the ideal of liberal education is frequently mentioned, but we shouldn't be fooled. *Diversity* only preserves some of the outward appearance of liberal education, while substituting its own antiliberal agenda on every crucial point.") (emphasis in original).

In addition to shielding students from intellectually diverse viewpoints, universities have increasingly built campus cultures designed to shield favored minority groups from hearing speech they may deem "offensive." There is no exchange of competing ideas, let alone a robust one, in "safe spaces" where no one hears speech they don't like. *Speech First, Inc. v. Cartwright*, __ F.4th __, 2022 WL 1301853 at *14 (11th Cir. 2022) (Marcus, J., concurring) ("A university that has placed its highest premium on the protection of feelings or safe intellectual space has abandoned its core mission. . . . A university that turns itself into an asylum from controversy has ceased to be a university; it has just become an asylum.").

All of this occurs in the name of promoting "diversity." As one author has noted, "'Diversity' in the academy purported to be about bridge-building and broadening people's experiences. It has had the opposite effect: dividing society, reducing learning, and creating an oppositional mind-set . . . ." Mac Donald, The Diversity Delusion 6 (2018).

1. Prominent Harvard Insiders Are Speaking Out Against The Orthodoxy Of Thought Being Imposed In The Name Of "Diversity."

Lawrence Summers served as President of Harvard University from 2001 to 2006, and Summers has taught as a tenured professor at Harvard since 2011. Lawrence H. Summers, *Curriculum Vitae*, https://bit.ly/3rjAmcU. In a 2016 interview, Summers warned of a "creeping totalitarianism in terms of what kind of ideas are acceptable and debatable on college campuses." Duehren, *Summers Decries 'Creeping Totalitarianism' at Colleges*, Harvard Crimson (Jan. 21, 2016), https://bit.ly/3LYu22t.

Summers connected this orthodoxy to the paternalistic desire to shield students from messages that may make them uncomfortable: The Harvard Crimson reported that "Summers said he was worried the primary mission of the university—to seek truth and foster debate—may be imperiled by a preference for comfort and harmony on college campuses." *Id.*; *see also* Conversations with Bill Kristol, *Larry Summers II Transcript*, https://bit.ly/3JF44j0 ("if our leading academic institutions become places that prize comfort over truth, that prize the pursuit of mutual understanding over the pursuit of better and more accurate understanding, then a great deal will be lost"). Summers observed that "the weakness of administrators who have often had as their dominant instinct to placate rather than to educate has emboldened those who see their moment to establish a kind of orthodoxy." *Id.; see also Wood*, *supra*, at 229 ("It dawned on some that *diversity* might be an immensely useful idea: a positive-sounding and potentially popular

rubric for advancing a political agenda that had so far proven highly unpopular with the American people as a whole.") (emphasis in original).

Summers repeated the same themes in early 2022: "Mr. Summers also noted that too often [American universities] 'pursue diversity' of various kinds but 'resist intellectual diversity, including conservative and non-coastal viewpoints.' In the name of 'comfort,' too many universities are 'creating a stifling orthodoxy that is in its own way as oppressive as McCarthyism." Hoffman, *Summers Tells Sun He Worries Economic Policy Being Driven by 'Sentiment,' 'Politics'*, N.Y. Sun (March 4, 2022), https://bit.ly/3LY6vyS.[7]

Niall Ferguson was a prominent Harvard professor of history from 2004 to 2016. Niall Ferguson, *Curriculum Vitae*, https://bit.ly/3rhjXG0. He recently echoed the warning that freedom of thought and speech on campus are no longer considered acceptable, since they are incompatible with the modern conception of "diversity":

> Trigger warnings. Safe spaces. Preferred pronouns. Checked privileges. Microaggressions. Antiracism. All these terms are routinely deployed on campuses throughout the English-speaking world as part of a sustained campaign to impose

[7] This is incompatible with *Grutter*'s expectation that preferences would "prepar[e] students for work and citizenship." 539 U.S. at 331; *id.* at 324 (noting that "Justice Powell emphasized that . . . the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of diverse students") (cleaned up). Civic leaders must function in an environment that respects free speech.

