No. 20-1199

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,
Respondent.

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

BRIEF OF SPEECH FIRST AS AMICUS CURIAE IN SUPPORT OF PETITIONER

BRADLEY A. BENBROOK
Counsel of Record
STEPHEN M. DUVERNAY
Benbrook Law Group, PC
400 Capitol Mall, Suite 2530
Sacramento, California 95814
(916) 447-4900
brad@benbrooklawgroup.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae 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).

Speech First has a vital interest in the outcome of this case. Whereas the "diversity" rationale was expressly 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: Student speech has come under assault in recent decades. The Court should vindicate the cause of free speech on campus by abandoning the charade that racial preferences actually promote First Amendment goals.

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1. All parties were given timely notice and 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

This brief focuses on one of the many reasons why *Grutter v. Bollinger*, 539 U.S. 306 (2003), should be overruled. A majority of the Court in *Grutter* embraced, for the first time, the grievously wrong assumption of Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), that a university's racial preference program served a compelling interest because it would promote the First Amendment. *Bakke*, 438 U.S. at 312-14. 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.'" *Id.* at 313.

The theory's incompatibility with First Amendment principles was apparent from the outset. It is not neutral, which runs contrary to fundamental First Amendment concepts. Decisions before and after *Bakke* demonstrate – rightly – that schools cannot rely on First Amendment freedoms when it comes to *disadvantaging* minority students. Moreover, in exercising this supposed First Amendment "academic freedom" to select students by discriminating, colleges had to follow the "plus-factor" script; this is no recognizable First Amendment freedom.

Despite this, the *Grutter* majority fully embraced Justice Powell's theory that preferences were a matter of academic freedom designed to vindicate the First Amendment. 539 U.S. at 313 ("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"') (citation to *Bakke* omitted).

And *Grutter* compounded *Bakke*'s error by concluding that courts should *defer* to universities' predictable claims that their policies do, in fact, help achieve speech-based goals – "cross-racial understanding," in *Grutter*'s case. *See Grutter*, 539 U.S. at 330. This deference too is wholly foreign to the First Amendment.

But deference was necessary to find a compelling interest, because almost no one actually believes that preference programs stimulate a "robust exchange of ideas." Indeed, defenders of preference have claimed it is nearly impossible to make such a determination. They also typically describe the benefits of diversity in terms of *outcomes* that have nothing to do with the speech-based theory on which the diversity rationale is based.

Amicus Speech First is 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. Nor was the Court willing to accept remedying "societal discrimination" as a compelling interest for racial preferences. *Id.* at 310.

So another solution was needed to allow colleges to continue using preference programs. Justice Powell found the solution by adopting a rationale offered by none other than Harvard University itself, 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).

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

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* at 24-25. The majority in *Sweezy* overturned the conviction of a university professor, on due process grounds, for violating New Hampshire's law against "subversive activities." 354 U.S. at 254–55.

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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 Bakke*, 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.[3]

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

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[3] The University of California made only a passing reference to academic freedom and *Sweezy*, in the context of arguing for application of a rational basis test on federalism grounds. *See* Br. for Petitioner, *Regents of Univ. of Cal. v. Bakke*, No. 76-811, at pp. 74-76 & n. 74 (June 7, 1977).

Bakke at 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).

Justice Powell's view that vindicating a university's academic-freedom right through racial preferences is a compelling interest garnered just one vote: his own. The remaining opinions didn't bother to examine it.

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 observed – presciently, in the context of this case – 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 stand-

ard 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).

B. It Was Immediately Apparent That The Politically-Expedient Diversity Rationale Conflicted With Basic First Amendment Doctrine.

Justice Powell constructed the academic freedom-based diversity rationale from a two-Justice concurrence in *Sweezy* and the majority opinion in *Keyishian*, but both cases involved attempted government *intrusions* into academic freedom. *Sweezy*, 354 U.S. at 236-46 (university professor investigated for violating state law criminalizing "subversive" activities based on political beliefs); *Keyishian*, 385 U.S. at 591-92 (university professors and staff fired after not complying with state law used "to prevent the appointment or retention of 'subversive' persons in state employment"). *Cf. Grutter*, 539 U.S. at 362-64 (Thomas, J., concurring and dissenting) (criticizing the Court's "unprecedented deference" based on misapplication of *Sweezy* and *Keyishian*).

Not until Justice Powell adopted Harvard's amicus argument had "academic freedom" been thought of as a way to justify racial discrimination. With this foundation, it's not surprising that the theory never fit within any recognizable First Amendment doctrine.

One of the basic premises of First Amendment doctrine is that government regulation affecting protected activity must be neutral. This concept has long but-

tressed, 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 Free Exercise 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 Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[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 ad-

vanced 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]

This case presents the question whether application of a "minus" factor to Asian applicants satisfies a compelling interest – a prospect that Allan Bakke's own lawyer (Prof. Mishkin) regarded as unlikely to survive constitutional scrutiny. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. Pa. L. Rev. 907, 925 (1983) ("There would seem to be no *a priori* reason why a 'minus' should be treated differently than a 'plus' factor – used in precisely the same sort of calculus – and yet I consider it most unlikely that the Court (or Justice Powell) would uphold a program seeking diversity by assigning such a 'minus' to membership in a racial or ethnic group considered to be overly represented in a student body chosen to achieve 'diversity.'").