> ideological conformity in the name of diversity. As a result, it often feels as if there is less free speech and free thought in the American university today than in almost any other institution in the U.S.
>
> To the historian's eyes, there is something unpleasantly familiar about the patterns of behavior that have, in a matter of a few years, become normal on many campuses. . . . Any student of the totalitarian regimes of the mid-20th century recognizes all this with astonishment. It turns out that it can happen in a free society, too, if institutions and individuals who claim to be liberal choose to behave in an entirely illiberal fashion.

Ferguson, *I'm Helping To Start A New College Because Higher Ed Is Broken*, Bloomberg Opinion (Nov. 8, 2021), https://bloom.bg/3jua4Av.[8] *Cf. Cartwright*, 2022 WL 1301853 at *14 (Marcus, J., concurring) ("History provides us with ample warning of those times and places when colleges and universities have stopped pursuing truth and have instead turned themselves into cathedrals for the worship of certain dogma.").

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[8] Ferguson also warns that "people are behaving on major campuses like they live under an authoritarian regime. [¶] Nothing has surprised me more . . . in the last 30 years, than to discover that people can inform on their colleagues; they can participate in show trials; they can have people canceled in a regime that is apparently free and democratic. We voluntarily have started to behave as if we're in a totalitarian state on many, many American campuses. Everybody knows this, though not many people are willing to say it out loud." Martínez, *Universalizing the life of the mind*, The Pull Request (Dec. 8, 2021) (transcript of Ferguson interview), https://bit.ly/3EaGJoq.

Summers and Ferguson have recently joined a group of scholars spanning the ideological spectrum as founders of the University of Austin, a project established on the premise that American universities have abandoned the pursuit of truth. Kanelos, *We Can't Wait for Universities to Fix Themselves. So We're Starting a New One*, Common Sense (Nov. 8, 2021), https://bit.ly/3O6WbWV; Univ. of Austin, *Board of Advisors*, https://bit.ly/3juH4Zh (listing Summers); Univ. of Austin, *Founding Trustees*, https://bit.ly/3v85jC6 (listing Ferguson).

The university president's founding announcement proclaims that "illiberalism has become a pervasive feature of campus life," where undergraduates censor themselves and "faculty are being treated like thought criminals." Kanelos, *supra*. And it asks: "If [universities] are not open and pluralistic, if they chill speech and ostracize those with unpopular viewpoints, if they lead scholars to avoid entire topics out of fear, if they prioritize emotional comfort over the often-uncomfortable pursuit of truth, who will be left to model the discourse necessary to sustain liberty in a self-governing society?" *Id.*

2. Survey Data Show That College Students Censor Themselves Rather Than Dissent From Orthodoxy And That Increasing Numbers Of Students Will Participate In Censoring Others' Speech.

Ample evidence supports the conclusion that free speech is under attack on American campuses.

"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 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.

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.* A large group of Yale Law School students recently provided a concrete example; they issued threats of violence in the course of shouting down a Federalist Society panel event designed, ironically, to demonstrate that ideologically diverse speakers can agree on the virtue of free speech.[9]

- "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.

Heterodox Academy, a nonpartisan, non-profit entity, has conducted annual surveys since 2019 that reach similar conclusions. *See* Stiksma, *Understanding the Campus Expression Climate: Fall 2019*, Heterodox Academy 2020, https://bit.ly/3vfHtEu (surveying 1,580 students on "how reluctant (versus comfortable) they felt in the classroom

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[9] One of the panelists (Kristen Waggoner) works at the Alliance Defending Freedom, but the Yale student censors objected to that group's positions on gay and transgender rights. Thiessen, Opinion, *Free speech gets tossed at Yale Law School*, Wash. Post (March 24, 2022) ("As soon as Yale law professor Kate Stith began to introduce Waggoner, a group of students rose and began to shout her down, heckle her, with several reportedly holding up their middle fingers."); Sibarium, *Hundreds of Yale Law Students Disrupt Bipartisan Free Speech Event*, Wash. Free Beacon (March 16, 2020) ("As they stood up, the protesters began to antagonize members of the Federalist Society . . . . One protester told a member of the conservative group she would 'literally fight you, bitch.'").

giving their opinions on politics, race," and other topics) (Heterodox 2019 Report); Stiksma, *Understanding the Campus Expression Climate: Fall 2020*, Heterodox Academy 2021, https://bit.ly/37HXn2z (surveying 1,311 students on their reluctance to speak about controversial topics); Zhou, Stiksma, & Zhou, *Understanding the Campus Expression Climate: Fall 2021*, Heterodox Academy 2022, https://bit.ly/3rlzhBw (surveying 1,495 college students on comfort expressing their views on controversial subjects) (Heterodox 2021 Report).

In the 2019 Heterodox survey, 55% of respondents "agreed that the climate on their campus prevents students from saying things they believe." Heterodox 2019 Report, 4. By 2021, that number had grown to 63%. Heterodox 2021 Report, 3.

And in 2020, the Knight Foundation published the results of a Gallup survey of 3,000 undergraduate students regarding their views on free speech and "diversity" as values. Knight Foundation, *The First Amendment on Campus 2020 Report: College Students' Views of Free Expression* 16, https://kng.ht/3slaigj. The findings revealed the troubling extent to which students believe campus "diversity" and free speech are *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.'" *Id.* at 16.

In short, these studies confirm that reality does not fit the theory underlying *Bakke* and *Grutter*.

3. High-Profile Examples Demonstrate How The Diversity Orthodoxy Is Enforced.

We could exhaust our word limit by recounting anecdotes where speech is punished on campus. Instead, we will limit our examples to two incidents demonstrating what happens to those who speak about the subject of these very cases: racial preferences.

Georgetown Law. In March 2021, Georgetown University Law Center adjunct professor Sandra Sellers was fired after a video of a conversation with a colleague was posted on Twitter. Miller & Lapin, *Georgetown Law professor caught complaining about black students on Zoom: video*, N.Y. Post (March 11, 2021), https://bit.ly/3uvZrU5. The video captured Sellers, an apparent *supporter* of racial preferences, lamenting that "I end up having this angst every semester that a lot of my lower ones [students] are blacks. Happens almost every semester. . . . It's some really good ones, but there are usually some that are just plain at the bottom. It drives me crazy." *Id.* Georgetown's dean Bill Treanor issued a statement apologizing, announcing grants for faculty to develop more curricula "addressing racial justice," and reaffirming his "administration's commitment to diversity." Treanor, *A Message to the Georgetown Law Community*, Georgetown Law (updated March 21, 2021), https://bitly.com/.

In addition to firing Sellers, dean Treanor placed adjunct professor David Batson – who said nothing in the original video, but appeared to "nod in agreement" – on administrative leave. Miller & Lapin, s*upra.* Batson

submitted a letter of resignation the next day. A second video, released after Sellers' firing and Batson's resignation, showed Batson acknowledging and trying to sort out his "own perceptions" and "unconscious biases" about students. Shibley, *One Georgetown Law professor fired, one resigns after conversation about black students' academic performance accidentally recorded*, FIRE (March 18, 2021), https://bit.ly/3O5SiBL. This sort of open and honest discussion should be encouraged (or at least tolerated) by advocates of diversity and academic freedom. And yet Batson was branded a racist and immediately canceled.

MIT. In October 2021, the Massachusetts Institute of Technology rescinded an invitation to University of Chicago geophysics professor Dorian Abbot, who had been scheduled to deliver an honorary lecture on advances in climate science. Mounk, *Why the Latest Campus Cancellation Is Different*, The Atlantic (Oct. 10, 2021), https://bit.ly/3O8C7n0. What was Professor Abbot's sin? Campus activists (and a swarm of Twitter users) objected that Abbot had expressed views against racial preferences in university hiring. Powell, *M.I.T.'s Choice of Lecturer Ignited Criticism. So Did Its Decision to Cancel.*, N.Y. Times (Oct. 20, 2021), https://nyti.ms/3uxxI5x.