The diversity rationale is more than just non-neutral. While supposedly promoting the exercise of "academic freedom," schools must follow the prescribed "plus factor" script for how racial preferences may be implemented. "[I]t is a very strange sort of freedom that wins

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[4] This lack of neutrality also contrasts with Justice Powell's purported rejection of the argument that certain types of preferences were "benign." *Bakke*, 438 U.S. at 294; *see id.* n.35 ("[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.") (quoting Bickel, The Morality of Consent 133 (1975)).

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, 131 U. Pa. L. Rev. at 924 (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).[5]

Justice Powell's opinion was thus appropriately recognized as more of a political compromise than a doctrine with solid constitutional support. As then-Professor Scalia put it, "the 'compelling' interest at issue in *Bakke* is the enormously important goal of assuring that in medical school . . . we will expose these impressionable youngsters to a great diversity of people. We want them to work and play with pianists, maybe flute players. . . . We want bespectacled chess champions and football players. And, oh yes, we may want some racial minorities, too. If that is all it takes to overcome the presumption against discrimination by race, we have witnessed an historic trivialization of the Constitution. Justice Powell's opinion . . . strikes me as an excellent compromise between two committees of

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[5] In fact, Harvard had urged that "[n]eeds and goals, as reflected in admissions policies, vary from university to university and among different schools in the same university. Educators need substantial freedom to search for better solutions to difficult educational problems." Harvard Am. Br. in *Bakke* at 10-11. This "freedom" permits no such flexibility, however.

the American Bar Association on some insignificant legislative proposal. But it is thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution." Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race."*, 1979 Wash. Univ. L.Q. 147, 147–48 (1979).[6]

C. Nevertheless, Five Justices In *Grutter* Accepted Justice Powell's First Amendment Academic Freedom Rationale – And Compounded The Error By Deferring To The University's Claims About Preferences' Alleged Benefits.

When the validity of racial preferences in higher education returned to the Court in *Grutter*, the five-Member

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[6] *See also*, *e.g.*, *McCormack*, 1979 Utah L. Rev. at 530 ("Most educators would agree that some element of diversity in a student body is healthy, but few would assert that this factor is the primary motivation behind minority preferences or that it is sufficiently important to justify a practice that would otherwise be illegal or unconstitutional."); Van Alstyne, *A Preliminary Report on the* Bakke *Case*, 64 A.A.U.P. Bull. 286, 294 (Dec. 1978) ("[I]n the dispensation the Powell opinion provides to higher education, the purpose to be served, as important as educators may deem it to be, is at best a purpose to furnish a better learning environment for all of the students – a purpose not exactly overwhelming or even nationally compelling."); Dworkin, *The* Bakke *Decision: Did It Decide Anything?*, N.Y. Rev. Books (Aug. 17, 1978) ("[T]he argumentative base of [Justice Powell's] opinion is weak. It does not supply a sound intellectual foundation for the compromise the public found so attractive. The compromise is appealing politically, but it does not follow that it reflects any important difference in principle, which is what a constitutional, as distinct from a political, settlement requires.").

majority expressly adopted Justice Powell's First Amendment "academic freedom" rationale in holding that the University of Michigan Law School had a compelling interest in attaining a diverse student body:

> 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 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 theory for what it was. Indeed, University of Michigan's President 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).[7]

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.[8] For instance, with a "critical mass" of minority students admitted through racial preferences, the "admissions policy 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 (citation omitted).

In light of the reality of speech on campus (*see* section II *infra*) and the necessarily anecdotal and subjective nature of these alleged benefits, these assertions could only be accepted as fact by *deferring* to the university's claims – thus introducing another doctrinal casualty necessary to maintain the pretense that racial preferences vindicate

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[7] *Cf.* Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 34-36 (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").

[8] *See* Levinson, *Diversity*, 2 U. Pa. J. Const. L. 573, 577, 578 (2000) (acknowledging that defenders of racial preferences adopted "diversity" as a "mantra" and comparing it to a game of Simon Says; "if Simon says, 'Start talking about diversity – and downplay any talk about rectification of past social injustice,' then the conversation proceeds in exactly that direction").

First Amendment principles. *See id.* at 328 (deferring to the school's "educational judgment that . . . diversity is essential to its educational mission"); *id.* at 362-63 (Thomas, J., concurring in part and dissenting in part) (discussing "unprecedented deference" that is "antithetical to strict scrutiny"). By doing so, *Grutter* prioritized the university's claim to an unenumerated First Amendment "academic freedom" right over the Equal Protection rights of racially-disfavored applicants. *Cf. Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2223 (2016) (Alito, J., dissenting) ("If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals [such as achieving cross-racial understanding], then the narrow tailoring inquiry is meaningless. Courts will be required to defer to the judgment of university administrators, and affirmative-action policies will be completely insulated from judicial review.").