Specifically, in an op-ed published in Newsweek, Professor Abbot argued that universities should adopt a "Merit, Fairness, and Equality" framework where "applicants are treated as individuals and evaluated through a rigorous and unbiased process based on their merit and qualifications alone." Abbot & Marinovic, Opinion, *The Diversity Problem on Campus*, Newsweek (Aug 12, 2021), https://bit.ly/3juB5Ur. He proposed that universities

"invest[] in education projects in neighborhoods where public education is failing to help children from those areas compete," which "would be evidence-based and non-ideological, testing a variety of different options such as increased public school funding, charter schools and voucher programs." *Id.* For voicing this heresy, Professor Abbot was shunned and sent packing.

It is worth noting that both Georgetown and MIT have formal policies claiming to protect free speech and promote the open exchange of ideas. Georgetown Univ. Faculty Handbook § IV(L), *Pol'y on Speech and Expression* (approved June 8, 2017) ("It is not the proper role of a university to insulate individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Deliberation or debate may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or ill conceived."); Mass. Inst. of Tech., Policies & Procedures § 9.1 ("In an academic community, the free and open exchange of ideas and viewpoints reflected in the concept of academic freedom may sometimes prove disturbing or offensive to some. The examination and challenging of assumptions, beliefs or opinions is, however, intrinsic to the rigorous education that MIT strives to provide.").

But these lofty-sounding policies go out the window when someone engages in speech that violates the unwritten, de facto speech code. It is no wonder that self-censorship follows in the wake of such incidents.

B. Many Universities Enforce Conformity Of Thought Through Formal Policies.

University administrators also enforce the governing orthodoxy through 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" and "bias" 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 – all with the predictable result of more self-censorship. *See*, *e.g.*, Sacks & Thiel at 167 (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"); *Cartwright*, 2022 WL 1192438 at *8 (given breadth of speech code, "a reasonable student could fear that his speech would get him crossways with the University, and that he'd be better off just keeping his mouth shut"); *id.* at *10 ("No reasonable college student wants to run the risk of being accused of 'offensive,' 'hostile,' 'negative,' or 'harmful' conduct – let alone 'hate or bias.'").

While some 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), universities persist.

Speech First recently sued the University of Texas at Austin. *See Speech First, Inc., v. Fenves*, 979 F.3d 319 (5th Cir. 2020). The university maintained multiple speech codes: (1) it 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. The University threatened to investigate and discipline students who violated these policies.

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 Reporting Systems. Universities across the country are increasingly suppressing speech through the use of bias reporting systems, which typically involve "bias response teams" charged with documenting, investigating, and punishing students who engage in "bias." Speech First recently issued a report on bias reporting programs. Speech First, *Free Speech in the Crosshairs: Bias*

Reporting on College Campuses (2022), https://bit.ly/3LPSlA4 (Speech First Report). Speech First evaluated 821 higher education institutions and found that 56% have bias reporting systems (including Harvard and UNC). *Id.* at 3, 16–17. Many of the most aggressive programs are housed in university "Diversity, Equity, and Inclusion" offices. *Id.* at 3.

Typically, bias reporting systems "invite students and faculty to report speech that is 'biased' on the basis of some protected characteristic, such as race, religion, sex, sexual orientation, [and] gender identity/expression." *Id.* at 5. Most definitions are so broad that they cover political speech. *Id.* at 6 (vague and broad definitions are "difficult for students to interpret and easy for administrators to employ at their discretion"). "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." 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. In most cases, the accuser can choose to remain anonymous. Speech First Report at 5.

Bias response programs usually 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.'" Snyder & Khalid, *The Rise of "Bias Response Teams" on Campus*, The New Republic (Mar. 30, 2016), bit.ly/1SaAiDB. But in reality, these programs "intimidate and silence students whose viewpoints do not conform to the dominant social, political, and cultural

narratives on campus. Speech First Report at 6; *see also* FIRE, *Bias Response Team Report 2017* 28, bit.ly/2UPmibW (FIRE Report) (programs 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").

Speech First has been on the forefront of challenging these programs through litigation, bringing six lawsuits against bias response programs at 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. In the University of Michigan case, *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 762 (6th Cir. 2019), the team would collect 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.

Free Speech Zones. Some colleges restrict 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 speech 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, 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 overrule *Grutter* and end the discrimination being committed in the name of the First Amendment.

Respectfully submitted.

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