This 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 and stimulate the "robust exchange of ideas." 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 short, it is long past time to stop pretending that the First Amendment provides a basis for racial discrimination by universities.

II. Racial Preference Programs Since *Bakke* Have Manifestly Not Led To A More "Robust Exchange Of Ideas" On College Campuses.

The diversity rationale has not delivered what it was supposedly going to deliver. More than 40 years of racial preferences have not led to the "robust exchange of ideas" in universities that Justice Powell envisioned and *Grutter* deferentially assumed. To the contrary, the opposite has occurred.

A. Even Supporters Of Racial Preferences Admit It's Nearly Impossible To Measure The Contribution Of "Diversity" To The Exchange Of Ideas – So They Focus Instead On Non-Speech Outcomes To Justify Preferences.

It is worth noting at the outset that Justice Powell himself appeared to acknowledge that it's not really possible to determine whether the supposedly-compelling diversity rationale actually works. 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 "some of the benefits derived from a diverse student body" by quoting 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.* n.48 (quoting Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)).

But this endorsement included a remarkable 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).

Nearly 20 years later, President Bowen co-authored a book with former Harvard President Derek Bok, The Shape of The River (1998), which sought to provide empirical vindication for racial preferences in elite universities. The book, however (like scores of amicus briefs supporting racial preferences in this Court in cases since *Bakke*) focused almost entirely on performance *outcomes* (e.g., grades, participation in graduate programs, and employment), rather than the actual justification underlying the supposed compelling interest of preferences, namely the robust exchange of ideas between racial groups on campus. *See Grutter*, 539 U.S. at 330 (citing The Shape of the River as support for conclusion that "numerous studies show that student body diversity promotes learning

outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals'").

This is no accident: Focusing on conclusions that a diverse student body helps students "prepare to live in a diverse world" "allow[s] educators to avoid the more difficult rationale that black students are necessary to add diverse viewpoints to the classroom, an argument that is not only essentialist in nature but one that tends to treat black students as objects for the school's own purposes, justifying, for example, the notion that black students should be called on to give the black perspective on affirmative action or to instruct white students on black culture." Selmi, *The Facts of Affirmative Action*, 85 Va. L. Rev. 697, 730 (1999) (reviewing The Shape of the River).

"[T]he fact that '[t]he rationale of [a decision] does not withstand careful analysis' is a reason to overrule it, *e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). And that is even truer when, as here, the defenders of the precedent do not attempt to 'defend [its actual] reasoning.'" *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2481 n.25 (2018) (citation and emphasis omitted). The same goes for *Grutter*'s rationale that racial preferences promote the robust exchange of ideas.

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

Freedom of speech on college campuses – and particularly speech touching on the very sort of sensitive racial

matters theoretically giving rise to "cross racial understanding" – has been steadily and 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.

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). "Each year, college students, professors, and lecturers gather in classrooms across America (and increasingly online) 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/2PFzsYf ("College Pulse Rankings").

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.

Another extensive survey of nearly 20,000 undergraduate students at 55 schools revealed that 60% of students had engaged in self-censorship: "they could not express their opinion on campus because of how other students, professors or their college administrators would respond." College Pulse Rankings 13. Race was second only to abortion as the most difficult subject on which "to have an open and honest conversation" in this environment. *Id.* 14.

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 thus does not fit the theory – adopted by Justice Powell in *Bakke* and embraced in *Grutter* – that diversity through racial preferences necessarily *promotes* the robust exchange of ideas.

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 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"); Le, *Harvard Is No Friend of Free Speech*, The Harvard Crimson (April 5, 2017) (arguing that Harvard's speech codes suppress student speech).

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 rejected the university's effort to evade liability by invoking "paeans to the freedom of speech": "while purporting to invoke free speech, the [university's 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 five 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, and University of Central Florida.

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.'" Snyder & 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"); *see also Fenves*, 979 F.3d at 338 (when accusers may submit "anonymous reports [it] carries particular overtones of intimidation to students whose views are 'outside the mainstream'"). 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. FIRE Report at 15-19.

Universities cast a wide net when defining "bias," with most borrowing categories like race, sex, and sexual orientation from discrimination statutes. FIRE Report at 4. But "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.

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* 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). Although litigation may be inducing administrators to reduce these obnoxious policies and some states have restricted the practice, FIRE, *Spotlight on Speech Codes 2020* 23-

24, https://bit.ly/2QCQk2m, that "free speech zones" exist on any campus without universal condemnation by academics reflects a mindset completely at odds with *Grutter*'s assumption 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.

CONCLUSION

For the reasons above and those stated by Petitioner, the Court should grant the petition for a writ of certiorari and reverse *Grutter*.

Respectfully submitted.

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BRADLEY A. BENBROOK
Counsel of Record
STEPHEN M. DUVERNAY
Benbrook Law Group, PC
400 Capitol Mall, Suite 2530
Sacramento, California 95814
(916) 447-4900
brad@benbrooklawgroup.com